

CERTIFICATION OF PERSONNEL BOARD RECORDS

I certify that attached hereto is a true and correct copy of the Findings of Fact, Conclusions of Law and Recommended Order and Final Order in the case of **KEVIN CARTER VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2016-017)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 15th day of December, 2016.



MARK A. SIPEK, SECRETARY
KENTUCKY PERSONNEL BOARD

Copy to Secretary, Personnel Cabinet

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-017

KEVIN CARTER

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 December 2016 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated November 4, 2016, 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** Background paragraph 14, and substitute the following:

14. **Purnell Howard** testified he had worked in security for the Blackburn Correctional Complex for 13 and a half years, but had resigned after Rowlette became Warden to work in the private sector. Howard testified that when Rowlette assumed the position of Warden he instructed him and other supervisors to "sit back" from writing-up those they supervise and "don't give so many reprimands." Howard said that it was standard operating procedure for a Lieutenant when she/he found a "drop" of contraband near the perimeter of the complex to make the decision to wait for an inmate to appear and seize the inmate who had come to retrieve the contraband. He said Wardens Haney,

Bottom and Rion had permitted Sergeants to make the decision to seize the contraband and wait for the expected inmate to arrive. He said that never in his experience after such an event had there been a lockdown of the facility.

B. **Delete** Finding of Fact paragraph 3, and substitute the following:


3. In the imposition of disciplinary measures by the Blackburn Correctional Complex of the Department of Corrections there has been a significant difference in the punishment given Carter as compared to similarly situated Correctional Officers referred to in paragraphs 18-22 of "Background." Carter has not been granted opportunities to reform his conduct offered by progressive discipline. And the punishment of a two-level demotion from Lieutenant to Correctional Officer given to Carter was exceptional and not proportional to the lesser punishments of written reprimands and suspensions given other Sergeants, Lieutenants, and Captains at the Complex during the years that Carter was their fellow worker.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as Altered, be and they hereby are, approved, adopted and incorporated herein by reference as a part of this Order, and Appellant's appeal is **SUSTAINED to the extent therein.**

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 15th day of December, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
SECRETARY

A copy hereof this day mailed to:

Hon. Edward Baylous
Mr. Kevin Carter
Mr. Rodney E. Moore

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-017

KEVIN CARTER

APPELLANT

VS.

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 on September 23, 2016, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Stephen T. McMurtry, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Kevin Carter, was present and was not represented by legal counsel. Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Edward Baylous.

BACKGROUND

1. Appellant, **Kevin Carter**, was a Correctional Officer with the rank of Lieutenant at the Blackburn Correctional Complex, Lexington, Kentucky. On January 19, 2016, Rick Rowlette, Warden of the Complex, demoted Carter to the entry level position of Correctional Officer. A copy of the letter of demotion is attached as "**Recommended Order Attachment A.**" The four violations given as reasons for the demotion will be discussed in turn.

2. Kevin Carter and Correctional Officer Jason Lotter on December 14, 2015, at about 5:30 p.m., while conducting a perimeter check of the Complex, discovered a bag of contraband with its contents (a pipe, chewing tobacco, rolling papers and a lighter) scattered near Interstate 64. Knowing that such contraband was often intentionally thrown from the interstate close by the grounds of this minimum security complex to be picked up by an inmate, Carter and Lotter seized the contraband and strategically positioned themselves to await the appearance of an inmate. At about 6:53 p.m., inmate Steve Dougherty appeared and was apprehended by the officers. Carter radioed the Control Center Operator asking him to call Warden Rowlette for

advice as to whether the State Police should be called. A more thorough search of the inmate found synthetic marijuana called "spice."

3. Warden Rowlette's demotion letter accused Carter of starting his own Internal Affairs investigation in violation of CPP 3.23(D) which permits "Only the Commissioner, the Warden, the Deputy Commissioner, or the Director of Probation and Parole to initiate an Internal Affairs Investigation." According to Kentucky Corrections Policies and Procedures 3.23, Section I, in the definition section an "'Investigation' means a systematic inquiry to determine facts." And at CPP 3.23, Section II, B(G), violations in the institution are to be reported immediately to the Shift Supervisor. Carter was the Shift Supervisor.

