

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2020-237

TAMARA BROOKS

APPELLANT

VS.

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

JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS

APPELLEE

* * * * *

The Board, at its regular April 2022 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 16, 2022, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be altered as follows:

A. **Delete** the Conclusions of Law paragraph 6 and substitute the following:

6. The Appellant failed to carry her burden of proof that her dismissal was the result of sex or gender discrimination. KRS 13B.090(7).

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as Altered, are approved, adopted, and incorporated herein by reference as a part of this Order, and the Appellant's appeal is **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 13th day of April, 2022.

KENTUCKY PERSONNEL BOARD



**MARK A. SIPEK
SECRETARY**

A copy hereof this day mailed to:

Tamara Brooks
Hon. Jesse Robbins
Hon. Rosemary Holbrook (Personnel Cabinet)
Rodney Moore

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
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APPELLANT

V. FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS

APPELLEE

** **

This matter came on for an evidentiary hearing conducted by video teleconferencing using Amazon Chime on February 22, 2022, at 9:30 a.m. ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before Hearing Officer Mark A. Sipek. The proceedings were recorded by audio/video equipment and was authorized by virtue of KRS Chapter 18A.

The Appellant, Tamara Brooks, was present and was not represented by legal counsel. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Jesse Robbins. Also present was the Agency Representative, Warden Scott Jordan.

BACKGROUND

1. The Hearing Officer notes this appeal was filed with the Personnel Board on December 3, 2020. On the appeal form and during the pre-hearing conference, the Appellant, a classified employee without status, indicated she was challenging her probationary dismissal in addition to advancing claims of race and gender discrimination. The Appellant further explained her claims in the narrative portion of the appeal form wherein she states, in pertinent part:

I gave a OJT my phone number[.] We were talking and I made another note that said [“]Shut up Matheny[”] and I made a note for a worker that works in property. I sat the note on her desk[,]which OJT Matheny grabbed. He had my phone number and 2 notes one which wasn't his[.]

2. The issue for the evidentiary hearing was whether or not the Appellant was dismissed from her position as a Correctional Officer during her initial probationary period as a result of sex discrimination. The burden of proof was placed upon the Appellant and was by a preponderance of the evidence. Importantly, the Appellant abandoned her claim of race discrimination and presented no evidence of racial discrimination during her case-in-chief.

3. The Appellant called **Harry Vincent** as her first witness. Vincent is a long time Corrections employee. He reached the rank of Lieutenant, retired, and then returned as a Correctional Officer in December 2020. He was assigned to the Property Room.

4. Vincent recalls working with the Appellant in the Property Room when she was an OJT employee. "OJT" means On the Job Training. Vincent testified that OJT officers would learn the paperwork utilized in the Property Room. Vincent did not recall seeing any notes passed between the Appellant and any other employees in the Property Room. Vincent stated he did not refer to the new officers as OJT.

5. The Appellant called **Lisa Crick** as her next witness. Crick is a Correctional Officer. She testified that, in December 2020, she primarily worked on the Adjustment Committee. She does not recall working in the Property Room, does not recall working with the Appellant, and has no memory at all of any of the events underlying this appeal. She stated that she has very little memory of the timeframe in question because she has suffered a traumatic brain injury and also lost three (3) family members around the time of the events associated with the appeal.

6. Crick testified that she would not refer to new officers as OJT rather than their name. She felt that this would be disrespectful.

7. The **Appellant, Tamara Brooks**, testified on her own behalf. She interviewed for a position as a Correctional Officer at the Kentucky State Penitentiary (KSP) on October 1, 2020. She stated she had previous experience working for the Department of Corrections in Missouri. She stated she wanted to be a Correctional Officer because she likes working with people and de-escalating situations.

8. The Appellant was an OJT Officer assigned to KSP. As a result of her OJT status, she did not have a badge. Further, she did not work around inmates unless she was with another, more senior, officer. She testified that, while working in the Property Room, Officer Vincent told her he would not learn her name because she would not be around long enough. He referred to her as OJT.

9. On December 2, 2020, the Appellant was working as an OJT Officer in the Property Room with Officer Vincent. Another OJT Officer, Dakota Matheny, was working in the Property Room with her. The Appellant stated she and Matheny passed notes back and forth while working. The Appellant said she passed two (2) notes to Matheny. The first was a note with her phone number and was signed "TEE." The second note to Matheny was some kind of joke. The note read "shut up!!! Matheny!!! Was here!!! LOL how is you." (*sic*).

