

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2012-100

ROBERT BLACKBURN

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

\*\* \*\*

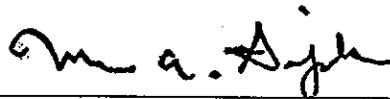
The Board at its regular May 2013 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated April 1, 2013, and having considered Appellant's Exceptions (returned as untimely) and being duly advised,

**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 14<sup>th</sup> day of May, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Amber Arnett  
Hon. Michael Boylan  
Stephanie Appel

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2012-100

ROBERT BLACKBURN

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

\*\* \*\* \* \* \*

This matter came on for evidentiary hearing on December 19, 2012, at 9:35 a.m. at 28 Fountain Place, Frankfort, Kentucky, before John C. Ryan, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A.

Appellant, Robert Blackburn, was present and was represented by the Hon. Michael L. Boylan. The Agency, Justice and Public Safety Cabinet, Department of Corrections, was also present and was represented by the Hon. Amber Arnett.

This matter was the subject of one pre-hearing conference conducted on June 19, 2012 at which the issues were defined and other procedural matters dealt with. The evidentiary hearing was initially assigned for October 11, 2012 and thereafter rescheduled, by agreement of the parties, to December 19, 2012.

Following the evidentiary hearing, during the course of preparation of Recommended Order, the Hearing Officer discovered that portions or all of the testimony of three witnesses failed to be recorded by the audio equipment. By agreement of the parties, the hearing was reconvened on February 22, 2013 and the missing testimony again presented.

BACKGROUND

1. By letter of April 18, 2012 over the signature of Cookie Crews, then-Warden of the Kentucky State Reformatory at LaGrange, Kentucky, Appellant, Robert Blackburn, was involuntarily demoted from his position of Correctional Lieutenant, grade 11, to Correctional Officer, grade 9, effective that date. A true copy thereof is attached hereto as "**Recommended Order Attachment A.**" Said letter, which speaks for itself, listed a menu of alleged offenses as grounds for this action.

2. Mr. Blackburn took appeal of the action on April 25, 2012 under the categories of "Demotion" and "Discrimination" without designating the nature thereof. He further wrote:

I was demoted effective April 18, 2012. The demotion was based on illegal motives including reprisal for FMLA activity and prior personnel board (sic) complaints and a lawsuit against the Agency. Further, the Agency did not follow proper procedure in the demotion and even if they had followed proper procedure, demotion is not appropriate.

3. Upon convening the hearing, the parties waived opening statements and, under its assigned burden, the Agency offered the testimony of **Clark Taylor**, currently Warden of Kentucky State Reformatory (KSR). The Warden described his work history with the Agency, commencing in 1988 through assuming the position in June 2012. He noted that it is a medium security facility, depicting his duties generally as the overall guidance and leadership of the 625 member staff and management of a 23 million dollar budget.

4. Warden Taylor previously served as head of security at KSR and introduced a policy (KRS 03-00-14) made effective January 16, 2007 on the subject of Prohibited Employee Conduct, Disciplinary Actions, and Appeal Process. Included therein was the abolition of possession of tobacco products inside the institution and prison yard, designating such materials as contraband. The one exception is possession of such material by employees inside their personal vehicle. He noted that this policy was widely disseminated preparatory to its implementation and addressed in both initial and supplemental training of all staff. The basis of the policy was a noted need to improve the health atmosphere, primarily on the part of inmates at KSR, which is also a medical center. It rendered possession of tobacco products by any inmate as a major violation and afforded a six-month implementation before becoming fully effective. He recalled that smoking cessation classes were conducted for the inmates, also made voluntary on the part of staff.

5. The Warden continued that as the cessation deadlines approached in June 2007 some staff voluntarily ceased smoking while others invested less effort during the interim. Consequently, management found it necessary to circulate a memorandum on July 5, 2007 addressing the subject of smoking in the staff parking lot. The need for the memo arose because rather promptly it became clear that many smokers among staff were abusing the option of smoking in their vehicles. He characterized that aspect of the cessation effort as a "disaster." Specifically, while some staff did not leave their post others, more flexible, were making frequent trips to their vehicles, the result being that upon many occasions several staff were in the parking lot simultaneously, weakening overall security. Further, they were depositing butts and emptying their ash trays in the lot, whereupon inmates were required to clean up the areas, exposing them to the materials while prohibiting them from possessing this contraband. He recalled that the July 5, 2007 memo was sent by e-mail to all staff having such; it was also posted

on bulletin boards and read at roll-calls for five consecutive days. He could not verify that Appellant personally saw the memo noting, however, that it was widely broadcast and disseminated and that he could not have not been aware thereof. Both the policy and the memorandum were introduced as part of his testimony.

6. Appellant having no cross-examination of Warden Taylor, **Senior Captain Jay Whitfield** explained his involvement in the relevant events. He now serves at the Luther Lockett Correctional Complex, but previously held the position of Senior Captain at KSR. He has been Senior Captain for five years, having been in Corrections with the Agency for thirteen years. He recited his work history, commencing as a Correctional Officer at KSR and attaining a total of four promotions to his current rank. While at KSR he supervised the security staff, recalling that he was a supervisor when Appellant started there as a Correctional Officer. He was a Senior Captain and Appellant was a Lieutenant when the tobacco-free policy was implemented in 2007, confirming that it, combined with the memorandum previously introduced, prohibited use of tobacco anywhere upon KSR property. He introduced an aerial view of the KSR complex including its parking area and identified specified points of reference thereon.