4. Rowlette's demotion letter accused Carter of violating Blackburn Correctional Policy 03-02-01, Section C (4), which requires employees "...to report illegal or unauthorized activity on the part of inmates... that threaten the safety and security of the institution." On December 4, 2015, Rowlette spoke to inmate James Bush who said he had been providing Carter with information about inmates bringing in dangerous contraband from the adjacent Kentucky Horse Park and Thoroughbred Retirement Farm. Rowlette charged that Carter had not reported this information to his superiors.

5. Rowlette charged Carter with failure to "insure adequate staff coverage" as "post orders dictate." He charged that on November 17, 2015, the Deputy Warden sent an email to all security supervisors, including Carter, informing them that all requests for leave time by a security supervisor had to be submitted to her for approval. Security supervisors could be Sergeants or Lieutenants, but not Correctional Officers. Prior to this notification, Carter had approved Sergeant Aseltine's leave which left the December 4, 2015 shift without a supervisor. On December 3, 2015, upon learning that the 8-4 shift forthcoming on December 4 and December 5, 2015, had no shift supervisor, Deputy Warden Harm ordered Carter to work a double shift of 16 hours.

6. This led to charge 3, an alleged violation of Blackburn Correctional Complex Policy 03-02-01, Section F(18), that prohibits staff from "Engaging in any other activity which shall be deemed detrimental to the proper discharge of your duties as an employee or which may come into conflict with the goals and missions of DOC and BCC." In an angry response to Deputy Warden Harm's command that he work a 16-hour shift, Carter posted on Facebook: "Got mandated to work my two days of (sic) ... BTW, fuck work."

7. Carter appealed his demotion to the Personnel Board on February 5, 2016, stating as follows:

Appealing demotion due to never receiving any type of written reprimands, suspensions. Working in a hostile work environment. Being

harassed. Favoritism among different supervisors. Appealing the 4 reasons for being demoted from Lieutenant to Correctional Officer. [1] CPP 3.23, Section 11, D. [2] BCC 03-02-01 Section C, 4. [3] BCC 03-02-01, Section F, 18. [4] BCC 03-02-01 F (4). Appealing due to these reasons can be proven wrong and too harsh of a punishment without any progressive disciplinary. Worked in Corrections 5 years & supervised for 3 of them. [sic]

8. **Brandy Harm**, former Deputy Warden of the Complex, now an Administrative Specialist with the Department of Corrections, testified that it was Carter's responsibility to assure there was a ranking officer to supervise the December 4, 2015, 8:00 p.m. to 4:00 a.m. shift. Carter had permitted Sergeant Aseltine time off for that particular shift without scheduling a superior officer to take his place. Harm said it was necessary to have a ranking officer, a Captain, Lieutenant or Sergeant to supervise Correctional Officers on all shifts. Harm said she "mandated" that Carter work the 16-hour shift rather than leaving that task to the supervisor of the preceding shift, which was Carter's solution.

9. Harm's solution to the shift problem precipitated Carter's expression of anger over having to work the 16-hour shift. Harm testified that for Carter to publicly post his angry feelings about having to work a double shift was not professional and reflected poorly on the institution in violation of BCC 03-02-01, Section F(18). In support of the charge that Carter failed to report information received from inmate Bush, Harm said Carter lacked the experience to determine the value of information reported by an inmate. It was imperative he relay all information to either her or Captain Sizemore, the Internal Affairs Officer at Blackburn. She said Carter would not be aware of other secret investigations to which inmate Bush's information might have been relevant. Harm said Carter admitted to her that the information was not passed on to his superiors. In support of Charge (1), conducting an unauthorized investigation, Harm said that it was dangerous and could have interfered with other ongoing investigations. She said that Carter was aware of the policy as it was earlier announced by Rowlette, but she admitted that previous Wardens had not enforced it.

