

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2014-198**

**KIMBERLY COOMES**

**APPELLANT**

**FINAL ORDER  
REJECTING HEARING OFFICER'S  
VS. FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND RECOMMENDED ORDER**

**JUSTICE AND PUBLIC SAFETY CABINET,  
DEPARTMENT OF CORRECTIONS,  
J. MICHAEL BROWN, APPOINTING AUTHORITY**

**APPELLEE**

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The Board at its regular June 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 14, 2015, and being duly advised,

**IT IS HEREBY ORDERED** that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer are rejected and the Board issues its own Findings of Fact, Conclusions of Law and Recommended Order as follows:

**BACKGROUND**

This matter came on for an evidentiary hearing on January 7, 2015, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and authorized by virtue of KRS Chapter 18A.

Appellant, Kimberly Coomes, was present and not represented by legal counsel. Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Edward Baylous. Also present as Agency representative was Aaron Smith, Warden of the Kentucky State Reformatory.

There are two issues in this appeal. The first is whether the five-day suspension of the Appellant, from duty and pay, from her position as a Social Service Clinician I with the Department of Corrections, was taken with just cause and was neither excessive nor erroneous. The burden of proof is on the Appellee to prove its case by a preponderance of the evidence. The second issue is the Appellant's claim that she failed to receive proper notice of this suspension, in violation of KRS 18A.095(8). The burden of proof on this issue was on the Appellant to prove her claim by a preponderance of the evidence.

Opening statements were waived by both parties. Prior to having gone on the record the Hearing Officer noted the recent submission by the Appellant of a proposed exhibit. The parties had engaged in discussions of possible partial settlement of this case. The proceedings went off the record and the Hearing Officer left the hearing room to allow the parties privacy to conclude their settlement discussions.

The parties advised the Hearing Officer they had agreed to a partial settlement of the case. Mr. Baylous stated that Ms. Coomes had proposed to introduce a document that appeared to be an arrest record for Michael Schiesser, the officer involved in the incident. Mr. Baylous stated that document had not been timely disclosed to the Cabinet as part of Appellant's witness and exhibit list.

Mr. Baylous further stated that the Cabinet would waive objection to the late submission of that document and stipulate it may be admitted into evidence. In exchange, the Cabinet has "stipulated that she did not, in fact, receive a copy of the final suspension letter prior to the commencement of her suspension. In order to cure that defect, we have offered to essentially change the leave from an unpaid suspension to an administrative leave with pay and reimburse her for the pay that she had lost as a result of this suspension."

Mr. Baylous continued, "Should we prevail in this appeal, after the decision becomes final, at that time we would impose the five-day suspension without pay, but only after finality of the case and we have prevailed on the merits of the case. And she has agreed, in exchange for my stipulation to the admissibility of the document and waiving of late notice. She will accept that resolution to cure the defect on the timing of the suspension letter." Ms. Coomes confirmed that this was her understanding.

Pursuant to questions from the Hearing Officer, the Cabinet affirmed that by stipulating it had not provided Appellant proper notice of her suspension, Appellant therefore met her burden of proof in her claim that she failed to receive proper notice of the suspension, in violation of KRS 18A.095(8).

The Hearing Officer next asked why he should not then summarily rule in Appellant's favor if the suspension is void for failure to abide by the notice requirements in KRS Chapter 18A. Mr. Baylous responded, "Because we don't believe that the technical failure operated as a bar for us issuing discipline, and we also believe there is an issue of waiver, by leaving the facility, she prevented us from handing it to her prior to the suspension, or delivering it to her, prior to the suspension beginning. So I think there was an issue of a potential waiver."

The Hearing Officer inquired, if the matter were now changed to administrative leave, whether he and the Personnel Board had jurisdiction to hear anything, as administrative leave is not an appealable disciplinary action. Mr. Baylous responded, "Well, I think the fact that it's part of the settlement doesn't change the jurisdiction. It's an agreement that we have reached."

The Hearing Officer posited the question that if he accepted the settlement, that is, placing Ms. Coomes on administrative leave, is that not the starting point for this hearing? He inquired how it is that he could reinstate a suspension.

