

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-202

HELEN COWHERD

APPELLANT

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

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

APPELLEE

** ** *

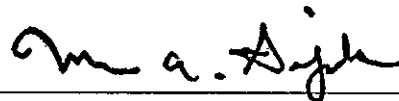
The Board at its regular April 2013 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated February 26, 2013, and being duly advised,

~~IT IS HEREBY ORDERED~~ that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be, and they hereby are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **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 17th day of April, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Stafford Easterling
Helen Cowherd
Stephanie Appel

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-202

HELEN COWHERD

APPELLANT

VS.

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

JUSTICE AND PUBLIC SAFETY CABINET
DEPARTMENT OF CORRECTIONS
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APPELLEE

** ** ** ** **

This matter came on for an evidentiary hearing on February 11, 2013, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before R. Hanson Williams, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Helen Cowherd, was present at the hearing and was accompanied by Nathaniel Coleman. However, she was not represented by legal counsel. Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and was represented by the Hon. Stafford Easterling. Appearing as Agency representative was Warden Janet Conover of the Kentucky Correctional Institution for Women.

The Appellant timely filed this appeal on September 7, 2012, from a three-day suspension imposed upon her by letter dated August 28, 2012, for alleged poor work performance. A copy of the suspension letter is attached as **Recommended Order Attachment A**.

The burden of proof as to the suspension was placed upon the Appellee by a preponderance of the evidence to show that the disciplinary action was neither excessive nor erroneous.

BACKGROUND

1. The Appellee called the Appellant, **Helen Cowherd**, as its first witness. She testified that she has been employed at the Kentucky Correctional Institution for Women (KCIW) as a Correctional Officer for approximately the past eight years.

2. Appellant stated that she receives one annual day and one sick leave day per month. The vacation policy at KCIW during 2011 was that any requests for vacation in 2012 had to be submitted no later than December 31, 2011. Therefore, in December 2011, the Appellant requested vacation time and was approved to take vacation July 17 through July 23, 2012. [Appellee's Exhibit 1] She stated that the requested days of vacation would have required the Appellant to have forty (40) hours of vacation time at the time she commenced her vacation.

3. She testified that on July 14, 2012, Shift Supervisor Captain Ronald Johnson contacted her by phone and told her that she did not have enough annual vacation time recorded for her scheduled vacation. According to the Appellant, she asked Johnson what she should do and he replied, "I cannot tell you what to do" because he had not authorized her vacation. As a result, the Appellant did not report to work on Tuesday, July 17, 2012, and remained off work until she returned on Tuesday, July 24.

4. Upon return to work, the Appellant filed an Occurrence Report [Appellee's Exhibit 2] in which she related that she had asked Captain Johnson what she needed to do and he told her he could not tell her what to do. In addition, the Appellant also denied that Captain Johnson told her she needed to report to work on Tuesday, July 17.

5. The Appellant next received a July 20, 2012 letter from Warden Janet Conover informing her she was absent without approved leave and was directed to return to work or provide documentation within five days of the date of the letter. [Appellee's Exhibit 3] After returning to work on July 24, 2012, the Appellant was called to a meeting in Senior Captain Patterson's office to discuss her leave. Present was Captain Danielle Burke and later, during the meeting, Captain Johnson was called to the meeting. Appellant reiterated during this meeting that she informed the others that Johnson did not tell her to return to work on July 17, 2012, rather only saying he could not tell her what to do.

6. As a result of the unauthorized taking of leave, the Appellant was subsequently suspended for three days. She then identified Appellee's Exhibit 8, a collection of four written reprimands she had previously received, which also formed the basis of the decision for the three-day suspension.

7. Appellee called its next witness, **Captain Ronald Johnson**. He has been employed with Corrections in excess of ten years and has been a Shift Supervisor at KCIW for approximately eight months.