10. **Eric Sizemore**, Captain for Internal Affairs at Blackburn, testified that he investigates all violations of policy and administrative regulations committed by the staff, inmates and visitors and reports directly and secretly to the Warden. He described the structure of an Internal Affairs investigation and produced the "Internal Affairs Investigations" written policy of the Department of Corrections, which was identified as Appellee's Exhibit 2. He testified that Carter did not have the authority or the experience to assess the credibility of an inmate who reported information about institutional violations by other inmates. He related an incident when Carter had failed to pass along information to him which would have been valuable in another ongoing investigation. This failure for which Carter was being disciplined, he said, likely enabled inmates to introduce additional contraband into the institution.

11. In support of Charge 3, Sizemore said Carter admitted to him he had posted the Facebook comment, but regarded it as not work-related because it was posted after work hours. Sizemore described an incident of his drinking beer at an Applebee's restaurant while in uniform. He was disciplined for that under this same policy.

12. **Tiffany Ratliff** testified that she assumed the position of Warden at the Blackburn Correctional Complex after Warden Rowlette had stepped down. It was her opinion, after reviewing the charges against Carter and his work history, that demotion was appropriate. She stated that had she started the investigation she might have recommended termination.

13. **Tiffany Taylor**, HR Administrator for the Blackburn Correctional Complex, and **Christy Peach**, Rowlette's Secretary, testified that Warden Rowlette spoke and treated his subordinates very harshly. Taylor said many of his subordinates had filed grievances against him. Peach said he treated her so improperly that she sought and received another position within the Department of Corrections outside of his immediate control. Peach said that Carter had been helpful to her in adjusting to Rowlette's demeanor.

14. **Purnell Howard** testified he had worked in security for the Blackburn Correctional Complex for 13 and a half years, but resigned after Rowlette became Warden to work in the private sector. Howard testified that when Rowlette assumed the position of Warden he instructed him and other supervisors to "sit back" from writing-up those they supervise and "don't give so many reprimands." Howard said that it was standard operating procedure for a Lieutenant when she/he found a "drop" of contraband near the perimeter of the complex to make the decision to wait for an inmate to appear and seize the inmate who had come to retrieve the contraband. He said Wardens Haney, Bottom and Ryan had permitted Sergeants to make the decision to seize the contraband and wait for the expected inmate to arrive. He said that never in his experience after such an event had there been a lockdown of the facility.

15. Howard testified that, in his experience, Carter had always passed along information from inmates to his supervisor. But on cross-examination, he agreed reports of smuggling money or money orders should be communicated immediately. He testified that Carter was his Facebook friend, but he had not seen the post that expressed his displeasure with having to work a double shift.

16. Essentially, **Carter's** defense was that he had worked in Corrections for five years, rising rapidly from Correctional Officer to Lieutenant without any imposition of disciplinary action against him. He argued he was entitled to progressive discipline in this situation. He also testified that his work performance evaluations had been exemplary. He had earned a performance evaluations of "Highly Effective" for 2014, "Outstanding" for 2013, and "Highly Effective" for 2011.

17. In support of his defense that he was denied progressive discipline, Carter introduced relevant records of one Captain, three Lieutenants, and two Sergeants to prove that other correctional supervisors had been granted progressive discipline. One Sergeant had been issued reprimands for failure to report inmates illegally smoking, failure to grant a sick Correctional Officer leave to go home, failure to prepare a report of dangerous contraband in the institution, and a three-day suspension for failure to report illegal activity by an inmate.

18. Another Sergeant received a written reprimand for a racially-offensive comment to a staff member, a one-day suspension for a second racially-offensive comment to a staff member, and a written reprimand for failing to sign the Post Orders prior to an inmate transfer and complete the inmate movement log.

19. A Captain was suspended for three days for refusing to participate in a planned search for contraband, suspended for three days for inappropriate and abusive language, suspended for one day for disobeying a lawful order and given two reprimands for allowing an inmate to view video footage in violation of a lawful order and failing to provide an accurate PBMS information after being counseled by his supervisor.