The Hearing Officer asked Ms. Coomes whether she was agreeable to the settlement as proposed. She affirmed that she was. The Hearing Officer indicated he accepted the settlement with the caveat that he would revisit and look at the status of Appellant's original suspension in view of the two stipulations made by the Cabinet.

The Hearing Officer took evidence from the parties, hearing from witnesses Kimberly Coomes and Aaron Smith. Testimony offered at the hearing is not relevant to the outcome of this appeal, and will not be recited in this Final Order.

### **FINDINGS OF FACT**

1. The parties stipulated that the Appellant did not receive a copy of the final suspension letter prior to commencement of her suspension; that the Cabinet will change the unpaid suspension to administrative leave with pay and reimburse Appellant for the pay she lost during the suspension; that Appellant has met her burden of proof on her claim that she failed to receive proper notice of the suspension, in violation of KRS 18A.095(8). The Cabinet stipulated to the admission of Appellant's Exhibit 1, a document purporting to be the arrest record of Michael A. Schiesser. The parties further agreed that in the event the Cabinet prevails in this appeal, after the decision becomes final, then at that time the Cabinet would re-impose the five-day suspension against the Appellant without pay.

2. The Appellee, having withdrawn the suspension of the Appellant, the Appellant is no longer facing a penalization as the term is defined at KRS 18A.005(24).

3. The Appellant was not issued an Intent to Dismiss letter and is not eligible to be placed on Administrative Leave, pursuant to KRS 18A.095(2)(c).

### **CONCLUSIONS OF LAW**

1. The Appellee, having admitted that it failed to properly give the Appellant advance notice of her suspension in violation of KRS 18A.095(8), the Appellee has now withdrawn its suspension of the Appellant.

2. The Appellant is no longer facing a penalization as the term is defined at KRS 18A.005(24), and the Board does not have jurisdiction over this matter, as this appeal is now moot.

3. The appeal is moot because the Appellant is no longer facing any type of appealable penalization, and the Appellant has been granted the relief she was seeking in this matter.

4. The Board does not have jurisdiction to hear an appeal regarding a potential suspension that the Appointing Authority may impose upon the Appellant depending upon a ruling by the Personnel Board.

5. As a result, the Board cannot approve the proposed agreement by the parties.

6. In addition, the Personnel Board cannot sanction the use of Administrative Leave when an employee has not been issued an Intent to Dismiss letter. See KRS 18A.095(2)(c).

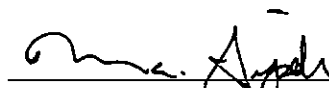
**ORDER**

**IT IS HEREBY ORDERED** that the appeal of **KIMBERLY COOMES VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS, (APPEAL NO. 2014-198)** is **DISMISSED AS MOOT**. The Appellee shall also reimburse the Appellant for any leave time she used attending the hearing and any pre-hearing conferences. [KRS 18A.095(25).] The Appellee shall reimburse the Appellant for the five-day suspension already served.

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 24<sup>th</sup> day of June, 2015.

**KENTUCKY PERSONNEL BOARD**



**MARK A. SIPEK, SECRETARY**

A copy hereof this day sent to:

Hon. Edward Baylous  
Kimberly Coomes  
Bobbie Underwood

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2014-198**

**KIMBERLY COOMES**

**APPELLANT**

**VS.**

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AND RECOMMENDED ORDER**

**JUSTICE AND PUBLIC SAFETY CABINET  
DEPARTMENT OF CORRECTIONS  
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**APPELLEE**

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Appellant, Kimberly Coomes, was present and not represented by legal counsel. Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Edward Baylous. Also present as Agency representative was Aaron Smith, Warden of the Kentucky State Reformatory.

There are two issues in this appeal. The first is whether the five-day suspension of the Appellant, from duty and pay, from her position as a Social Service Clinician I with the Department of Corrections, was taken with just cause and was neither excessive nor erroneous. The burden of proof is on the Appellee to prove its case by a preponderance of the evidence. The second issue is the Appellant's claim that she failed to receive proper notice of this suspension, in violation of KRS 18A.095(8). The burden of proof on this issue was on the Appellant to prove her claim by a preponderance of the evidence.

