

**BRADLEY BEVERLEY**

**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  
J. MICHAEL BROWN, APPOINTING AUTHORITY**

**APPELLEE**

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The Board at its regular March 2013 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated January 8, 2013, 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 \_\_\_\_\_ day of March, 2013.

**KENTUCKY PERSONNEL BOARD**

\_\_\_\_\_  
**MARK A. SIPEK, SECRETARY**

A copy hereof this day sent to:

Hon. Stafford Easterling  
Hon. Michael Boylan  
Stephanie Appel

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2012-104**

**BRADLEY BEVERLEY**

**APPELLANT**

**VS.**

**FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND RECOMMENDED ORDER**

**JUSTICE AND PUBLIC SAFETY CABINET  
DEPARTMENT OF CORRECTIONS  
J. MICHAEL BROWN, APPOINTING AUTHORITY**

**APPELLEE**

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This matter came on for an evidentiary hearing on December 4, 2012, 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 pursuant to the authority found at KRS Chapter 18A.

Appellant, Bradley Beverley, was present and represented by the Hon. Michael Boylan. Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Stafford Easterling. Accompanying Mr. Easterling was Ms. Ann Smith, Paralegal, and Ms. Cookie Crews, Agency representative.

The issue in this appeal is whether there was just cause for the demotion of the Appellant from Correctional Sergeant to Correctional Officer, effective March 16, 2012, and whether such action was excessive or erroneous. The burden of proof was on the Appellee to demonstrate by a preponderance of the evidence that there was just cause for disciplinary action and that the demotion was neither excessive nor erroneous.

The parties waived presentation of opening statements. Appellee presented an oral motion requesting any rebuttal testimony from Amanda Judd be by telephone. Appellant had no objection to the motion. As the parties agreed that any potential testimony by Amanda Judd be taken via telephone, the requirements of KRS 13B.080(7) have been met, and Appellee's motion was **SUSTAINED**.

**BACKGROUND**

1. The first witness for the Appellee was **Bradley Beverley**, the Appellant. At the time of this incident, Mr. Beverly held the position of Correctional Sergeant at the Kentucky State Reformatory (KSR) and had been employed by the Department of Corrections for three years and nine months. He had no prior disciplinary actions against him.

2. Part of his training with the Department of Corrections included instruction regarding sexual harassment and anti-harassment policy. He identified the policy as appearing in Kentucky Corrections Policies and Procedures No. 3.5, Sexual Harassment and Anti-Harassment (Appellee's Exhibit 1). He read into evidence the prohibited behavior cited in II. Policy and Procedures, A. Prohibited Behavior, 6:

Threatening, demeaning, or offensive conduct directed toward, or regarding, an individual because of his age, disability, gender, religion, color, race, or national origin.

3. On February 14, 2012, Beverley was performing work in the Senior Captain's office. Correctional Officer Judd asked for help moving furnishings in her office and solicited Appellant's assistance. During that time he and Judd were joking around. Judd then asked Appellant what he wanted as his reward. He responded, "A kiss." They talked a few more minutes until Appellant was called out of the office.

4. He returned to the Senior Captain's office several times throughout the day due to his work requirements. He talked with Officer Judd and made frequent reference to the "reward." At the end of his shift, he returned to the Senior Captain's office and joked with Judd about the "reward." She said she would not give him a kiss, but would give him a hug. Beverly responded, "Okay, but if you give me a hug, I'm going to have to grab your butt." The two hugged and Beverley reached around and grabbed Judd's bottom. He said, "Oh wow, I'm surprised at how firm your bottom is."

5. At the time of this incident, Appellant was a Correctional Sergeant and Judd was a Correctional Officer. Although Appellant was not Judd's direct-line supervisor, as a Sergeant he had general authority over her.

6. Appellant had been requested to, and did give, a written statement to Deputy Warden Troy Pollock on February 15, 2012. (Appellee's Exhibit 2)

7. At the time of the incident, Appellant believed the contact was mutual. However, he understood after the incident that his contact was unwanted. He admits now that as the touching was unwanted, it was a violation of the Sexual Harassment Policy. He believes punishment should have been imposed; however, the degree of punishment in the form of demotion was too severe. A written reprimand or suspension would be more appropriate.