10. The Appellant stated that the third note was intended for Officer Crick. This note read "If you see this tell me hey when you see me I'm a OJT right now!!" (*sic*). The three (3) notes were admitted into evidence as **Appellant's Exhibit 1**.

11. The Appellant stated that, the following day, Matheny was searched when he entered the facility, and the notes were found. Matheny gave a statement, and the Appellant was called to the Internal Affairs Office. The Appellant told the Internal Affairs Officer that she wrote the notes. She stated that the two (2) notes were intended for Matheny and the third note was intended for Officer Crick. She stated that none of the notes were intended for inmates. She stated that the Internal Affairs Officer talked to her about how these notes could be perceived as being directed towards an inmate. The Appellant testified that she was upset during her interview with Internal Affairs. She asked for them to review the video of this incident, but they refused. The Appellant acknowledged that she slammed the door when she left the Internal Affairs Office. The Appellant was never asked to write a report regarding this incident.

12. The Appellant testified that she waited on the bench outside the Internal Affairs Office for approximately an hour. She was then told that she had been dismissed. She asked to see the Warden but was told she could not. The Appellant filed her appeal with the Personnel Board by email on the same date.

13. The Appellant testified that she believed her dismissal was the result of sex discrimination. She testified that, when she was in training, she was told about an incident where a female Correctional Officer forgot her keys, went into a unit with inmates, and was sexually assaulted. She testified that she believed the focus of the training was that female officers were targeted and had to be on special alert.

14. The Appellant acknowledged that she knew that two (2) of the three (3) Deputy Wardens at the Kentucky State Penitentiary were females. She acknowledged that she was also aware that two (2) of the five (5) Captains were females.

15. At the conclusion of her testimony, the Appellant rested her case. The Appellee made a Motion for Directed Verdict, which was denied.

16. The Appellee called **James Noland** as its first witness. In December 2020, he was working at the prison entrance processing staff as they entered the facility. On December 3, 2020, he processed OJT Officer Matheny and found three (3) notes, one (1) of which contained a phone number. Noland thought that this could be a phone number meant for inmates in an effort to bring in contraband. He handed the notes to Seth Mitchell, the Internal Affairs Office Supervisor.

17. The Appellee called **Seth Mitchell** as its next witness. He has been employed with the Department of Corrections for fourteen (14) years and is currently the Correctional Major at KSP. In December 2020, he was employed as the Internal Affairs Office Supervisor at KSP.

18. On December 3, 2020, when Noland gave him the notes, Mitchell obtained permission from the Warden to investigate this matter. Mitchell was concerned that these notes might have been intended for an inmate. The fact that one (1) of the notes identified a staff member as an OJT led him to believe that this note was intended for an inmate. He believed that all staff members knew who the OJT Officers were. He started his investigation by interviewing Matheny. Matheny told him that the notes were written by the Appellant. Matheny told him he had picked

the notes up from a desk in the Property Room. One (1) of the notes contained the Appellant's phone number, which Matheny acknowledged that the Appellant had given to him. Matheny felt the other two (2) notes were for him, but he was not sure. Matheny did not think these notes should be left lying around.

19. Mitchell then interviewed the Appellant. She acknowledged that she had written the notes and stated that two (2) were intended for Matheny and one (1) was intended for Crick. Mitchell stated that what troubled him the most in his interview with the Appellant was her attitude. Mitchell felt that she had no respect for the investigation. He stated she could care less that she was in the Internal Affairs Office. After answering a few questions, she became uncooperative. He stated she was disinterested in the conversation. Due to her failure to cooperate with the investigation, he asked her to leave the office. When she left his office, she slammed the door as hard as he had ever heard the door slam before. At that point, Mitchell went to speak to the Warden.

20. Mitchell stated that, because the Appellant failed to cooperate, he could not conclude his investigation as to whether the notes were a violation of any policies. He stated that, if they were merely notes being passed between Officers, there was no problem. He stated that if the notes were intended for inmates, then several policies were violated. Although he could not determine who the notes were intended for, he did determine, through his investigation, that the Appellant had failed to cooperate with an Internal Affairs investigation. Mitchell testified that the failure to cooperate itself violated a number of policies. Mitchell prepared an Internal Affairs Investigation Report, which was admitted into evidence as **Appellee's Exhibit 8**. His findings read as follows:

The action of OJT Brooks hindered Internal Affairs and their ability to investigate the notes found in the Property Room. OJT Brooks' actions and behaviors both during and after this interview, were disrespectful and unprofessional.

Mitchell's report was forwarded to the Warden for appropriate action.