Opening statements were waived by both parties. Prior to having gone on the record the Hearing Officer noted the recent submission by the Appellant of a proposed exhibit. The parties had engaged in discussions of possible partial settlement of this case. The proceedings went off the record and the Hearing Officer left the hearing room to allow the parties privacy to conclude their settlement discussions.

The parties advised the Hearing Officer they had agreed to a partial settlement of the case. Mr. Baylous stated that Ms. Coomes had proposed to introduce a document that appeared to be an arrest record for Michael Schiesser, the officer involved in the incident. Mr. Baylous stated that document had not been timely disclosed to the Cabinet as part of Appellant's witness and exhibit list.

Mr. Baylous further stated that the Cabinet would waive objection to the late submission of that document and stipulate it may be admitted into evidence. In exchange, the Cabinet has "stipulated that she did not, in fact, receive a copy of the final suspension letter prior to the commencement of her suspension. In order to cure that defect, we have offered to essentially change the leave from an unpaid suspension to an administrative leave with pay and reimburse her for the pay that she had lost as a result of this suspension."

Mr. Baylous continued, "Should we prevail in this appeal, after the decision becomes final, at that time we would impose the five-day suspension without pay, but only after finality of the case and we have prevailed on the merits of the case. And she has agreed, in exchange for my stipulation to the admissibility of the document and waiving of late notice. She will accept that resolution to cure the defect on the timing of the suspension letter." Ms. Coomes confirmed that this was her understanding.

Pursuant to questions from the Hearing Officer, the Cabinet affirmed that by stipulating it had not provided Appellant proper notice of her suspension, Appellant therefore met her burden of proof in her claim that she failed to receive proper notice of the suspension, in violation of KRS 18A.095(8).

The Hearing Officer next asked why he should not then summarily rule in Appellant's favor if the suspension is void for failure to abide by the notice requirements in KRS Chapter 18A. Mr. Baylous responded, "Because we don't believe that the technical failure operated as a bar for us issuing discipline, and we also believe there is an issue of waiver, by leaving the facility, she prevented us from handing it to her prior to the suspension, or delivering it to her, prior to the suspension beginning. So I think there was an issue of a potential waiver."

The Hearing Officer inquired, if the matter were now changed to administrative leave, whether he and the Personnel Board had jurisdiction to hear anything, as administrative leave is not an appealable disciplinary action. Mr. Baylous responded, "Well, I think the fact that it's part of the settlement doesn't change the jurisdiction. It's an agreement that we have reached." The Hearing Officer posited the question that if he accepted the settlement, that is, placing Ms. Coomes on administrative leave, is that not the starting point for this hearing? He inquired how it is that he could reinstate a suspension.

The Hearing Officer asked Ms. Coomes whether she was agreeable to the settlement as proposed. She affirmed that she was. The Hearing Officer indicated he accepted the settlement with the caveat that he would revisit and look at the status of Appellant's original suspension in view of the two stipulations made by the Cabinet.

**BACKGROUND**

1. The first witness for the Appellee was the Appellant, **Kimberly Coomes**. The arrest record of Michael A. Schiesser, the admission of which having been stipulated to by the Cabinet, was marked as Appellant's Exhibit 1 and admitted. Such document shows that Michael A. Schiesser had been arrested on November 20, 2014, and charged with Promoting Contraband in the 1<sup>st</sup> Degree as well as Official Misconduct in the 1<sup>st</sup> Degree.

2. For the past four years Ms. Coomes has been employed by the Department of Corrections at the Kentucky State Reformatory (KSR) as a Social Service Clinician. She described her duties as being a healthcare provider and part of the institution's security team. At the time of her initial hire, she had attended two of the three weeks of the basic academy where she had been told the safety and security of the institution was part of her responsibility even though she was not a uniformed employee. She was not required to and did not take the third week of the academy pertaining to firearms. During the training she learned defensive maneuvers, how to transport, handcuff, and search inmates, and how to search units. She had no knowledge of the use of force protocol. She had also been trained how to de-escalate situations.

