

**COMMONWEALTH OF KENTUCKY
KENTUCKY PERSONNEL BOARD
APPEAL NO. 2016-246**

JUSTIN BRYANT

APPELLANT

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

**JUSTICE & PUBLIC SAFETY CABINET
DEPARTMENT OF CORRECTIONS**

APPELLEE

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This matter came on for evidentiary hearing on February 24, 2017, at 9:30 a.m., at 28 Fountain Place, Frankfort Kentucky before Brenda D. Allen, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Justin Bryant, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, Justice & Public Safety Cabinet, Department of Corrections, was present and was represented by the Honorable Catherine M. Stevens. Also present was Warden Don Bottom.

The issue before the Hearing Officer was whether or not the Appellant was penalized when he was assessed a day without pay for his refusal to report to the Kentucky State Reformatory, his assigned post, on August 25, 2016. The Appellee had the burden of proof by a preponderance of evidence.

BACKGROUND

1. Justin Bryant filed his appeal with the Personnel Board on September 6, 2016, appealing an August 29, 2016 memorandum by which he was assessed a day without pay for refusing to work his assigned post.

2. A prehearing conference was held on January 10, 2017, during which the issue was defined and the evidentiary hearing was set for February 24, 2017.

3. On the day of the hearing, the Appellee made a motion to file post hearing briefs. With no objection by the Appellant, the motion was **SUSTAINED**, with the Appellee being ordered to file a Post Hearing Brief first, followed by the Appellant filing his brief fifteen days

later. The Hearing Officer stated that she would issue a Post Hearing Order outlining specific deadlines.

4. The first witness to testify on behalf of the Appellee was **Warden Don Bottom**. After being sworn, Warden Bottom testified that he has been working in Corrections for twenty-four years. He has formerly served as Deputy Warden, and was promoted to Warden of Northpoint Training Center (Northpoint) in October 2012.

5. Warden Bottom testified that the LaGrange area's four correctional facilities were experiencing a staffing shortage of approximately 150 vacancies and that has created a public safety issue. He stated that all of the remaining facilities, including Northpoint, have been required to help provide staff for those institutions.

6. Warden Bottom identified Appellee's Exhibit 1, an August 13, 2016 email he received from Deputy Commissioner James Erwin to all Wardens advising that, as a result of the shortage, each week two facilities would be required to provide five (5) Correctional Officers to assist with medical transportation of inmates.

7. Warden Bottom indicated that in determining how to staff this, he decided to utilize experienced Correctional Officers due to the increased risk involved in taking inmates outside of the facility. He also stated that although the Deputy Commissioner stated in the email that costs for the 10 to 12 hour days and lodging expenses would be billed to Kentucky State Reformatory, Warden Bottom elected to rotate staff daily so that individuals did not have to stay overnight away from their families. He testified that he sought volunteers first, but when they were unable to obtain enough volunteers, they assigned staff for this transport assignment on their regular work day with mandatory overtime.

8. Warden Bottom advised that it was not possible to accommodate the individual desires of each officer, some of whom did not want to be assigned to transport away from their normal post, and the needs of the Agency were paramount.

9. The witness identified Appellee's Exhibit 2, a Request for Approval of Unpaid Leave or a "W-Day." He advised that this form was issued to Justin Bryant resulting from his refusal to work his assigned transport duties at Kentucky State Reformatory (KSR) on August 25, 2016.

10. The next witness to testify on behalf of the Appellee was **Deputy Warden Julie Thomas**. After being sworn, Deputy Warden Thomas testified that she has served as the Deputy Warden since 2009, and she has been the Deputy Warden in charge of Security for approximately two years. She advised that her responsibilities include supervising Captains and Shift Commanders.

11. Deputy Warden Thomas advised that she was aware of the directive from the Deputy Commissioner with regard to the transport assignment and that it was necessary to send five officers three days per week. She testified that initially they were going to utilize the Correctional Emergency Response Team (CERT), but because of the long-term nature of the assignment, it was not feasible to continue to utilize this special response team. As such, she sought to identify other experienced officers for this assignment.

12. Deputy Warden Thomas advised that the Appellant was one of the officers selected to work the transport assignment at KSR. However, when Appellant was notified, he stated that he did not want to work the assignment and that he would report to his normal duty station at Northpoint. She testified that she advised him that his assignment was at KSR and, if he refused to work it, he would not be permitted to come to work that day, and would be issued an Unauthorized Day Without Pay. She testified that the Appellant did not come to work, and the W-Day was issued.