8. He testified that on the morning of July 14, 2012, at approximately 10:00 a.m., he had phoned Appellant telling her she did not have enough time to take the forty-hour vacation scheduled. He confirmed that he told her he could not tell her what to do, but was adamant that he did inform her that she needed to report to work on July 17. The Appellant then replied, "If they have a problem, they can call me next week." The witness then introduced Appellee's Exhibit 11, his Occurrence Report filed on July 20, 2012. He confirmed the facts contained therein, the primary one being he had informed her on July 14 that she only had approximately

ten hours of time and needed to have forty hours in order to take her vacation. He also confirmed that he informed her that she would need to report for work on Tuesday, July 17.

9. The witness also confirmed Appellee's Exhibit 12, his Occurrence Report of July 24, 2012, following the meeting in Senior Captain Patterson's office. He testified that he again replied to her after being asked what he would do that, "I cannot tell you what to do, but you must report to work on July 17."

10. On cross-examination, the witness answered that he could not approve vacation without there being enough leave time accumulated, even if a vacation had been previously approved.

11. On redirect, the witness answered that since the vacation request was made in December of 2011, the following months would have given Appellant ample time in which to accumulate the time necessary to have vacation approved in July 2012. The witness also denied that the Appellant had asked him if she could take one or one and a half days off.

12. The Appellee's next witness was **Stephanie Appel**. She has been the Personnel Director for the Department of Corrections for approximately the past eight years. She stated that the Corrections' policy on Leave Without Pay (LWOP) is that there is no mechanism for taking vacation LWOP; however, there is such a mechanism for taking sick leave LWOP. She then introduced Appellee's Exhibit 13, the Kentucky Human Resources Information System (KHRIS) records for the Appellant as of the time period December 16, 2011, through December 31, 2011. At that timeframe, the Appellant's sick leave balance was shown to be eight hours and the annual balance was shown to be ten hours. She also introduced Appellee's Exhibit 14, a KHRIS sheet for the Appellant for the period July 1, 2012, through July 15, 2012. This report shows the Appellant's leave balance at that period as zero hours of sick leave and ten hours for annual leave.

13. On cross-examination, the witness affirmed that there was no regulation in place for taking vacation time as LWOP.

14. Appellee's next witness was **Captain Charles Patterson**. He has been employed with the Agency for approximately thirty-two years and has been a Senior Captain at KCIW for approximately the past two years. He confirmed the meeting in his office of July 24, 2012, and confirmed that during the meeting Captain Johnson said in the meeting that he had told Appellant to report to work on July 17.

15. The Appellee's last witness was **Janet Conover**. She has been employed for approximately twenty-three years with the Department and has been Warden at KCIW for the past three years. She stated that the basis of her decision for a three-day suspension was the history of discipline of the Appellant [four written reprimands for poor work performance] and the disregard for the authority which the Appellant had shown toward Captain Johnson.

16. With that, the Appellee closed.

17. The Appellant, **Helen Cowherd**, recalled herself and simply again denied that Captain Johnson had told her to report to work on July 17, 2012.

FINDINGS OF FACT

1. In December 2011, the Appellant was pre-approved to take vacation from July 17 through 23, 2012.

2. On July 14, 2012, the Appellant was told by Captain Johnson he could not approve her taking vacation as she did not have the necessary hours accumulated.

3. Johnson informed the Appellant she would need to report to work on July 17, 2012.

4. The Appellant failed to report for work on July 17 and did not return to work until July 24, 2012.

5. The Appellant had four previous written reprimands for poor work performance.

6. The three-day suspension was neither excessive nor erroneous.

CONCLUSION OF LAW

The Appellee carried its burden of proof by a preponderance of the evidence in justifying the three-day suspension.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **HELEN COWHERD VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2012-202)** 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).

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).

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

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 R. Hanson Williams** this 26th day of February, 2013.

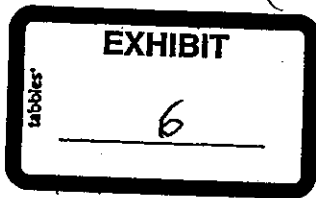
KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof mailed this date to:

Hon. Stafford Easterling
Helen Cowherd



DEPARTMENT OF CORRECTIONS

LaDonna Thompson
Commissioner

KENTUCKY CORRECTIONAL INSTITUTION FOR WOMEN
P.O. Box 337
Pewee Valley, Kentucky 40056
Telephone: (502) 241-8454

Janet Conover
Warden

August 28, 2012

Helen Cowherd

Dear Ms. Cowherd:

After careful consideration of the statements made on your behalf in the disciplinary interview held on August 1, 2012, and the written statement which you provided. I find no reason to alter my decision to suspend you from duty and pay for a period of three (3) days.