7. He recalled that on August 11, 2011, while still head of Security, then Deputy Warden Troy Pollock advised him to “grab a pair of binoculars” and accompany him to a specified location with a view of the employee parking lot. Upon arriving there he observed Appellant apparently smoking in his vehicle. The Deputy Warden instructed him to contact Appellant when he returned and bring him to the Deputy Warden’s office, which was accomplished. At that time the Deputy Warden asked Appellant directly whether he was smoking in his vehicle and he acknowledged that he was. The witness observed Pollock to then inform Appellant that this constituted a violation. Thereafter, on December 29, 2011 the witness received a contact from an officer stationed at the front gate who informed him that as Appellant passed through he appeared to smell of marijuana. The witness informed Deputy Warden Pollock, who instructed him to bring him to his office. The Senior Captain detected no marijuana odor; however, upon questioning Appellant admitted he had been smoking in the parking lot, and he was again informed that he was in violation.

8. Under brief cross-examination, the Senior Captain acknowledged that he was not Appellant’s direct supervisor but was in his chain of command. The witness possesses no disciplinary authority but, rather, investigates alleged violations and reports to the Deputy Warden. He was not aware whether Appellant was issued any written reprimands or other such discipline upon either of the two referenced occasions but confirmed the verbal warnings, for which he was present and overheard.

9. **Troy Pollock** is now Assistant Warden at a correctional center in the state of Louisiana and his testimony was presented telephonically. He retired from the Kentucky Department of Corrections after almost twenty-three years, having commenced as a Correctional Officer and risen through the ranks to Deputy Warden for Security at KSR. He held that position for three years, serving under then-Warden Cookie Crews throughout the time germane to this appeal. Included among his several duties was supervisor of personnel, policing their adherence to policy and compliance with facility and departmental rules.

10. Directed to his recollection of contact with Appellant on August 3, 2011, he recalled that prior thereto he had received reports that supervisors were violating the tobacco free policy, going to their vehicles in the parking area and smoking. On that date, he and Senior Captain Whitfield observed Appellant doing this, sitting in his vehicle smoking more than one cigarette. He advised Whitfield to have Appellant come to his office when he returned. Appellant did so and when quizzed acknowledged that he smoked one and one-half cigarettes in his car while on break. He further acknowledged his awareness of violating the policy, insisting that under Kentucky law he was afforded the right to a smoke break. He was thereupon reminded by the Deputy Warden that this was not the case at KSR and instructed to follow the policy.

11. The former Deputy Warden continued that on December 29, 2011 he was advised by Senior Captain Whitfield that the officer posted at Gate 1 thought that she smelled marijuana on the person of Appellant as he passed through. He instructed Whitfield to have Appellant come to his office and upon appearing there the witness noted a cigarette smoke odor. Appellant agreed upon inquiry that he smoked outside the gate before entering and was issued another reminder or warning concerning the policy. Appellant again insisted that under a mandate issued by the Governor, smokers must be afforded an area for smoke breaks. The witness again informed him that this was incorrect under KSR policy. He recalled that as Appellant departed his office he stated, "Go ahead and write me up."

12. On January 11, 2012, the facility librarian reported that Appellant had been there using the computer and left it on. Appellant subsequently acknowledged utilizing the computer, insisting that his visit there was job related. However, further investigation discerned that he utilized the equipment to visit one or more sites for personal business and, further, transmitted certain inmate information to his wife's website, contrary to policy prohibiting transmission of facility information to personal websites. The witness provided a report to Warden Crews, who thereupon directed technician Brian Cote to suspend Appellant's computer privileges. In due course, he supplied the Warden a complete report relative to the asserted smoking violations and inappropriate internet usage by date of January 23, 2012, with recommended discipline.

13. Under brief cross-examination, the former Deputy Warden was unable to comment whether e-mails sent to the wife's private account were actually non-confidential. He reiterated, however, that under the relevant Code of Ethics signed by all staff no work related information is to be transmitted to a private e-mail address. Appellant pressed him concerning the portion of the Code of Ethics or policy which provides that suspension of the privileges or other discipline might be imposed, but not both. The witness deferred to the wording of the policy.

14. **Brian Cote** has served as Informational Systems Supervisor at KSR since August 2006. He depicted his duties in that capacity to include maintenance of the integrity and security of the information data system at the facility. His office does not routinely monitor all e-mail traffic in and out of the system other than to randomly spot-check or monitor the overall usage. A specific account or address can only be targeted for review upon request from the Warden or Deputy Warden, whereupon he or his office will then retrieve whatever information was requested. He noted that software is in place to review usage and traffic upon each machine. Further, each authorized user is assigned an account and, upon proper request from upper management, the account may be specifically monitored for traffic to and from that account.