8. **Cookie Crews**, who at the time of the incident was Warden of KSR, was the next witness. Soon after February 14, 2012, Deputy Warden Troy Pollock advised her about the subject incident. Warden Crews instructed Pollock to conduct an investigation. Deputy Warden Pollock tendered his investigative report on or about February 17, 2012. (Appellee's Exhibit 3)<sup>1</sup>

9. The report shows Correctional Officer Judd filed an Incident Report on February 14, 2012, and that she and the Appellant had signed their respective written statements generated during the investigation.

10. Ms. Crews reviewed the Report before rendering a decision on discipline. She concluded Beverley, having been a supervisor, was in a room with another employee and engaged in unacceptable contact in "touching her butt." The facilities' supervisors and line-staff are to act appropriately and professionally. Policy also prohibits harassment. The fact that Appellant was a supervisor and Judd a front-line Correctional Officer "weighed heavily" on her decision. Beverley, as a supervisor, had authority over Judd. However, "he is a good employee."

11. She took everything into consideration. Knowing Appellant had no prior disciplinary action, she believed demotion was the only option she had other than termination. She had considered all levels of discipline.

12. Although she considered termination as appropriate discipline, she felt that due to his work performance, a demotion would be something Beverley could get past; that one day he could again become a supervisor. "I took a chance on just demoting him." He was a really good employee who made a poor choice. Crews gave him a chance to learn and grow from this. It was just unacceptable behavior.

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<sup>1</sup> This exhibit was admitted for the limited purpose of being a document that had been relied upon by the Warden in her decision. It was not admitted for the truth of the matters or information contained therein.

13. On March 5, 2012, in her capacity as Appointing Authority, Crews authored, signed and issued the disciplinary letter (Appellee's Exhibit 4). Beverley was cited for misconduct due to the February 14, 2012 incident, constituting a direct violation of Corrections Policy and Procedure 3.5: Sexual Harassment and Anti-Harassment, II.-A: Prohibited Behavior, 1: "Lewd or sexual comments about an individual's body or attire;" and 2: "Sexual innuendo, including embarrassing comments or terminology." Appellant's demotion to Correctional Officer, a grade 9 position, was effective March 16, 2012.

14. The actions of Beverley did not directly result in the inability of Judd to perform her job duties nor did it adversely affect her employment opportunities. Beverley's actions throughout the course of that day, however, could be considered "continuous." Furthermore, groping someone is non-verbal conduct.

15. The parties each presented their respective closing arguments.

### **FINDINGS OF FACT**

1. Bradley Beverley, the Appellant, is a classified employee with status. He is employed by the Justice and Public Safety Cabinet, Department of Corrections, as a Correctional Officer at KSR.

2. On February 14, 2012, Beverley was employed as a Correctional Sergeant at KSR. While in the Senior Captain's office that day, and at the request of Correctional Officer Amanda Judd, he helped move some furniture in Judd's office. Beverley then asked for a reward in the form of a kiss. Beverley was then called out of the office prior to any physical contact between them.

3. Beverley returned to the Senior Captain's office several times throughout the day and made frequent references to his "reward" when Judd was present. At the end of the day Judd agreed to a hug. Beverley responded, "Okay, but if you give me a hug, I'm going to have to grab your butt." The two hugged and Beverley reached around and grabbed Judd's bottom. Beverley stated, "Oh wow, I'm surprised at how firm your bottom is."

4. Correctional Officer Judd wrote and submitted an Incident Report on February 14, 2012 (Appellee's Exhibit 3). The incident was made known to Deputy Warden Troy Pollock, who in turn informed Warden Cookie Crews. Warden Crews directed Pollock to conduct an investigation.

5. Deputy Warden Pollock separately interviewed Judd and Beverley, obtained their written statements, and drafted his February 7, 2012 Investigative Report (Appellee's Exhibit 3). This report was delivered to Warden Crews.

6. At the time of this incident, Kentucky Corrections Policies and Procedures, Policy No. 3.5 – Sexual Harassment and Anti-Harassment, was in full force and effect (Appellee’s Exhibit 1).

7. Correctional Sergeant Beverley had not been Correctional Officer Judd’s direct-line supervisor. However, as a Sergeant, Beverley did hold a position of authority relative to Judd.