3. She had observed the unprofessional, disrespectful manner by which Officer Michael Schiesser had approached the subject inmate. This inmate, Jamie Sargent, had been a client of the Appellant for more than a year.

4. The day prior to the incident, Appellant heard that Officer Schiesser had encouraged inmate Sargent to go ahead and kill himself. On the day of the incident, after it had occurred, Appellant tried to report the matter to her supervisor, Dr. King. Dr. King was in a meeting so she reported it to Webb Strang, the Unit Administrator.

5. Appellant had come to the institution the prior May and been assigned to the C-Wing. She is a certified Social Worker with ten years experience. On the C-Wing she heard many inmates complain how Officer Schiesser had been disrespectful to them. There were many young, rookie officers at that time, who escalated matters with the inmates.

6. Appellant's duties included her talking with C-Wing inmates to determine how they were doing. If they had placed an order with the canteen, she delivered the canteen order to them. She gave them psycho-educational information on their diagnoses and medications, engaged in crisis de-escalation and other social work activities. She conducted some brief counseling, coping skills and strategies. Having more than three years experience, she was allowed to use brief, crisis de-escalation techniques.

7. Appellant, when presented with a copy of Appellee's Exhibit 1, stated she had never seen the document before. She acknowledged, however, that it appeared to be the Commonwealth of Kentucky Job Specification for her job title as Social Service Clinician I. She testified that the mission statement of a SSC includes the provision of humane professional services to inmates.

8. She had not received authority, from Dr. King, Dr. Williams, Dr. Coleman or Warden Smith, to intervene with inmates.

9. Upon review of p. 2 of Appellee's Exhibit 1, she read part of same into the record. "Typical Working Conditions and Unique Physical Requirements" includes:

As a result of enforced intervention, the worker runs the risk of physical harm. May be required to physically restrain individuals.

Appellant stated it appears the description includes participation in security activities.

10. By the time of the incident she had established a rapport with inmate Sargent, knew he had committed seven prior assaults against staff, and had a problem with authority figures and people who disrespected him. That day she had been talking to him prior to Officer Schiesser appearing on the scene. Inmate Sargent had never been disrespectful or threatening to Appellant.

11. With reference to the incident, she saw a problem, sought to solve it and did so. Officer Schiesser was never assaulted by the inmate. The Officer stood 5'11" and weighed 218 lbs. while inmate Sargent was 5'5" and weighed 130 lbs. The issue was resolved when inmate Sargent sat down after instruction from Appellant. At that time he was in "hobbles and mitts."<sup>1</sup>

12. Officer Schiesser and inmate Sargent were standing face-to-face, locked in a stare. Appellant leaned in and used motivational interviewing skills to encourage Sargent to make a good decision. She stated to him, "Is it worth this? Don't you want to get into the program?" She leaned in waved her hand and called "Mr. Sargent." Sargent broke his stare and sat down.

13. She knew inmate Sargent had cut himself quite a few times in the past. He had bipolar 1 disorder with a borderline personality disorder. He was typically hypo-manic, meaning he was agitated, irritable, and experienced poor sleep patterns.

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<sup>1</sup> This describes how inmate Sargent's ankles were chained together to his waist and his hands chained together to his waist, covered in mitts (Testimony of Appellant). Such device was also utilized to prevent Sargent from doing self-harm (Testimony of Aaron Smith).



14. When asked by the Hearing Officer about job duties described in Appellee's Exhibit 1 referring to "therapeutic social work services," Ms. Coomes described that as having brief contacts with an individual through a humanistic approach and offering encouragement. She does not conduct ongoing therapy for any of the inmates. The inmates in C-Wing are present for brief stays. She encourages them to hang on; that their depression will pass.

15. In the Psychiatric Unit there are three wings: A, B and C. Inmates from the C-Wing come from off the yard or from jails and are acutely psychotic, suicidal, or homicidal. They need crisis stabilization and medication adjustment. In wings A and B, inmates participate in programs once they have been stabilized.

16. The next witness for the Appellee was **Aaron Smith**. Since May 1, 2014, Mr. Smith has been the Warden at KSR. The prior nine months he was the Deputy Warden of Security at that institution. He is currently also the institution's Appointing Authority.

