

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-141**

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 February 10, 2014, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Geoffrey B. Greenawalt, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Robert Blackburn, was present 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. Amber Arnett.

The issue at the evidentiary hearing was the dismissal of the Appellant. The burden of proof was upon the Appellee to demonstrate by a preponderance of the evidence that the disciplinary action taken against the Appellant was neither excessive nor erroneous and was taken with just cause.

BACKGROUND

1. The Appellant, Robert Blackburn, timely filed his appeal with the Personnel Board on June 10, 2013, appealing his dismissal from his position of Correctional Officer with the Kentucky State Reformatory (KSR).

2. The first to testify was **Dorothy Taylor**, who is a Sergeant of Internal Affairs and the urinalysis coordinator at KSR.

3. Ms. Taylor testified that on March 6, 2013, the Appellant was randomly selected to submit to a urinalysis (i.e. drug test). Ms. Taylor explained that employees are randomly selected by computer to be drug tested and placed on a list which is transmitted to the Warden at KSR. The Warden then contacts Ms. Taylor who proceeds to procure urine samples for purposes of drug testing from those employees set forth on said list. On the day in question, the

Appellant, who had been randomly selected to be drug tested, was directed to appear at the Internal Affairs office. Within 15 – 30 minutes of being called in for testing, the Appellant was relieved from his duties at the Internal Affairs office. Upon arrival, Ms. Taylor explained to him that he had been randomly selected to be drug tested and needed to provide her with a urine sample.

4. Ms. Taylor gave the Appellant a medication form to fill out listing all the medications he was currently prescribed. The Appellant appeared fidgety. He also told her he could not remember all the medications he was on. She then asked him if he needed to call home or to his physician's office for help completing the list. She also told the Appellant he could bring in a list the following day. According to Ms. Taylor, the Appellant did not return the list to her the next day.

5. Ms. Taylor then filled out a Chain of Custody form that the Appellant also had to sign. The Appellant had a long-sleeved shirt on so she asked him to roll up his sleeves and take everything out of his pockets except his money.

6. Ms. Taylor provided the Appellant with a collection cup, then asked him to wash and dry his hands thoroughly and fill the cup with urine to no less than the 60 ml mark. He was also instructed not to turn on the water or flush the commode in the bathroom until after his sample had been produced. Ms. Taylor stood directly outside the bathroom door while the Appellant produced his sample and did not hear any water running or the commode flush.

7. Once produced, the Appellant placed his urine sample on the table. Ms. Taylor asked him to watch her while she tightened the top to the collection cup. She did this to insure the Appellant knew his sample had not been tampered with. Ms. Taylor then placed a strip over the cup to seal the sample. The strip was signed and dated by Ms. Taylor and the sample was placed in a bio-bag along with the signed and dated chain of custody form. As this form is completed in triplicate, Ms. Taylor kept a copy and gave the other to the Appellant. As with the sealing of the actual sample, Ms. Taylor looked at the Appellant to be sure he watched her seal the bio-bag and knew the sample had not been tampered with.

8. Finally, Ms. Taylor took the sealed bio-bag to a room up front at Gate 1 and placed it in a locker. Ms. Taylor explained that at approximately 3:00 p.m., she collects all the samples she has taken for the day from the locker and ships them via UPS to the testing facility in California (Phamatech). According to Ms. Taylor, she is the only one with access to the key to the locker. Appellee's Exhibit 1 was introduced into the record and is a copy of the form filled out by the Appellant on March 6, 2013 which was placed in the bio-bag along with the

Appellant's sealed urine sample (a copy of which was also given to the Appellant). Ms. Taylor stated that once the samples are sent out via UPS, her involvement with the drug testing ends.

9. The next to testify was **Ms. Amy Ganschow**, who has been the Human Resource Administrator at KSR for the past two and a half years. Her duties include supervising the payroll and handling all the Human Resource duties at KSR. According to Ms. Ganschow, she works directly for Warden Taylor and is the institutional liaison for, and processor of, major disciplinary action requests at KSR. According to Ms. Ganschow, Teresa Harris will contact her if an employee's drug test turns up positive. She then informs the employee of the positive result and instructs them to provide her with a current prescription list or empty medication bottle(s) for purposes of determining whether any of the prescription medications on the list would have caused the positive result.

10. Appellee's Exhibit 2 was introduced into the record and is an e-mail from Ms. Harris informing Ms. Ganschow that the Appellant had tested positive for Oxycodone and requesting proof of prescription.

11. Appellee's Exhibit 3 was introduced into the record and is a list of the Appellant's prescriptions provided on April 18 which Ms. Ganschow submitted to Teresa Harris.