8. Warden Crews reviewed the investigative report, as well as Beverley’s prior disciplinary history and the applicable policies. Appellant had no prior disciplinary actions and was generally a good employee. Although Crews considered termination as the appropriate discipline for such acts, she took Appellant’s work record and disciplinary history into account, when she decided to demote Beverley to Correctional Officer.

9. Citing violation of Department of Corrections Policy and Procedure 3.5, Warden Crews authored the disciplinary letter of March 5, 2012 (Appellee’s Exhibit 4). She demoted Beverley to Correctional Officer, a grade 9 position, effective March 16, 2012.

10. Beverley timely filed his appeal with the Kentucky Personnel Board on May 13, 2012.

### **CONCLUSIONS OF LAW**

1. The issue in this case is whether there was just cause for the demotion of the Appellant from Correctional Sergeant to Correctional Officer, effective March 16, 2012, and whether such action was excessive or erroneous. The burden was on the Appellee to prove its case by a preponderance of the evidence.

2. Bradley Beverley was a classified employee with status. A classified employee with status will not be demoted, or otherwise penalized except for cause. KRS 18A.095(1).

3. A “penalization” includes, but is not limited to, demotion and any action that diminishes the level, rank, discretion, or responsibility of an employee without proper cause; and the abridgment 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 credible and convincing to the mind.” Black’s Law Dictionary, 5<sup>th</sup> Ed., p. 1064. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of 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. In his position as a Correctional Sergeant, Bradley Beverley was part of the supervisory staff of the Kentucky State Reformatory. Although not in the direct line of supervision of Correctional Officer Amanda Judd, Beverley did have authority over her.

6. Kentucky Corrections Policies and Procedures, Policy No. 3.5, states that “Sexual harassment” is defined in 29 C.F.R. § 1604.11. That federal regulation states:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

7. The Department of Corrections has made known in Policy 3.5 that any form of harassment on the basis of sex shall not be tolerated and that offensive or inappropriate conduct at work shall be prohibited even in the instance when such conduct does not rise to the level set by 29 C.F.R. § 1604.11. (Appellee’s Exhibit 1) Appropriate action is mandated to ensure that any harassment shall not recur.

Furthermore, Policy 3.5 prohibits behavior that includes lewd or sexual comments about an individual’s body or attire, as well as sexual innuendo.

8. Following an investigation, appropriate action, which may include disciplinary action up to and including dismissal, shall be taken based upon the findings of the investigation.

9. The acts of the Appellant clearly constituted unwelcome sexual advances and physical contact of a sexual nature which created an intimidating and hostile work environment, but no less than an offensive work environment for Correctional Officer Judd. This is evidenced by the fact that Officer Judd, that same day, reported this incident to other individuals, and submitted her Incident Report.

10. Such comments by the Appellant to Officer Judd also constituted sexual comments about Judd’s body. These acts of unwanted physical touching and comments constituted a violation of Kentucky Corrections Policies and Procedures, Policy No. 3.5. Appellant also testified that at the time of the hearing, he admitted that the touching was unwanted, it was a violation of the sexual harassment policy, and that some form of punishment, short of demotion, should have been imposed.

11. Policy No. 3.5 makes it clear that appropriate action for such behavior may include disciplinary action up to and including dismissal. (Appellee's Exhibit 1) Warden Crews testified that she did consider termination to be an appropriate level of discipline for these acts, but took into consideration Appellant's past good work history and absence of prior disciplinary actions. Rather than impose termination of the Appellant, she wanted to give him a chance to learn and grow from this incident of unacceptable behavior and admitted she ". . . took a chance on just demoting him."

12. From all the evidence, the Appellee has shown by a preponderance of the evidence that there was just cause for Appellant's demotion and that such action was neither excessive nor erroneous.

### **RECOMMENDED ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Personnel Board that the appeal of **BRADLEY BEVERLEY VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2012-104)** be **DISMISSED**.

### **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).

**Any document filed with the Personnel Board shall also 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 Roland P. Merkel** this \_\_\_\_\_ day of January, 2013.

**KENTUCKY PERSONNEL BOARD**

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**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Stafford Easterling  
Hon. Michael Boylan