15. The witness identified a printout dating from December 29, 2011 reflecting data, such as time and sites visited, under Appellant's account, as well as the length of time spent there. He identified the entries thereon, found to be a visit to a vehicle insurance website at which the user spent approximately eight minutes. He viewed that an accidental visit in such circumstance is "doubtful" due to the length of time spent and, he noted further, is a very strong indication that the visit and information reflected was sought by the user. In this instance, Appellant was expressly referenced together with a specific vehicle including make and model. He confirmed that the information was printed and supplied to Deputy Warden Pollock. He introduced the printout as a part of his testimony together with the relevant policy impacting it. He confirmed that the nature of the information, and such usage of facility equipment, was a violation of one or more specific provisions of the internet policy of the institution, which policy is discussed with and signed for by each employee upon hiring.

16. The witness produced a print screen also developed from Appellant's e-mail inbox, accessed through his assigned account in the form of a "sent items" folder. He viewed that this material is evidence of violation of another portion of the policy, since it revealed that he had transmitted information to a private account belonging to Tina Blackburn, perceived to be Appellant's spouse. The witness reviewed one or more specific e-mails therefrom for the record, pointing out that the content pertained to job-related information, prohibited from transmission to any non-DOC account. He reported that activity of this nature is governed by a computer/internet agreement which all account holders are required to study and sign for and is contained in the employee's personnel file. He presented the material and the agreement in the course of his testimony.

17. Under cross-examination, Appellant directed the witness to a portion of the policy providing that internet access may either be revoked or discipline assessed. The witness acknowledged that his access was suspended but not revoked, the distinction being that a revocation closes the account, whereas suspension merely prevents accessing it until re-authorized. Turning to the approximately eight-minute exposure referenced in prior testimony pertaining to vehicle insurance, the witness pointed out that this "visit" was not an e-mail. However, a portion of the sequence is an e-mail and he acknowledged that it contains no quote for insurance coverage. Nonetheless, he noted, the sequence identifies a specific make, model and year of a vehicle and the entire package gives strong indication of interaction between the user and the entity, Esurance. The witness further opined strong doubt that the same screen would be viewed for this length of time without an interaction/exchange. He did not personally verify that the user actually conducted any interaction, discerned to be an internet "conversation," merely pointing to the time consumed. He also referenced an entry from the print screen thanking the user for his inquiry, again noting that a specific vehicle was referenced. The witness confirmed that the applicable policy contains no prohibition relative to leaving a machine unattended for any particular amount of time where the user might be distracted or otherwise engaged. He agreed that if the user desires to "hide" usage, the material could be deleted. Finally, this witness was unaware of any prior history of abuse by Appellant of his work-related computer privileges.

18. **Cookie Crews** now serves as Health Service Administrator with the Agency. She commenced her Agency service in 1984, nearly twenty-nine years previously and recited her history for the record. She became Warden at KSR in October, 2009 and moved from that position in June 2012. She holds ten years experience involving disciplinary actions and was Warden throughout the sequence of events involving Appellant which led to this appeal.

19. This witness signed Appellant's disciplinary letter and introduced a copy thereof for the record. She described the procedure in obtaining its drafting and issuance, pointing out that as the Appointing Authority she caused all incidents to be investigated, obtained reports, and thereupon submitted the package to personnel officials at the central agency. All facts were analyzed at the appropriate levels and ultimately she reviewed the final disciplinary letter, executed it, and caused it to be delivered to the recipient. The witness was familiar with the recitations in the final letter and discussed each in her testimony.

20. Ms. Crews explained that as Warden of the facility, she expected supervisory personnel to be inherently familiar with all relevant policies and related requirements attendant to their position. She noted that supervisors are required to lead by example and are held to a higher behavioral standard and must project appropriate leadership for staff, as well as authority toward inmates. They are expected to teach both staff and inmates proper protocol of behavior and to not deviate therefrom in such a way that would afford either those under their supervision

or the inmates fodder to break the rules; they might then utilize the bad example as leverage to obtain favors in exchange for maintaining silence concerning observed improper conduct by the supervisor. She emphasized that all management must teach and lead by example, a critical factor in a correctional facility.

21. The witness addressed the smoking cessation policy imposed at KSR in June 2007. She emphasized that it was a "huge undertaking" for all personnel and inmates, requiring several months of implementation, and uniform enforcement of the ban was critical. Appellant, however, signaled in his violation thereof upon at least the two occasions that he did not intend to display proper example in his position as a supervisor. She was particularly distressed with his "go ahead and write me up" comment to the Deputy Warden when confronted upon one of the occasions, which she interpreted as an intent to continue violating the policy and which displayed, in her view, disrespect toward upper management. She perceived this attitude as unbecoming an officer supervising others, particularly in light of the extreme difficulty in getting the ban in place.

22. Relative to the asserted improper use of internet cited in the demotion letter, the witness recognized the need for supervisory personnel to have internet access to aid in performing their assigned duties, which include preparation of performance evaluations and dealing with certain matters pertaining to inmates. However, when use thereof is inappropriate such as for personal business and thereupon becomes a distraction when on duty, there is risk that the inmates will discover a pattern and utilize any period of inattention to commit infractions themselves. The usage must therefore be closely monitored, particularly as to supervisory personnel whom, she again emphasized, should lead by example. Similarly, fraternizing with inmates, such as voluntarily making copies for them, can lead to more serious issues and must be severely limited to what is authorized by policy.