12. Appellee's Exhibit 4 was introduced into the record and is a copy of an e-mail to Dr. Doug Crall asking him whether the Appellant's positive drug test result would have been caused by any of the prescriptions set forth on his medication list. According to Ms. Ganschow, Dr. Crall is a doctor with the Division of Mental Health Services. Dr. Crall's opinion was that the medications taken by the Appellant would not have caused a positive test result for Oxycodone.

13. Appellee's Exhibit 5 was introduced into the record and is a copy of the intent to dismiss letter drafted by Ms. Ganschow for Warden Clark Taylor's review and signature. A copy of the dismissal letter dated May 31, 2013, was also made a part of Appellee's Exhibit 5.

14. Appellee's Exhibit 6 was introduced into the record and is a copy of Kentucky Corrections Policy and Procedure No. 3.11, Drug Free Workplace Employee Drug Testing. According to Ms. Ganschow, the Appellant violated Section J of the policy.

15. Appellee's Exhibit 7 was introduced into the record and is a copy of Kentucky Corrections Policy and Procedure No. 3.1, Code of Ethics. According to Ms. Ganschow, the Appellant violated Section D(1).

16. Appellee's Exhibit 8 was introduced into the record and is a copy of the Appellant's list of completed training classes. Also attached thereto is a copy of the General Standards of Conduct.

17. Appellee's Exhibit 9 was introduced into the record and was prepared by Ms. Ganschow. This is a list of employees who have been dismissed for positive drug tests since 2009.

18. On cross-examination, when asked how many people who had positive drug tests had not been terminated Ms. Ganschow stated that there were none.

19. The next to testify was **Warden Clark Taylor** who has been the Warden at KSR since June 2012. Mr. Taylor is KSR's appointing authority and has known the Appellant since 2004.

20. According to Warden Taylor, Teresa Harris, the Human Resource Branch Manager at Central Office, sends KSR a list of employees to be randomly drug tested on a quarterly basis. The list is then forwarded to KSR's urinalysis coordinator Sergeant Taylor to collect the required employee urine samples. Appellee's Exhibit 10 was introduced through the witness and is a copy of a list of employees selected for random drug testing on March 6, 2013. The list included the Appellant. Warden Taylor testified that he is not involved at all with the sample collection or testing. He is simply informed of the results by Ms. Ganschow through Ms. Harris.

21. Warden Taylor approved both the intent to dismiss and the dismissal letters found at Appellee's Exhibit 5. According to Warden Taylor, the Appellant came into his office on the day after he provided his urine sample and told him he may test positive for something he took the previous weekend. Apparently the Appellant hurt his back moving something and took some of his wife's pain medication. Warden Taylor simply told the Appellant that he would have to wait for the test results and reiterated that the Department of Corrections had a "zero tolerance" policy.

22. Warden Taylor conducted a pre-termination hearing at which time the Appellant told him he had a lot of time in the Department of Corrections and stated he had previously been prescribed the same medication he ended up testing positive for, but could not afford to fill it. The Appellant sought leniency from Warden Taylor based on these considerations. According to Warden Taylor, he decided to terminate the Appellant because the "zero tolerance" policy is pretty clear and had to be kept up because KSR is a dangerous environment wherein all

employees had to keep a clear mind at all times to ensure the safety of the staff, public, and inmates.

23. On cross-examination, Warden Taylor testified he was not aware the Appellant had filed a lawsuit against KSR. He also admitted he had no direct evidence that the Appellant was under the influence of drugs on March 6, 2013. According to Warden Taylor, his understanding is that when a drug is in one's system it infers they are under the influence, and zero tolerance means zero tolerance. Warden Taylor also admitted the Appellant did not exhibit any behavior that would indicate he was under the influence of narcotics and that the Appellant had submitted a letter from his doctor at the pre-termination hearing demonstrating that the same medication he tested positive for had been prescribed to him. This did not carry any weight with Warden Taylor because it did not say he was currently prescribed that medication.

24. On redirect, Warden Taylor noted that Policy No. 3.11, marked as Appellee's Exhibit 6, included a definition of "under the influence" on p. 2 thereof. According to said policy, "under the influence" meant, among other things, that an employee's blood or urine has a detectable amount of alcohol or any other substance or substances.

25. The next to testify was **Dr. Surinder Kad**. Dr. Kad has been the physician at KSR since August 2013. He has practiced medicine for approximately 40 years. Appellee's Exhibit 11 was introduced into the record and is a copy of Dr. Kad's curriculum vitae (CV). According to Dr. Kad, he has extensive experience with drug testing and he compares medication lists with drug test results all the time.