17. He identified Appellee's Exhibit 2 as the August 29, 2014 letter he authored advising Ms. Coomes of the intent of the Appointing Authority to suspend her from duty and pay for a period of fifteen days.

18. He identified Appellee's Exhibit 3 as the September 5, 2014 letter he authored advising the Appellant of her suspension from duty and pay for a period of five days.

19. Prior to issuing the intent letter, Deputy Warden Paige McGuire had met with him and advised of the situation. Subsequently, information had been gathered, placed in a report, and provided to the Warden. The description of the event given by the Appellant was his understanding of what had happened. He determined discipline was necessary because her actions were inappropriate. Her actions created undue risk when she intervened with the Security Officer who had been attempting to handle an unruly inmate. It is typical that such Officer should handle that situation. At the point when the incident occurred with the inmate, the Officer would have followed normal security protocols, which protocols were interrupted when Appellant intervened.

20. Officers receive that type of training through Basic Academy, and annually during in-service trainings. They are well versed in how to handle such a situation. There was nothing to justify the acts of Ms. Coomes. It is the job of uniformed security staff to handle unruly inmates. This was not an appropriate intervention by the Appellant, given her job responsibilities. The Officer had been distracted from what he should have been doing. He was required to call his supervisor. The intervention created an undue risk.

21. It is the expectation that the security officer involved would call other security staff to assist. The first call would go to the security supervisor in that unit.

22. Sometime subsequent to the incident, Officer Schiesser resigned to take another job. Thereafter, the institution's Internal Affairs supervisor received information that while Schiesser had been on the job he may have been involved in smuggling contraband. An investigation was conducted and confirmed that Schiesser had been smuggling contraband. Schiesser was subsequently arrested.

23. The statements about the incident, provided by Appellant and by Schiesser, were similar. Warden Smith had no corroborating information that Officer Schiesser did not follow policy, leading up to the incident. He also had no corroborating information about Appellant's actions, other than through the statements provided to him. Both individuals reported the same events.

24. Following issuance of the intent to suspend letter, he met with the Appellant. Ms. Coomes related what had happened, and her version of the events was the same as her testimony earlier this morning.

25. He decided the suspension would be reduced from fifteen days to five days. At that point he did not feel that what happened warranted a fifteen-day suspension. He had examined Appellant's prior disciplinary actions including a written reprimand and a three-day suspension. He decided discipline was indeed warranted and that in progressive fashion, five days would be appropriate.

26. He had initial concerns about Appellant's earlier statement that she was not concerned about Officer Schiesser's safety. However, after further consideration he decided the actual incident was what he was to concentrate on and Appellant's subsequent conversation with Officer Schiesser had been in the heat of the moment; that she had no malicious intent when she conducted her intervention. However, such intervention was still inappropriate.

27. He identified Appellee's Exhibit 4 as KSR, Policies and Procedures, Policy Number KSR 03-00-14, Prohibited Employee Conduct, Disciplinary Actions, and Appeal Process. When he decided to issue the suspension, he determined Appellant's actions had violated Policy and Procedure I. Prohibited Activities and Conduct, O. which reads as follows:

Engaging in any other activity which shall be deemed detrimental to the proper discharge of duties as an employee of the Department of Corrections, or which comes into conflict with attainment of goals and the mission of the Department of Corrections or KSR.

28. Appellant had interfered with a Security Officer in the performance of his duties and potential utilization of the use of force policy. The situation was ended without the use of force. However, resources should have been called to secure de-escalation. One tries first to prevent physical force.

29. The Warden, upon examination of a portion of p. 2 of Appellee's Exhibit 1, opined that the matter of enforced intervention, risk of physical harm, and potential to physically restrain individuals, was a matter of self-protection for the Appellant rather than affirmative duties. The role of mental health professionals is to deal with the mental health issues of inmates on the C-Wing. Mental health professionals do help reinforce the safety and security of the institution.

30. Appellee rested its case. Appellant presented her case.

31. The sole witness for the Appellant was **Kimberly Coomes**, the Appellant. Ms. Coomes stated that she acted based on her opinion of the officer who was "inhumane," an opinion she formed based on reports received from other inmates on her caseload.