13. The Appellee then called the Appellant, **Justin Bryant**, as the next witness. After being sworn, the Appellant testified that he has been employed as a Correctional Officer at Northpoint for almost eight years. The witness identified **Appellee's Exhibit 3**, a document issued to him in June 2009, upon hiring, outlining the conditions of his employment. He acknowledged the document detailed his work could take him outside the facility on transport and that overtime would sometimes be required. However, he testified that it was his understanding that CERT employees were required to be utilized for this particular transport assignment.

14. The witness then identified **Appellee's Exhibit 4**, an Information Report he completed and upon which he refused, in writing, to work his assigned post at KSR on August 25, 2016.

15. The witness identified **Appellee's Exhibit 5**, a memorandum issuing him notice of the Unauthorized Day of Leave Without Pay when he did not work his assigned shift at KSR. Appellee's Exhibits 3, 4 and 5 were entered into the record without objection.

16. **Warden Don Bottom** was briefly recalled for rebuttal and testified regarding the use of CERT officers, stating they are utilized for emergency events, but are not required for staffing shortages.

17. The Appellee rested.

18. The Appellant, **Justin Bryant**, then testified in the narrative that being assigned to a different institution is unfair and that he felt he should be assigned a state vehicle to get to and from KSR, which is two and one-half hours from his normally assigned post.

19. The Appellant rested.

20. Each party made a closing statement. The record was left open pending receipt of Post Hearing Briefs. The Appellee submitted a Post Hearing Brief with attachments prior to the established deadline. No post hearing documents were filed by the Appellant. The Hearing Officer considered the entire record.

FINDINGS OF FACT

1. The Appellant, Justin Bryant, was employed in the classified position of Correctional Officer with the Justice and Public Safety Cabinet, Department of Corrections, and was assigned to the Northpoint Training Center. (Testimony of Appellant.)

2. In August 2016, the Deputy Commissioner advised all Wardens that, due to staffing shortages, they needed to assign their staff to provide medical transport for inmates at KSR. (Testimony of Warden Bottom, Appellee's Exhibit 1.)

3. On August 23, 2016, the Appellant was notified that he was being required to work transport duty at KSR. He refused, in writing, to work the assignment and advised Deputy Warden Thomas that he would report to his normal workstation only. (Appellee's Exhibit 4, Testimony of Deputy Warden Thomas, Appellant.)

4. The Deputy Warden advised the Appellant that reporting to his normal duty station was not an option and that if he did not report to KSR, he would be issued a "W-Day" (Unauthorized Day of Leave Without Pay). (Testimony of Deputy Warden Thomas.)

5. 101 KAR 2:095, Section 2(3) and (4), provides:

(3) An appointing authority may require an employee to work hours and days other than regular days and hours, including an overtime or inclement weather schedule if it is in the best interest of the agency.

(4) An employee who works for an agency that requires more than one (1) shift or seven (7) days a week operation may be reassigned from one shift to another for from one post to another or alternate days of by the agency to meet staffing requirements or to maintain security or provide essential services for that agency.

6. 101 KAR 2:102, Section 10(1) and (2), provides:

(1) An employee who is absent from duty without prior approval shall report the reason for the absence to the supervisor immediately.

(2) an unauthorized or unreported absence shall:

(a) be considered absence without leave

(b) Be treated as leave without pay for an employee covered by the provisions of The Fair Labor Standards Act 29 U.S. C. Chapter 8.

...

7. On August 25, 2016, the Appellant did not report to KSR, and was issued an unauthorized absence, and a day of leave without pay.

8. KRS 18A.095(1) provides:

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

9. KRS 18A.005(24) provides:

‘Penalization’ means demotion, dismissal, suspension, fines, and other disciplinary actions; involuntary transfers; salary adjustments; any action that increases or diminishes the level, rank, discretion, or responsibility of an employee without proper cause or authority, including a reclassification or reallocation to a lower grade or rate of pay; and the abridgment or denial of other rights granted to state employees.

10. The Hearing Officer finds that when the Appellant refused to work his assigned shift and was not on approved leave, he had no legal entitlement to be paid for the day.

CONCLUSION OF LAW

The Cabinet has met its burden of proof that the unauthorized absence and the day of leave without pay issued to Justin Bryant, as a result of his refusal to work his assigned post at KSR on August 25, 2016, did not constitute a penalization. Accordingly, the Personnel Board is without jurisdiction over this matter.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **JUSTIN BRYANT VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2016-246)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen 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 exception 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 the 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).

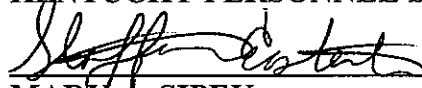
Any document filed with the Personnel Board shall be served on the opposing party.

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 Brenda D. Allen** this 2nd day of June, 2017.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy this day mailed to:

Hon. Catherine M. Stevens
Justin Bryant