26. Appellee's Exhibit 12 was introduced into the record and is the Appellant's drug test results. These results indicate a high level of Oxycodone which is an opiate for a separate entity of drug class. When comparing Appellee's Exhibit 3 with Appellee's Exhibit 12, Dr. Kad noted that Hydrocodone has a separate identity under the opiate class than Oxycodone and could not have caused the test results noted in Appellee's Exhibit 12. In other words, the Appellant's test results did not result from any of the medications listed on Appellee's Exhibit 3. Dr. Kad stated that the metabolites of Oxycodone and Hydrocodone are totally different.

27. Appellee's Exhibit 13 was introduced into the record and, according to Dr. Kad, is the "Holy" book utilized regularly by medical review physicians. Dr. Kad refers to this manual to refresh his memory on metabolites of different drugs. Appellee's Exhibit 14 was introduced into the record and is also a classic source which is referred to by medical review physicians all the time. This particular document demonstrates the time elements and half-lives of drugs and demonstrates the timeframe in which you can easily detect the presence of a drug in one's

system. Both Appellee's Exhibits 13 and 14 show the differences between Oxycodone and Hydrocodone.

28. The next to testify was **Dr. Thomas Aucoin**, who is a Vice-President with Phamatech. Dr. Aucoin has a Ph.D. in Biomedics with a specialty in Toxicology. He also has a Master's Degree in Forensic Chemistry. Dr. Aucoin is certified by the federal government as an expert in drug testing and has been involved with over 200 drug tests per year for over twenty years.

29. According to Dr. Aucoin, Phamatech is a laboratory which provides screening and confirmation of urinalysis services for the Kentucky Department of Corrections. According to Dr. Aucoin, secured urine samples are received at Phamatech and are documented. The special sealed bags are opened and samples are sorted for the type of drug testing required. The samples are also scanned to ensure they are the correct employees. According to Dr. Aucoin every time a sample passes to another individual within Phamatech it is documented. In this instance the Appellant's drug testing came out positive and the test results were confirmed. The information was then provided to the Commonwealth of Kentucky.

30. The Appellant's sample arrived on March 12 at approximately 9:50. The seal on the sample was intact. Had it not been, the testing of the sample would have been cancelled. Each sample is physically examined before opening to ensure they have not been tampered with. A variety of tests are then run to determine if the sample has been adulterated. According to Dr. Aucoin, the Appellant's sample fell in the acceptable range and had not been tampered with. Appellee's Exhibit 15 was introduced into the record and is a list of all the employees at Phamatech who touched the Appellant's sample. When a sample tests positive, the computer directs the technician to obtain another sample and to re-test it to ensure the initial results were accurate. The Appellant's test results shown on Appellee's Exhibit 12 are computer generated and demonstrate he tested positive for Oxycodone and Oxymorphone. According to Dr. Aucoin, because Phamatech holds the highest certification of any testing facility in the United States, said results are very reliable.

31. The testimony of Dr. Aucoin marked the end of Appellee's case in chief.

32. The next to testify was the Appellant, **Robert Blackburn**. Mr. Blackburn had been employed by the Department of Corrections for approximately seventeen years prior to his termination. According to Mr. Blackburn, he was made a Lieutenant in 2000 and a Captain in 2003 or early 2004. He was then demoted to Lieutenant in 2007 and further demoted to a Correctional Officer in 2013.

33. Mr. Blackburn stated he had taken medical leave under the FMLA due to his wife's inability to walk. He explained he took this leave intermittently as needed. He also stated he experienced several problems with the Deputy Warden regarding his taking leave. As a result, he filed a lawsuit against KSR in the Oldham Circuit Court which was still pending in March, 2013 when his positive drug test came to light.

34. On March 6, 2013, someone came and got the Appellant from his post and took him to the Internal Affairs office. At that point he asked to speak with Warden Taylor. Once he was able to speak with Warden Taylor he told him his drug test might turn out positive because he had taken one of his wife's pain pills over the previous weekend. His wife had a prescription for Oxycodone. He also told Warden Taylor he had been prescribed the same medication in the past but did not fill it due to money issues. At hearing, the Appellant admitted it was wrong to take his wife's pain pill, but noted that he had been honest and upfront about it.

35. Concerning his drug testing, the Appellant stated he gave his urine sample in a little room with a bathroom connected to it. The bathroom included a sink and toilet. He could not remember if there was any blue agent in the toilet. According to Mr. Blackburn, Sergeant Taylor first filled out some forms then put gloves on and gave him a sample cup. She broke the seal on the cup and he took it into the bathroom. Sergeant Taylor told him there should be no running water. After producing a urine sample, he handed the sample cup to Sergeant Taylor. She then took the cup, sealed it with a label, placed it in a bio-bag, then sealed the bio-bag. Mr. Blackburn went to see Warden Taylor directly after he gave his urine sample.