21. Mitchell stated that the Appellant did not complain of any gender discrimination to him. He stated that he is not aware of any discrimination at the Kentucky State Penitentiary.

22. The Appellee next called **Captain Berton Bare** who worked in Internal Affairs as a Lieutenant in December 2020. He was present during the interview with the Appellant. He stated that the Appellant was disrespectful and refused to answer questions.

23. The last witness to testify for the Appellee was **Warden Scott Jordan**. Over the course of his career, he has been a Warden at three (3) different DOC correctional institutions. In December 2020, he was the Warden at the Kentucky State Penitentiary (KSP).

24. Warden Jordan testified that there are a number of females in management positions at KSP. Two (2) of the three (3) Deputy Wardens are female. Two (2) of the three (3) Unit Administrators are female. Two (2) of the five (5) Captains are female. He testified that the

Human Resources Department, the Records Department, the Business Office, and the Procedures Office are all headed by female employees.

25. Warden Jordan also testified that, for the past several years, they have been in a staffing crisis at the Kentucky State Penitentiary, and they need Correctional Officers. He testified about the warnings given to new staff during training. He is familiar with the training because he has sat in on training presentations before. Specifically, he testified that there are currently four (4) examples used to demonstrate the importance of maintaining safety at the prison. He stated that two (2) of these examples involve female staff and two (2) involve male staff. He stated that the point of these examples is to show staff they need to be careful around inmates.

26. Warden Jordan testified that new employees are on a six (6) - month probation. The probation time is to discover whether the employee is a good fit for the high-pressure high-stress position of working in a prison as a Correctional Officer. The idea is to find out whether an employee is a good fit or not during the first six (6) months. He testified that he is aware that they can dismiss employees during their initial probation for any reason other than discrimination. He uses probation to determine if an employee has good attendance and has the ability to follow policies, especially the code of ethics.

27. Warden Jordan testified that when he learned of the notes found at the front gate, there was valid reason for an Internal Affairs investigation. He believed there was risk that the notes were intended for an inmate, which raises serious security concerns. He specifically mentioned the telephone number caused a concern. Staff telephone numbers given to inmates cause security risk. He also testified the note in which the Appellant identified herself as an OJT could be a note for an inmate. He stated that staff members would know who the OJT employees were. He stated that OJT employees were identified on the roster, were always with some type of supervision, and did not wear a badge. An employee passing a note to an inmate would be a violation of Appellee's Corrections Policy and Procedure (CPP) 3.1, the Code of Ethics, which was introduced into evidence as **Appellee's Exhibit 9**. He stated that he was concerned staff members could be giving or receiving a gift, could be developing a relationship, or could be taking or sending a message for an inmate. All of these situations would be violations of CPP 3.1.

28. Warden Jordan also introduced Kentucky State Penitentiary Policy 3-01-01: General Guidelines for KSP Employees, which was entered into the record as **Appellee's Exhibit 10**. Based on this policy, employees are required to interact respectfully with each other.

29. When Warden Jordan received the Internal Affairs Investigation Report, he could not make a determination as to whether the notes were a policy violation. The report, however, indicated that the Appellant failed to cooperate with an Internal Affairs investigation. The report also included a report of the Appellant's angry outburst leaving the Internal Affairs Office. Warden Jordan stated this behavior was unacceptable for a Correctional Officer and he believed dismissal of the Appellant was the only proper course of action. He described the Appellant's conduct as unprofessional. He described slamming of the door as borderline violent conduct, which is in opposition of the goals and missions of the Department of Corrections.

30. Warden Jordan testified that Matheny was not terminated because he cooperated with the investigation. Warden Jordan testified that Appellant's angry outburst during the investigation posed a real clear danger and was the deciding factor in his decision to terminate the Appellant. He stated that the decision to terminate her employment was in no way based on the Appellant's sex.

FINDINGS OF FACT

1. The Appellant was employed as a Correctional Officer serving her initial probationary period at the Kentucky State Penitentiary (KSP). On December 2, 2020, the Appellant was serving as an On-the-Job Training (OJT) employee during her probationary period. She was working in the Property Room at KSP with another OJT employee, Dakota Matheny. The Appellant was passing notes back and forth with Matheny. (Testimony of the Appellant)

2. Matheny picked up the notes from the Property Room. The next morning, on December 3, 2020, the notes were found in Matheny's uniform pocket during a routine search as he entered the prison. The notes were found by James Noland, who turned them over to Internal Affairs Officer Seth Mitchell. (Testimony of the Appellant and Jason Noland.)