23. The former Warden continued that standard procedure under her watch was to obtain written reports detailing infractions from whatever investigation was performed, distill this information into a documented summary, and submit the package to central office for review and suggestion of discipline. In the course thereof, she routinely reviewed the employee's personnel file to discern whether there has been a pattern of similar behavior. This aspect, among others, bears upon the discipline to be imposed. She observed from Appellant's file that he was previously demoted in 2007 for solicitation of favors on behalf of his wife. She found that when challenged concerning this, Appellant agreed at that time to cease the activity, but nonetheless continued and was ultimately demoted from Captain since it appeared he was not prone to follow any rules other than his own. This prior episode, combined with a repetition of the pattern more recently, caused her to assume that at least as of this time Appellant does not possess sufficient supervisory skills. Consequently, in the best interest of the facility, it was viewed that he should be sent back to Correctional Officer status where he might again

commence working his way up through the ranks and thereby acquire the requisite management skills.

24. The witness called attention to the procedure wherein all new hires at the facility receive a checklist of rules and policies which they are expected to learn and practice. She produced as a portion of her testimony the facility Code of Ethics, which is contained in every personnel file including that of Appellant and for which he signed as read and understood on June 9, 1995.

25. The witness addressed Appellant's stated claim that he has been "singled out" for punishment due to his need for Family Medical Leave and/or the fact that he has had litigation pending against the Agency or facility. She urged that none of these events have any bearing upon the treatment of him in this instance, nor did she familiarize herself with either of those factors in assessing the demotion. She pointed out that Family Medical Leave, and any other leave, is an absolute right of the employee and that no one will be penalized for utilizing it as needed. She disavowed knowledge concerning any lawsuit initiated by Appellant. She explained that staff within KSR tend to become "family" and she routinely possessed considerable information about most personnel and their families and recognized that discipline impacts entire families of staff; thus it is not imposed arbitrarily. Nonetheless, she continued, supervisory employees represent management in the eyes of inmates and are the "face of the facility" at various levels. Consequently, managers must be held to a higher standard and lax enforcement of the rules and policies either by or toward them cannot be tolerated.

26. Under cross-examination, the former Warden confirmed that she was aware that Appellant's spouse had been ill, having known her from working together at another institution. She was also "slightly" aware of a pending suit by Appellant or the spouse, reiterating that those factors had no bearing upon the disposition of his current status. She was not aware of any notable discipline of Appellant in the interim between his demotion in 2007 and that in 2012.

27. Appellant reviewed with her the specific charges forming the basis of his current demotion. He pressed her as to whether each of the events were disciplined at the time of their occurrence, pointing out that the cited series extended over a considerable time span. She acknowledged that the Agency employs progressive discipline, noting that each penalization is imposed upon a case-by-case basis. She agreed that the purpose of progressive discipline is to alert the employee to curtail the behavior. Appellant discussed with her whether, and if so what, effort was made by management in each instance to rectify the particular, asserted infraction. The former Warden explained that, in addition to meeting with him after each of the two smoking episodes and the other events, the matters were referred to the Agency personnel department. In some instances response thereto was either not forthcoming or was delayed. She confirmed that no express discipline, such as written reprimands, was imposed at the time of the infraction(s).

28. Appellant addressed the policy governing use of internet and e-mails, observing that the sanction for improper use appears to be either revocation of internet privileges or imposition of progressive discipline, but not both. The witness acknowledged that Appellant's internet privileges had been suspended, thereby resolving that aspect. She explained that although that infraction is referenced in the April, 2012 demotion letter, disposition of his case was based upon the totality of the circumstances, reiterating the need for supervisory personnel to learn from their mistakes and lead by example. She emphasized that no specific violation recited in the letter was relied upon to reach the ultimate resolution but, rather, the "whole picture."

29. Under re-direct examination, the former Warden explained that she did not personally monitor the behavior of each employee nor check their e-mail traffic. She undertook to describe the e-mail monitoring system utilized at KSR, acknowledging that it is somewhat behind in technology. Her understanding of the monitoring process is that the in-house technician observes e-mail traffic in and out of the facility. When a slow-down or "drag" is detected indicating an overload the technician will investigate to discern the source and the reason. This "drag" can thereupon be traced to the source, the specific e-mails reviewed, and under this method inappropriate use will be pinpointed.

30. The witness further addressed the progressive discipline process raised by Appellant. She recalled that when he was demoted in 2007, he was alerted and warned that further improper activities might generate further discipline. She viewed that Appellant thereafter continued with his loose adherence to the rules, as outlined in the series of infractions set forth in the current demotion letter and, from that perspective, progressive discipline was employed by virtue of two demotions within the referenced time span.