36. During his pre-termination hearing, Mr. Blackburn admitted he took his wife's prescription pain medication after hurting his back one or two days before being drug tested. He also admitted he had been wrong by doing so. He asked the Warden for leniency given that he had seventeen years in with the Department of Corrections. He also noted that the medication did not affect his ability to perform his job and that no one complained about the way he was performing his job. Finally, Mr. Blackburn stated he had made a mistake, but not a horrendous mistake, and that he tried to be honest and upfront about it.

37. **Dorothy Taylor** was re-called as a rebuttal witness for the Appellee and testified she did not take any other samples at the same time she took the Appellant's and that there were no other employee samples in the room during that time.

38. This matter is governed by KRS 18A.095(1) which states:

A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause.

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

FINDINGS OF FACT

1. The Appellant, Robert Blackburn, was dismissed from his position of Correctional Officer with the Kentucky State Reformatory as a result of violating the Department of Corrections Policy and Procedure No. 3.11, Drug Free Workplace Employee Drug Testing and Corrections Policy and Procedure No. 3.1, Code of Ethics, all of which constitutes misconduct pursuant to 101 KAR 1:345. [See Appellee's Exhibit 5.]

2. The Appellant, a classified employee with status, timely filed his appeal with the Personnel Board on June 10, 2013, appealing from his dismissal as a Correctional Officer with the Kentucky State Reformatory.

3. On March 6, 2013, the Appellant's name appeared on a randomly selected list of employees to be drug tested at KSR. [See Appellee's Exhibit 10.] As a result, the Appellant was called to the Internal Affairs office and submitted a urine sample for purposes of drug testing under the supervision of Dorothy Taylor, a Sergeant with Internal Affairs and the KSR urinalysis coordinator.

4. The urine sample was collected and sealed and the sample was properly documented and placed in a tamper-resistant bag and shipped to Phamatech laboratory in California.

5. The samples arrived at Phamatech and the seals were intact. A variety of testing was performed to determine if the sample had been adulterated. All the results were in the acceptable range for the Appellant's samples. The Appellant's samples were placed on the Olympus testing equipment which were all automated on a computer. The first testing indicated a positive result, so a second sample was tested, which also indicated a positive result.

6. These results were then transmitted back to Department of Corrections. According to Dr. Aucoin, the testing performed at Phamatech has the highest certification of any testing in the United States and is very reliable. He was very confident in the test results and that the samples had not been tampered with, diluted, or adulterated. The results of the urine testing indicated a positive result for Oxycodone and Oxymorphone. [See Appellee's Exhibit 12.]

7. As a result of a positive urine test, the Appellant was asked to submit a list of his prescriptions. [See Appellee's Exhibit 3.] The result of the drug testing was compared with the medications listed on Appellee's Exhibit 3 by Dr. Crall. According to Dr. Crall, the testing results shown on Appellee's Exhibit 12 indicated a high level of Oxycodone, which has a unique identity under the opiate medication class. This result would not have been caused by a positive test by Hydrocodone. In other words, Oxycodone is different from Hydrocodone.

8. In addition, the Appellant repeatedly admitted that he took a pain medication a day or two prior to the subject testing which had not been prescribed to him.

9. On the basis of the Appellant's positive test result and Dr. Crall's determination that the same could not have resulted from any medication listed on Appellee's Exhibit 3, and following a pre-termination hearing, Warden Clark Taylor determined that the Appellant was in violation of the Department of Corrections Policy and Procedure No. 3.11, Section J(4), Drug Free Workplace Employee Drug Testing, and Corrections Policy and Procedure No. 3.1, Section D(1), Code of Ethics, and dismissed him from his position as a Correctional Officer with KSR.

CONCLUSION OF LAW

The Appellee has demonstrated by a preponderance of the evidence that the disciplinary action taken against the Appellant, the same being his termination from his position as a Correctional Officer with the Kentucky State Reformatory, was neither excessive nor erroneous, was appropriate under the circumstances and was done for cause.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **ROBERT BLACKBURN VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORECTIONS (APPEAL NO. 2013-141)** 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).

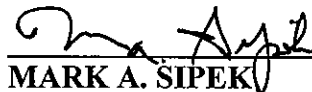
Any document filed with the Personnel Board shall be served on the opposing party.

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 Geoffrey B. Greenawalt** this 14th day of May, 2014.

KENTUCKY PERSONNEL BOARD



**MARK A. SIPEK
EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Amber Arnett
Hon. Michael Boylan