3. Mitchell conducted an investigation regarding the notes at the direction of the Warden. The Warden and Mitchell were concerned about these notes because one of the notes contained a phone number and because they identified a staff member as an OJT employee. This led them to believe it was possible that the notes were intended to be given to an inmate. Staff employee telephone numbers are security risks in the hands of inmates. Staff members know which employees are OJT employees. (Testimony of Seth Mitchell and Warden Jordan.)

4. Mitchell interviewed Matheny who told him the notes were written by the Appellant for Matheny. Matheny was found to have cooperated with the investigation. (Testimony of Seth Mitchell and Warden Jordan.)

5. Mitchell interviewed the Appellant who told him that two (2) of the notes were intended for Matheny and the third was for Officer Click. Mitchell told her the notes could be perceived as intended for an inmate. The Appellant insisted she had not been around any inmates. At some point, the Appellant became uncooperative with the investigation. Mitchell asked her to step outside the office and, upon leaving, she slammed the door. (Testimony of the Appellant and Seth Mitchell.)

6. Mitchell prepared a report of his investigation, which he gave to Warden Jordan. Upon reading the report, Warden Jordan determined that the Appellant was uncooperative and unprofessional during the investigation. He decided to terminate her employment. (Testimony of Seth Mitchell, Warden Jordan, and Appellee's Exhibit 8, December 3, 2020 dismissal letter.)

7. The Hearing Officer finds that neither sex nor gender played a role in the decision to terminate the Appellant. Warden Jordan terminated the Appellant, a female, because of her unprofessional behavior during the course of an Internal Affairs investigation while the Appellant

was a probationary employee. The Hearing Officer finds credible the testimony of Warden Jordan that he did not terminate Matheny, a male, because he cooperated with the investigation. (Testimony of Warden Jordan.)

8. The Appellee's training materials include scenarios illustrating the dangers of interactions with inmates for male and female staff. The Hearing Officer finds no evidence of sex discrimination based on Corrections' training. (Testimony of Warden Jordan.)

9. Mitchell asked Matheny to write a report during the investigation because he cooperated. He did not ask the Appellant to write a report because she was not cooperating. Sex or gender was not a factor in Mitchell's treatment of the two (2) officers. (Testimony of Seth Mitchell.)

10. The Hearing Officer finds that the Appellant was not fired because of her sex or gender.

CONCLUSIONS OF LAW

1. As a classified employee serving her initial probationary period, the Appellant could be dismissed without cause. The Appellant could only file an appeal with the Personnel Board by alleging illegal discrimination. KRS 18A.111 and KRS 18A.095(14)(a).

2. The Appellant presented a *prima facie* case of sex discrimination. She introduced evidence that she was a member of a protected class as a female. She introduced evidence that she was meeting the legitimate expectations of her employer as a Correctional Officer. She presented evidence that she suffered an adverse employment action when she was terminated. The Appellant presented evidence that she was treated differently than a similarly situated male when Matheny was asked to write a report and was not fired while she was not asked to write a report and was fired. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct.1817.

3. The Hearing Officer finds the Appellee articulated a legitimate, nondiscriminatory reason for the Appellant's termination. The Appellant was fired because of unprofessional behavior and her failure to cooperate with an Internal Affairs Investigation. The Appellee carried its burden of proof to rebut the presumption of the Appellant's *prime facie* case.

4. The Appellant failed to demonstrate that the Appellee's stated reason for her dismissal was pretextual. The Appellant presented no evidence that her failure to cooperate with the investigation was not the real reason she was dismissed.

5. The Appellee also refuted two (2) parts of the Appellant's *prime facie* case. The Appellee established that the Appellant was not meeting the legitimate expectations of her employer, as demonstrated by her unprofessional behavior and failure to cooperate with the investigation. The Appellee also demonstrated that the Appellant was not treated differently than her male counterpart.

6. The Appellant failed to carry her burden of proof that her dismissal was the result of sex or gender discrimination. KRS 138.090(7).

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 **TAMARA BROOKS VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2020-237)**, 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).

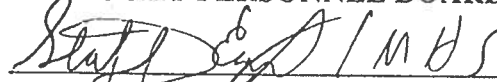
Any document filed with the Personnel Board shall be served on the opposing party.

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.

SO ORDERED at the direction of the Hearing Officer this 16th day of March, 2022.

KENTUCKY PERSONNEL BOARD



**MARK A. SIPEK
EXECUTIVE DIRECTOR**

A copy hereof this day e-mailed and mailed to:

Hon. Jesse Robbins
Tamara Brooks
Hon. Rosemary Holbrook (Personnel Cabinet)