31. **Pat Boutin** is in charge of records at KSR. She numbers among her duties the determination of those materials eligible, or not as the case may be, for release under the Open Records law and relevant regulations. Her office handles 700 to 800 requests annually. She explained that each request is reviewed under the particular law and a response issued either granting or denying it. She was directed to certain portions of an exhibit previously introduced containing what were depicted as "screen shots" and e-mails abstracted from traffic conducted by Appellant. She noted that two e-mails in the materials contain names of inmates headed for adjudication, detailing the alleged infractions and denominating the staff member assigned to perform a requisite investigation. Both e-mails were sent by Appellant to Tina Blackburn on May 14, 2011. The witness explained that the materials and information were preliminary and not eligible for public release; consequently, they were deemed confidential and any request for them under the Open Records law would be denied. No hearing dates were yet assigned at which some disposition of the allegations might occur. There was also risk of future litigation during which, if initiated, these materials could be improperly utilized by one party or another.

32. The witness continued that the subject transmissions were neither cleared by nor sent through her office despite standing orders requiring such. She identified the applicable Kentucky Revised Statute(s) under which her office operates and which govern all releases, noting that transmission of these particular items did not comply with those laws. She related that all supervisory personnel are specifically trained concerning release of confidential information. She introduced an "Employee Confidentiality and Security Agreement" signed by Appellant on January 7, 2000 under which he agreed that no confidential information or records might be released without prior written consent of the appropriate authority. Appellant had no cross-examination of Ms. Boutin.

33. **Carlos Schantz** has been employed with the Commonwealth for thirteen years and currently holds the position of Corrections Administrator I at KSR. Previously he was a Correctional Captain at that facility and in charge of the Internal Affairs office. His duties then consisted of investigation of staff and inmate related incidents, pre-investigation of Board of Claims matters, and oversight of the drug-testing program at KSR. Sometime in July, 2011 he was presented with a manila envelope, delivered by another Captain who reported receiving it from a Correctional Officer who, in turn, reported that Appellant had given it to that officer with a request that he deliver it to a named inmate. Neither the Captain nor the Correctional Officer ever opened it. Upon review of its contents by the witness, he found seven copies of a newspaper clipping which reported a recent indictment of another Correctional Officer. The witness confirmed with the Correctional Officer who handled it that it came from Appellant with the instructions previously referenced. His interview with Appellant revealed that he made the copies and that two of the seven were intended for his personal use. The witness also interviewed the inmate, who confirmed requesting the copies and that no compensation was paid or received for this favor. Finally, the witness viewed a surveillance video wherein Appellant was recorded entering and exiting the facility Nurses' station, where a copy machine is situated, carrying a manila envelope.

34. The witness explained that this activity by Appellant had no connection with his job duties and was consequently a violation of the policy prohibiting providing inmates benefits such as this. He introduced the policy and pointed to the relevant language therein. He amplified that the basis therefor is to avoid even the appearance of favoritism toward inmates as well as prevention of passing inappropriate material. He observed that inmates are afforded a procedure to obtain copies, consisting of a specified location within the facility available to them to purchase copies of authorized materials at nominal cost. The location is monitored and the materials are screened.

35. Under brief further examination by the parties, the witness expanded upon the entries in his report, pointing out that he had no authority to impose discipline upon staff, only inmates. He conceded that one entry upon the report form as to disposition of the charge; marked "unfounded" was in error, also recalling that no discipline was imposed upon the inmate.

36. The Agency having completed its proof in chief Appellant, **Robert Blackburn**, offered his own testimony. He verified that he is currently a Correctional Officer at KSR where he commenced employment in 1998. Prior to that, he served at the Luther Luckett Correctional Complex beginning in 1995. He was made a Sergeant at KSR in 1998, promoted to Lieutenant in 2000, and again promoted, to Captain, in April, 2004. He was thereafter demoted back down through the ranks as recited in the prior testimony. He filed a legal action against the Agency in November, 2010, presently pending, wherein he alleges violation of his Family Medical Leave rights. He urged that this arose due to his need to attend to medical needs of his spouse, who has been stricken with a debilitating condition since 2006; her condition causes her to pass out and suffer severe memory loss. Due thereto, he has found it necessary to seek intermittent Family Medical Leave "for several years," giving rise to employment issues. He recalled that he obtained statements from six different doctors directing that he not be assigned to third shift due to the circumstance of his spouse and was also refused leave upon at least one occasion. At one point he was moved to second shift, which he served for a full year, but this also presented problems and he missed considerable work time. He recited at least one instance when his spouse contacted him to advise that she was being released from a hospital and needed to be immediately picked up, but management would not release him to do so. Deputy Warden Pollock informed him that if he left he would be demoted; he remained on the job and went for his wife seven hours later.

37. Appellant also referenced a mediation session, apparently connected to the family leave issues, attended by Warden Crews, himself, and others, outcome of which the Warden had asserted that there would be no retaliation against him for taking his rightful leave. However, after approximately three months he began to sense and observe retaliatory behavior toward him by management and coworkers despite this commitment. He viewed that he had endured this behavior for at least four years. At one point he sought a medical transfer to another facility, but surmised that word about him was out and he was unable to obtain an interview in any of the other locations. He felt shunned and the subject of shabby treatment, and views that both demotions have been in retaliation due to his effort to enforce his rights.