32. She identified Appellant's Exhibit 2 as an e-mail she had sent on June 10, 2014, to Webb Strang. In that e-mail, she advised Strang, that "...Schiesser is a problem on C wing."

33. She identified Appellant's Exhibit 3 as the June 26, 2014 e-mail she had sent to Webb Strang. She sent a copy of this e-mail on July 2, 2014, to Deputy Warden Paige McGuire. The June 26 e-mail had been sent to Strang about fifteen minutes prior to the subject incident. In that e-mail she reported an inmate had been told by Officer Schiesser and another, to try harder to kill himself.

34. Following the subject incident, Deputy Warden McGuire met with Appellant and Dr. King. When they met, McGuire asked if Appellant meant what she said when she said that she could not care less about Schiesser's safety. Coomes told her, no, she was just angry. McGuire inquired if there were any other problems with Officer Schiesser. Appellant said no, but she would think about it. Subsequently, she remembered an incident and so sent the e-mail dated July 3, 2014, to the Deputy Warden. (Appellant's Exhibit 4.)

35. She identified Appellant's Exhibit 5 as a July 30, 2014 e-mail she sent to Webb Strang. Appellant testified that Officer Schiesser undermined the mission of the institution by his unprofessional, rookie interactions with inmates. Those acts led to him escalating this particular inmate to the point where the officer was a danger to himself. The inmate displayed anger and Officer Schiesser just stood there. Appellant intervened, the situation de-escalated, and was just as quickly over.

36. Following the incident she reported the matter to Webb Strang. He asked her to submit a report. She wrote and tendered her Incident Report. (Appellant's Exhibit 6.)

37. She gave a complete description of the incident. She had heard inmate Sargent had again cut himself. She went back to his cell and spoke with him. Officer Schiesser came on the scene and told inmate Sargent he needed to get him out of his cell for a MITT check. He took Sargent out of the cell. The three of them walked along and talked down the hall.

38. Officer Schiesser then told inmate Sargent to sit down. Sargent replied, "FU. I'll kick your ass." Officer Schiesser again told him to sit down. They were both locked in a stare. Officer Schiesser did not attempt to radio anyone.

39. Appellant watched another five to ten seconds while standing beside the two individuals who were face-to-face. Those individuals stood about one to one and a half feet apart. Appellant said, "Mr. Sargent. This ain't worth it. You've got goals. It's not worth it arguing with an officer. Just sit down and do what you're told." Sargent just kept staring. Appellant then leaned in toward Sargent's line of vision, waved her hand and said, "Sargent, just sit down. It's not worth it." At that point Sargent broke his stare.

40. Following the incident Appellant and Schiesser talked. She asked him about the policy on the use of MITTs. Schiesser told her about it. He then asked her if he could talk to her a second.

41. They went to the center of the wing. Schiesser asked, "You know I'm security, right?" Appellant replied, "I know you're security. I was trying to keep you from getting hurt because I know Sargent hates you." Schiesser said, "I don't need you to protect me, I'm security." Appellant then replied, "I don't really care if you get hurt, I don't want him to get in trouble for assaulting you. You make things worse." Schiesser asked how he made things worse and Appellant replied, "By the things you say to him, and your history with him. I've reported what I've heard to UA Strang." Schiesser then shook his head and walked off. Appellant then reported the matter to Webb Strang.

42. She identified Appellant's Exhibit 7 as Kentucky Corrections Policies and Procedures, Policy Number 4.7, Staff Training and Development – Adult Institutions. She identified section II. Policy and Procedure, C. Pre-Service Training, 1-16, as topics that were covered and she completed in the Basic Training Academy. By having done so, she believed that as a Social Service Clinician she was expected to safeguard the safety and security of the institution. That is part of what they stressed all through that training.

43. Appellant testified she has done pat-downs, cell searches, let inmates through locked doors, had fire door keys, assisted officers, conducted counts during fire drills, searched property, and she carried a radio. She stated she was a member of the security team. She had acted that day to safeguard the safety and security of the institution.