Based on the authority 101 KAR 1:345, Section 1 and 4, and in accordance with KRS 18A.095, you are hereby notified you are suspended from duty and pay for a period of three (3) days. Your dates of suspension are September 11, 12, 13, 2012. You are to return to work for your regular scheduled shift on September 14, 2012.

Poor Work Performance, i.e., on July 14, 2012, at approximately 10:00 am, Shift Supervisor Captain Ronald Johnson contacted you concerning your scheduled vacation from July 17, 2012 through July 21, 2012. Captain Johnson informed you that you did not have enough annual leave time recorded for that scheduled vacation. Captain Johnson informed you that you would need to report for work on Tuesday, July 17, 2012. You replied to Captain Johnson that you were going to take your vacation anyway because you had put in for it in December. Captain Johnson stated he understood, but that he could not authorize the vacation, again reminding you that you did not have the accumulated annual leave time as required. You asked Captain Johnson what you should do and Captain Johnson responded that he could not tell you what to do. Captain Johnson did reiterate again that you did need to report to work on Tuesday, July 17, 2012. You then stated "if there is a problem they can call me next week." Captain Johnson again stated he could not authorize the vacation. You replied: "ok" and hung up the telephone. As of July 20, 2012 at 8:00am, you had not reported to work or called the institution concerning your time off.

On July 24, 2012, you met with Senior Captain Charles Patterson and Captains Danielle Burke and Ronald Johnson to discuss this incident. Senior Captain Patterson reminded you that per your conversation with Captain Johnson, you could not take annual leave because you did not have any accrued leave time and that you that you should have reported for work on July 17, 2012. Your response to Senior Captain Patterson was that: you asked Captain Johnson what you should do; "should I come on in (to work) or can I take one day"? Captain Johnson's response to you was that "he couldn't tell you what to do", however he did tell you that you needed to report to work on Tuesday the 17th of July, that you did not have enough leave time to cover the vacation.

Recommended Order Attachment A

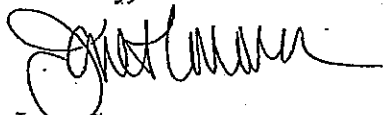
Your actions are a direct violation of Corrections Policy and Procedures 3.14: Absent without Leave: (a) If an employee is absent from duty without approval and does not report the reason to his supervisor at the beginning of the shift from which he is absent, the Shift Supervisor or Department Head shall discuss the absence with the employee immediately upon the employee's return to work and request an explanation for the absence. If the supervisor submits a recommendation for leave without pay, he shall state the reasons for the recommendation through the chain of command. In addition your actions are in violation of KCIW policy 03-09-02, Attendance and Leave Requirements "P" Unauthorized Absence #1. Unauthorized absence is an absence that the employee does not have prior approval, fails to give proper notice or fails to give the mandatory documentation for the absence. Furthermore, your actions are in violation of 101 KAR 2:102, Classified Administrative Leave Regulations.

✓ A review of your personnel file reveals the following: on June 19, 2012, a written reprimand for poor work performance; on January 7, 2009, a written reprimand for poor work performance; on August 16, 2007, a written reprimand for poor work performance; on September 28, 2006, a written reprimand for refusing mandatory overtime.

Failure to improve your performance and refusal to work mandatory overtime as required may lead to further disciplinary action, up to and including dismissal.

A copy of this notice shall be provided to the Personnel Cabinet in accordance with Personnel rules. As provided by 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. An appeal must be filed in writing using the attached appeal form and in the manner prescribed on the form.

Sincerely,



Janet Conover, Warden

Attachment

Cc: LaDonna Thompson, Commissioner—Department of Corrections
Tim Longmeyer, —Personnel Cabinet
Stephanie Appel, Director—Division of Personnel Services
Regional Personnel File
Evaluation File