38. Appellant addressed the specific claims underlying his most recent demotion. He did go to his vehicle and smoke a cigarette upon both occasions of August 3 and December 29 and admitted doing so when called in. He suspected that the officers at Gate 1 were under instructions to notify management whenever he passed through on break. Deputy Warden Pollock "did talk to me" after the August 3 incident, but he did not understand the conversation to be a warning. He recalled no lecture after the December 29 event, insisting that any claim that

he was using marijuana was false. Relative to making copies for an inmate, he recalled that the inmate came to him with a hometown newspaper requesting a copy or copies thereof, and he made the copies without thinking. He saw it as routine at the time, urging that various other staff do the same thing with impunity. He did not consider it improper, noting that Internal Affairs looked into it and no action was taken then, such as a warning or reprimand.

39. Addressing his use of internet privileges, Appellant explained that he utilized the librarian's computer to open up his account and, when he did so, an "Esurance ad" or other information was already there. He did open the website but conducted no search, sought no insurance quotes, and did not initiate the contact.

40. Again addressing the admitted smoking violations, Appellant insisted that he was misquoted in the citation against him from his conference with Deputy Warden Pollock. He recalled that his exact response was, "You're gonna write me up, just go ahead and write me up," rather than the phrasing set forth in the demotion letter. He denied failing to report others whom he caught violating the smoking policy; he did report them, but nothing was done about it. He asserted that "under the KRS" the facility is required to provide a smoking area somewhere on the premises. Finally, Appellant did not consider that the series of e-mails that he sent to his home to be a breach of security, urging that none of the information contained therein is confidential.

41. Appellant's testimony concluded his proof-in-chief. The Agency having no cross-examination of him, it presented rebuttal testimony from **Senior Captain Jay Whitfield**. Whitfield recalled that Appellant was a Lieutenant during the timeframe under scrutiny. In light of his attendance issues, the witness and Deputy Warden Pollock conferred seeking a solution as to how Appellant might be more productive and more fully utilized due to his absences. Among the measures implemented was a change to second shift, which commenced at 3:45 p.m. and ended at 11:45 p.m., to accommodate the situation toward more dependability. He urged that the arrangement was unconnected to the Family Medical Leave aspect but, rather, to obtain more supervisory productibility. He noted that Appellant's shift captain actually assigned his duties.

42. Appellant having no rebuttal cross-examination of the witness, following closing summaries by the parties the matter stood submitted for recommended order.

43. KRS 18A.095(1) requires that "A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause."

44. 101 KAR 1:345 is the regulation pertaining to disciplinary actions. Section 1 thereof affords an agency the right to discipline employees for lack of good behavior or unsatisfactory performance of duties. Section 3 thereof relates to demotion and prescribes the processing thereof. Appellant does not challenge the protocol engaged relative to delivery of notice.

45. Policy No. KSR 03-00-14 was issued January 5, 2007 and made effective January 16, 2007. The subject thereof is PROHIBITED EMPLOYEE CONDUCT, DISCIPLINARY ACTIONS, AND APPEAL PROCESS, and subpart III pertains to tobacco products, providing:

- A. All areas of KSR shall be free from tobacco use and no tobacco products, cigarette rolling papers, matches or lighters shall be permitted past Gate 1 or through any gate accessing the prison yard.
- B. Tobacco at the Kentucky State Reformatory shall be considered contraband as defined in KRS 520.010.
- C. Employees shall be permitted to keep tobacco products, matches and lighters in their personal vehicle.
- D. The use of tobacco by employees in state vehicles shall be prohibited.

46. The Agency has also implemented an EMPLOYEE CONFIDENTIALITY AND SECURITY AGREEMENT which Appellant signed for as read and received on January 7, 2000. The agreement requires, among other provisions, that the employee “. . . shall not disclose confidential information or records without the prior written consent of the appropriate authority in the Department of Corrections.” The document continues that the employee understands and agrees that improper disclosure may result in disciplinary action, including the possibility of dismissal.

47. Appellant signed a COMPUTER/INTERNET USAGE AGREEMENT on February 2, 2005. The agreement provides that agency computers are the property of the Commonwealth, exist for official and authorized use only, and that unauthorized or improper use may result in administrative disciplinary action. It further allows that “Any employee who violates these rules is subject to disciplinary or legal action by the Commonwealth of Kentucky under the Kentucky crime law . . .” As a corollary thereto, the Department adopted policy 6.5 on March 4, 2008 relating to E-MAIL AND INTERNET USE. This policy is considerably more comprehensive than the agreement, and prohibits a litany of activities utilizing state equipment including any transmissions of a personal nature or of confidential information. Subsection II.9 asserts that “violation of this policy may result in the revocation of internet access or progressive disciplinary action, up to and including dismissal.”