44. Upon cross-examination, she was asked about her prior discipline. On January 6, 2014, there had been a documented supervisory conference with Paige McGuire. She had also received a written reprimand on March 7, 2014, for poor work performance for having failed to timely report that two inmates, including Sargent, had been using suboxone. On March 10, 2014, she received a three-day suspension for poor work performance based on the fact that she had been told not to go into CPTU C-Wing and see inmate Jamie Sargent; that same day she did in fact go to see Sargent who was not on her caseload.

45. She acknowledged that Appellee's Exhibit 1 was the Job Specification for Social Service Clinician I issued by the Commonwealth of Kentucky. That document described the characteristics of her job as:

Provides intensive and/or therapeutic social work services through the assessment of client needs and the provision of social services to complex cases or provides intensive case management services to special health care needs children; and performs other duties as required.

46. Included among her typical working conditions were:

As a result of enforced intervention, the worker runs the risk of physical harm. May be required to physically restrain individuals.

47. Appellant rested her case. There was no further testimonial evidence presented. A separate briefing schedule was set by Interim Order.

### **FINDINGS OF FACTS**

1. The parties stipulated that the Appellant did not receive a copy of the final suspension letter prior to commencement of her suspension; that the Cabinet will change the unpaid suspension to an administrative leave with pay and reimburse Appellant for the pay she lost during the suspension; that Appellant has met her burden of proof on her claim that she failed to receive proper notice of the suspension, in violation of KRS 18A.095(8). The Cabinet stipulated to the admission of Appellant's Exhibit 1, a document purporting to be the arrest record of Michael A. Schiesser. The parties further agreed that in the event the Cabinet prevails in this appeal, after the decision becomes final, then at that time the Cabinet would re-impose the five-day suspension against the Appellant without pay.

2. Kimberly Coomes has for the past four years been employed as a Social Service Clinician by the Department of Corrections at the Kentucky State Reformatory. She is a healthcare provider and a classified employee with status. She has no knowledge of the Appellee's use of force protocol. She is a certified Social Worker with ten years experience and had been trained how to de-escalate situations.

3. On June 26, 2014, Appellant had been speaking with inmate Sargent in C-Wing. Officer Michael Schiesser came to the cell and advised he had to take Sargent from his cell for a MITT check. At that time Sargent was restrained in hobbles and MITTS.

4. Sargent, Schiesser, and the Appellant walked down the hall. Schiesser told the inmate to sit down. Inmate Sargent replied, "FU. I'll kick your ass." Schiesser again told the inmate to sit down. They were face-to-face and locked in a stare.

5. At that time, Appellant had been standing to the side of both Sargent and Schiesser. She then intervened telling Sargent that this was not worth it and that he had goals. It was not worth arguing with an officer. She told him to just sit down and do what he was told. She then leaned in towards Sargent's line of vision, waved her hand, and said, "Sargent, just sit down. It's not worth it." Sargent broke his stare and sat down. The incident ended.

6. Following the incident, she and Officer Schiesser spoke at the side. Schiesser asked if she knew he was security and she replied she did. She told him she was trying to keep him from getting hurt because she knew Sargent hated him. Following this discussion, Appellant reported the incident to Unit Administrator Webb Strang. At Strang's direction, she wrote and tendered her Incident Report. (Appellant's Exhibit 6.)

7. Deputy Warden Paige McGuire informed Warden Aaron Smith about the incident. Information was gathered in a report provided to Warden Smith. He determined Appellant's actions created risk by having interfered with the officer's attempt to handle the inmate. It is the officer who should have handled this situation and engaged in security protocols.

8. Sometime subsequent to the incident, Officer Schiesser resigned to take another job. A later investigation conducted by the institution's Internal Affairs confirmed that Schiesser had been smuggling contraband. Schiesser was arrested November 20, 2014, and charged with "Promoting Contraband – 1<sup>st</sup> Degree," and "Official Misconduct – 1<sup>st</sup> Degree." (Appellant's Exhibit 1.)