20. A Lieutenant received a three-day suspension for allowing an ineligible inmate to remain in the general population, a ten-day suspension for failure to follow a direct order, a five-day suspension for sleeping on duty, a written reprimand for failing to report illegal inmate activity, a written reprimand for disobeying a lawful order, a three-day suspension for disobeying a lawful order, and two other written reprimands for failing to obey lawful orders.

21. Another Lieutenant received a three-day suspension for failing to report illegal activity of an inmate, a written reprimand for failing to report illegal activity of an inmate, a written reprimand for disobeying a direct order, and a written reprimand for damaging the property of an inmate.

22. Finally, another Lieutenant received a written reprimand for harassing and demeaning a female employee and a five-day suspension for conduct that endangered an inmate.

FINDINGS OF FACT

The Hearing Officer makes the following findings by preponderance of the evidence:

1. There are no contested issues of relevant facts.

2. By a preponderance of the evidence, the facts and testimony stated in the preceding "Background" are correct and true. Carter's actions violated Kentucky Corrections Policies and Procedures 3.23, Section II (D) and Blackburn Correctional Policy 03-02-01, Sections C(4) and F(4) and (18). The Cabinet did not produce the Blackburn Correctional Policy, but the existence and genuineness of the Policy was accepted during the proceeding without objection by Carter.

3. In the imposition of disciplinary measures by the Blackburn Correctional Complex of the Department of Corrections there has been a significant difference in the punishment given Carter as compared to similarly situated Correctional Officers referred to in paragraphs 18-22 of the "Background." Carter has not been granted opportunities to reform his conduct offered by progressive discipline. And the punishment of a three-level demotion from Lieutenant to Correctional Officer given to Carter was exceptional and not proportional to the lesser punishments of written reprimands and suspensions given other Sergeants, Lieutenants, and Captains at the Complex during the years that Carter was their fellow worker.

4. The Cabinet offered two incidents of what could be described as poor work performance and improper behavior that it decided during the time Carter was a Lieutenant not to pursue. No weight is given to those incidents in this Recommended Order. To do so could very well deprive Carter of his statutory rights under KRS 18A.095(2)(a) and (3)(a).

CONCLUSIONS OF LAW

The disciplinary action of demotion from Lieutenant to Correctional Officer taken against Carter was excessive and erroneous in view of all the surrounding circumstances and in violation of KRS 18A.095 (22)(c). The Cabinets within the Executive Branch of the Commonwealth have consistently tried to make the many disciplinary actions against their similarly situated employees proportionate. The Kentucky Personnel Board has, indeed, required it. The Department of Corrections has failed in this case to make Carter's discipline proportionate to the discipline given similarly situated Correctional Officers at the Blackburn Correctional Complex during approximately the same period of time, that is, Carter's tenure of employment.

It could be argued that the Cabinet's disciplinary action against Carter violated the 14th Amendment to the US Constitution and Sections 1, 2 and 3 of the Kentucky Constitution, rights that guarantee that "all persons similarly situated should be treated alike." Expressed another way "No state shall deny any person within its jurisdiction the equal protection of the laws." *Elk Horn Coal Corp v Cheyenne Res Inc.*, 163 S.W.3d 408 (Ky. 2005), *Emberton v GMRI Inc.*, 299 S.W.3d 565 (Ky. 2009), and *D.F. v Codell*, 127 S.W.3d 571, (Ky. 2003). Although that argument

may be made, KRS 18A.095(22)(c) gives the Personnel Board ample authority to amend the disciplinary action given Kevin Carter by the Department of Corrections as recommended by the Hearing Officer.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **KEVIN CARTER VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2016-017)** be **SUSTAINED** to the extent as follows:

1. That Appellant be reinstated to his previous position and further awarded lost pay and benefits.
2. The Appellant shall be suspended from duty and pay for a period of fifteen (15) days.
3. The Appellee is ordered to reimburse Appellant for any leave time he used attending the hearing and any pre-hearing conferences at the Board, and to otherwise make Appellant whole. **[KRS 18A.105, KRS 18A.095(25), and 200 KAR 12:030.]**

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13.B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal, a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