**FINDINGS OF FACT**

1. At all times germane to this proceeding Appellant, Robert Blackburn, was a classified employee with status of the Commonwealth of Kentucky. Until April 18, 2012 he held the position of Correctional Lieutenant at the Kentucky State Reformatory (KSR) in which position he served approximately five years. His history in that regard is also marked by a prior demotion, from Captain to Correctional Lieutenant, in 2007 for asserted violation of the standards applicable to supervisory officers. The grounds for the most recent reduction in rank are detailed in the demotion letter, namely a cumulative series of actions on his part constituting lack of good behavior under the regulatory scheme. These events range in time from August, 2010 through early 2012 and include two incidents of violation of the smoking ban on facility grounds, improper use of facility computer equipment and internet access, and inappropriate favoritism toward an inmate. Appellant admits both smoking episodes, urges that he made copies for an inmate without thinking, and denies utilizing Agency computer equipment for personal use. He acknowledges transmitting certain inmate-related information to his wife, but insists that the material was not confidential.

2. Appellant was “lectured” by the then-Deputy Warden at the time of each of the two smoking violations and his internet access was suspended, but not revoked, following the computer usage episode. He recognizes that making copies for an inmate was, at the least, mindless. His position is that he effectively received appropriate discipline at the time of each incident, namely oral reprimands for the smoking and the suspension of his computer privileges and, accordingly, demotion following the series of events is unduly harsh and is a form of retaliation due to his efforts to invoke his rights under the Family Leave Act arising from the health circumstances of his spouse. It is the posture of agency management that, as a Lieutenant in charge of others, Appellant’s recurring violations of well known policies signal a defect in his management skills and demonstrate bad example, since supervisory personnel are held to a higher standard and are expected to adhere to and enforce the very rules which he has knowingly ignored or negligently violated. It argues that, while no single event cited might be sufficient to support its action, the accumulation of his behavior over the prior eighteen months demonstrates the need for more education, training, and development of respect for institution requirement if he is to ever return to supervisory duties.

3. The Hearing Officer finds the testimony of all witnesses and of Appellant to be credible, although that of Appellant is deemed to be subjective in nature.

**CONCLUSIONS OF LAW**

1. The majority of the allegations cited as grounds for the demotion of Appellant arise under institution policy, brought under the auspices of 101 KAR 1:345, the regulatory provision covering general lack of good behavior. Other than questions raised early on by Appellant as to whether institution personnel should be afforded a smoking area under either statute or Executive Order, he has not challenged the legality of the policies or the contents of any of the agreements he signed when he became employed at KSR. His longevity with the institution should dictate his inherent familiarity with these various requirements. The fact that he was promoted through the ranks, at one time to Captain, would seemingly support the fact that in prior years he substantially complied with the rules. However, in recent years he has been now demoted not once but twice for violations. The grounds for the earlier demotion, from Captain to Lieutenant, are not before the Board in this appeal and have no bearing upon the disposition hereof. However, that event, combined with the current demotion from Lieutenant to Correctional Officer, appears to be the latest step by management of imposition of progressive discipline. It would seem clear that in the view of management, Appellant has become lax or negligent in his compliance, potentially resulting in similar behavior, with potential for breakdown in discipline, by those staff whom he would supervise and inmates perhaps observing his every move.

2. Given its latest action, it is clear that upper management has lost confidence in Appellant's ability to lead and project proper example. While acknowledging the unfortunate health circumstances of his spouse, which are undisputed and no doubt present daily challenges, there is no proof that either family medical leave issues or other legal activity by Appellant impacted the Agency's disposition of his status. To the contrary, the proof is that the Agency seeks a show of future behavior sufficient to restore its confidence that Appellant understands, and will comply with, the various policies, whether or not he agrees therewith.

3. The Agency has sustained its burden to establish by a preponderance of the evidence that the series of violations support a demotion from supervisory rank. Appellant has not established that the action was retaliatory or discriminatory due to his having exercised his legal rights under the Family Medical Leave Act. Consequently, the action of the Agency was not unconscionable or excessive in light of the overall circumstances.

**RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **ROBERT BLACKBURN VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2012-100)** 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).

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 John C. Ryan** this 1<sup>st</sup> day of April, 2013.

**KENTUCKY PERSONNEL BOARD**

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

A copy hereof mailed to:

Hon. Amber Arnett  
Hon. Michael L. Boylan



## DEPARTMENT OF CORRECTIONS

LaDonna H. Thompson  
Commissioner

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

Cookie Crews  
Warden

April 18, 2012

Robert Blackburn

Re: Demotion

Dear Mr. Blackburn:

Pursuant to KRS 18A.095, you are advised that you will be involuntary demoted for cause from your position of Correctional Lieutenant, grade 11, at the Kentucky State Reformatory to Correctional Officer, grade 09 at Kentucky State Reformatory effective April 18, 2012. Your monthly salary will be reduced from \$3479.82 to \$3163.47.

Pursuant to 101 KAR 1:345, Section 1, and based upon a review of your performance, I find probable cause to believe that your demotion is justified based on the following specific reasons:

**Lack of Good Behavior, i.e.,** as reported by Deputy Warden of Security Troy Pollock, you continue to violate the institution's smoke-free policy.