9. During the incident, the Kentucky State Reformatory, Policies and Procedures, KSR 03-00-14, Prohibited Employee Conduct, Disciplinary Actions, and Appeal Process, was in full force and effect. (Appellee's Exhibit 4.) Warden Smith determined Appellant, by her actions, had violated Policy and Procedure, I. Prohibited Activities and Conduct, 0., which reads:

Engaging in any other activity which shall be deemed detrimental to the proper discharge of duties as an employee of the Department of Corrections, or which comes into conflict with attainment of goals and the mission of the Department of Corrections or KSR.

10. Appellant had a disciplinary history of a prior written reprimand (March 7, 2014) for poor work performance, and a three-day suspension (March 10, 2014) for poor work performance.

11. He identified Appellee's Exhibit 2 as the August 29, 2014 intent to suspend letter he had authored advising Appellant of intent to suspend her for a period of fifteen days.

12. Thereafter, he met with the Appellant and decided to reduce the suspension to five days. He identified Appellee's Exhibit 3 as the September 5, 2014 letter he authored advising Appellant her suspension was reduced to five days.

13. Appellant timely filed her appeal of the disciplinary action with the Kentucky Personnel Board.

### **CONCLUSIONS OF LAW**

1. A classified employee with status shall not be suspended, except for cause [KSR 18A.095(1)]. Appointing authorities may discipline employees for lack of good behavior for the unsatisfactory performance of duties [101 KAR 1:345, Section 1]. A suspension shall not exceed thirty days [101 KAR 1:345, Section 4(1)].

2. The Appellee issued Kimberly Coomes a five-day suspension by letter of September 5, 2014 (Appellee's Exhibit 3). That suspension was based on an allegation of poor work performance for violation of IPP 03-00-14, Section I, part O.

3. A classified employee with status who is suspended shall be notified in writing of the suspension; the effective date of the suspension; the specific reason for the action; and that she has right to appeal to the Personnel Board within sixty days. KRS 18A.095(8). It is reasonable that such notice of an effective date of suspension be delivered to a classified employee prior to commencement of such suspension.

4. The Appellee has stipulated that Appellant did not receive a copy of the final suspension letter (Appellee's Exhibit 3) prior to the September 8, 2014 suspension commencement date. To cure that defect, Appellee removed the disciplinary action in the nature of a suspension and changed it to administrative leave with pay. The Hearing Officer, prior to taking sworn testimony, advised the parties that he would accept the settlement and stipulations with the caveat that he would revisit and look at the status of the original suspension in view of the stipulations made by the parties.

5. The Kentucky Personnel Board has jurisdiction to hear appeals filed by classified employees who allege they have either been subject to certain types of discrimination. [KRS 18A.095(12)], or have been dismissed, demoted, suspended, or otherwise penalized. [KRS 18A.095(1)].

6. A "Penalization" means demotion, dismissal, suspension, fines, and other disciplinary actions; . . . any action that increases or diminishes the level, rank, discretion, responsibility of an employee without proper cause or authority, . . . and the abridgment or denial of other rights granted to state employees." [KRS 18A.005(24)].

7. Ms. Coomes has, effective the start of this hearing, not been dismissed, demoted, suspended or otherwise penalized. The Cabinet removed her suspension, reinstated her pay for the days of suspension, and changed the status to having been on administrative leave with pay. Having done this, the parties have left the Personnel Board with no issue that comes under its jurisdiction.

8. The Personnel Board is without the authority to make a recommended order that would in affect reinstate the suspension of the Appellant when the Appellee has conceded to withdraw that suspension, change Appellant's to administrative leave with pay, and reimburse her all pay and benefits she lost during the period of that suspension. This appeal shall dismissed based on a lack of jurisdiction. **Such dismissal of the appeal is not a ruling on the underlying merits of the appeal, and, therefore, should not be interpreted by either party to constitute Appellee having prevailed in this appeal.**

#### **RECOMMENDED ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, and the lack of jurisdiction over a justiciable issue, the Hearing Officer recommends to the Personnel Board that the appeal of **KIMBERLY COOMES VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2014-198)** be **DISMISSED**.



**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 Roland Merkel** this 14<sup>th</sup> day of May, 2015.

**KENTUCKY PERSONNEL BOARD**

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

A copy hereof this day mailed to:

Hon. Edward Baylous  
Kimberly Coomes