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 Stephen T. McMurtry** this 4th day of
November, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Edward Baylous
Mr. Kevin Carter



Received

FEB 11 2016

Personnel Board

DEPARTMENT OF CORRECTIONS

Matthew G. Bevin
Governor

BLACKBURN CORRECTIONAL COMPLEX
3111 Spurr Road
Lexington, KY 40511
859-246-2366
www.corrections.ky.gov

LaDonna H. Thompson
Commissioner

R.W. (Rick) Rowlette
Warden

January 19, 2016

Kevin Carter

Dear Kevin Carter:

Pursuant to KRS 18A.095, you are advised that you will be demoted for cause from your position as Correctional Lieutenant to the position of Correctional Officer effective beginning of business January 20, 2016. As a result, pursuant to 101 KAR 2:034, your salary will be reduced from \$3,177.42 to \$2,859.68.

You are demoted for violation of (1.) CPP 3.23, Internal Affairs Investigation, Section II, (D), which states that, "Only the Commissioner, Warden, Deputy Commissioner, or Director of Probation and Parole shall initiate an Internal Affairs Investigation", (2.) BCC 03-02-01, Section C (4), which prohibits employees from, "Having knowledge of but failing to report illegal or unauthorized activity on the part of inmates, visitors or staff or failing to report activities that threaten the safety and security of the institution", (3.) BCC 03-02-01, Section F, 18), which prohibits staff from, "Engaging in any other activity which shall be deemed detrimental to the proper discharge of your duties as an employee or which may come into conflict with the goals and mission of DOC and BCC", (4.) BCC 03-02-01, F (4), which prohibits employees from, "Insubordination or disobeying a lawful order given by a supervisor or higher ranking authority", specified as follows:

(1.) On December 14, 2015 you began your own investigation involving contraband. While conducting a perimeter check, you observed a bag lying in the grass. You climbed over the fence, leaving state grounds, to retrieve the bag and then waited in the dark to see if an inmate would attempt to retrieve the contraband. On December 7, 2015 Deputy Warden Harm and Captain Sizemore and met with you to discuss your failure to pass on information, and conducting an investigation without authorization. You were instructed on the proper procedure yet on December 14th you once again failed to report confidential information you received and the elected to investigate and set up a stakeout involving other staff, without authorization. You were the Shift Commander as well, therefore you should not have left BCC Property unless authorized 1

(2.) On December 4th, 2015 you failed to report information. Warden Rowlette was touring the holding cell area of the facility when inmate James Bush #154983 approached him. Inmate Bush advised the Warden that he had been supplying you with information on inmates bringing in dangerous contraband from the Kentucky Horse Park (KHP) and through the Thoroughbred Retirement Farm (TRF). An investigation showed that inmate Bush also passed along to you information that related back to another investigation involving KHP. You failed to report this information and admitted to Internal Affairs that you should have "acted on it".

(3.) You made inappropriate comments on Facebook. After being mandated to work, on December 4th, 2015 you posted on your Facebook page, "Got mandated to work my two days of ...BTW, fuck work". Subordinates that you directly supervise and former staff commented on your statement.

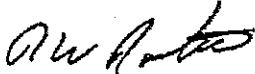
(4.) You failed to obey a direct order and ensure adequate staff coverage as directed. On November 17, 2015 Deputy Warden Harm sent an email to you and all security supervisors that stated that any requests for leave time by a security supervisor had to be submitted to her for approval. Without notifying Deputy Warden Harm, you approved Sgt. Aseltine's leave time during your RDOs which left the shift without a supervisor. Your post orders dictate that you are to ensure staff coverage.

For your information, the Kentucky Employee Assistance Program (KEAP) is a voluntary and confidential assessment and referral service for state employees. This service may help you with any personal problems that may be affecting your job performance. KEAP can be reached at (800) 445-5327 or (502) 564-5788.

RECOMMENDED ORDER ATTACHMENT A

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,



Rick Rowlette, Warden

Attachment: Appeal Form

cc: Secretary, Personnel Cabinet
Personnel File