Specifically, on August 3, 2011, Sr. Captain Jay Whitfield and Deputy Warden Pollock observed you smoking while sitting in your car in the institution's parking lot. During a meeting that day with Deputy Warden Pollock, you admitted to smoking one and half cigarettes while on break and Deputy Warden Pollock directed you not to smoke on institutional grounds again. Despite this directive, you admitted to Deputy Warden Pollock that you had been smoking in your car in the institution's parking lot a few minutes before reporting to his office on December 29, 2011.

Your actions violate Kentucky State Reformatory's Institutional Policy and Procedure 03-00-14(III), which states that "[a]ll areas of KSR shall be free from tobacco use[.]"

**Lack of Good Behavior, i.e.,** as reported by Deputy Warden of Security Troy Pollock, you used state time and equipment for personal use and used it to release information the disclosure of which was prohibited by the Open Records Act.

Specifically, in July 2011, during Captain Carlos Schantz's investigation into copies of a newspaper article you made for inmate Leonard Douglas, you admitted that you made two copies of the article for yourself using the copier in the KSR nursing care facility.

Also, in response to a report that you used the librarian's computer and in response to a conversation with you on January 11, 2012, about your internet and e-mail usage, Deputy Warden Pollock asked Brian Cote, Information Systems Supervisor, to check your e-mail and internet accounts. Mr. Cote confirmed that you received an e-mail on December 29, 2011, from quoteinfo@insureme.com. Mr. Cote reported that you then spent approximately eight minutes on the insurance website.

Mr. Cote also reported that from August 2010, to August 2011, you sent twenty-eight e-mail messages to your wife's personal e-mail account (tinablackburn.blackburn@gmail.com) including forwarding work e-mail messages, as follows:

One e-mail each on August 15, 2010; November 11, 2010; June 22 & 25, 2011; and August 6, 2011;

Two e-mails each on June 11 & 15, 2011; July 30, 2011;

Three e-mails each on April 22, 23, & 30, 2011; July 23, 2011; and

Five e-mails on May 14, 2011.

You stated to Deputy Warden Pollock that you "send all your work e-mails home to use in your lawsuit."

Of particular concern are two e-mail messages that you forwarded on May 14, 2011, about pending inmate disciplinary actions, pending investigations, and the identity of the investigators assigned. These records would have been prohibited from disclosure at that time under the Open Records Act due to their preliminary and investigative nature, privacy concerns, and/or their threat to security under KRS 61.878(1)(a), (h), (i), (j), and (l), and KRS 197.025(1).

Your actions violate CPP 3.1 (II)(A)(3), which prohibits the use of time, facilities, equipment, or supplies of the Commonwealth by an employee for his private purposes; CPP 6.5(II)(A)(2)(a), which requires that internet access be used for business purposes; CPP 6.5 (II)(A)(5), which prohibits using e-mail access to transmit a personal message or to provide access to information or records that are precluded from disclosure by KRS 61.878 or KRS 197.025. Your actions also violate CPP 6.5(II)(C)(1), which requires you to protect all work e-mail messages from unauthorized disclosure to third parties.

**Lack of Good Behavior, i.e.,** as reported by Deputy Warden of Security Troy Pollock, you have displayed unprofessional behavior for supervisory level staff.

Specifically, during your August 3, 2011 meeting with Deputy Warden Pollock, you stated that you had observed staff smoking in their cars on KSR grounds but said nothing to them or to their supervisors about violating policy. Also, while meeting with him on December 29, 2011, Deputy Warden Pollock told you that as a supervisor you are expected to follow all policies and set a good example for staff, and he directed you not to smoke on institutional grounds again. As you were leaving his office, you responded, "go ahead and write me up." While meeting that day, in response to a question about your use of your state e-mail and internet accounts, you told Deputy Warden Pollock that you did not use the computer for personal use. As your usage reports described above show, your statement was untrue.

Your actions violate Kentucky State Reformatory's Institutional Policy and Procedure 03-00-14(II)(U), which prohibits activities that are detrimental to the proper discharge of duties or in conflict with attaining the Department's goals and mission.

**Lack of Good Behavior, i.e.,** as reported by Deputy Warden of Security Troy Pollock, you made copies for an inmate in violation of policy.

Specifically, on July 28, 2011, Correctional Officer James Mensing delivered a sealed manila envelope to Captain Joseph Woods stating that you had given the envelope to him and instructed him to deliver it to inmate Leonard Douglas. Captain Woods delivered the envelope to Captain Carlos Schantz, who opened the envelope in the presence of Lieutenant Josh Deckard. The envelope contained seven copies of a newspaper article about a KSR Correctional Officer who had been indicted for racketeering. During Captain Schantz's investigation, you admitted that you made the copies of the article for Inmate Douglas.

Your actions violate CPP 3.1(II)(B), which prohibits you from providing a gift or favor to an inmate except as authorized in the performance of official duties.

As a Supervisor and a Department of Corrections employee, it is incumbent upon you to conduct yourself professionally at all times. 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.

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,



Cookie Crews  
Warden

Encl: Appeal Form

cc: LaDonna Thompson, Commissioner – Department of Corrections  
Tim Longmeyer – Secretary Personnel Cabinet  
Jim Erwin, Deputy Commissioner, Office of Adult Institutions  
Stephanie Appel, Assistant Director - Division of Personnel Services  
Regional Personnel File