

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2015-106**

**JOSH D. DECKERD**

**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**

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The Board, at its regular November 2016 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated September 15, 2016, Appellant's Exceptions 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** Conclusions of Law paragraphs 8 through 13, and substitute the following:

8.     No evidence was introduced at the evidentiary hearing that, during his Internal Affairs interview, the Appellant was advised he could refuse to answer any question that would tend to incriminate him, or if he did answer, neither the statements, information nor evidence gained as a result of the statements would be used against him in any criminal proceeding. In addition, no evidence was offered that the Appellant was advised he had an obligation with or without counsel to participate further in the investigation. Thus, having failed to introduce any evidence during the hearing that the Appellant was properly advised of his rights or obligations under the circumstances, the Appellee failed to prove the charge that the Appellant failed to cooperate in an investigation.

9. As Senior Captain Mazza did appear and offer his personal testimony at the hearing, the motion to schedule a second day of evidentiary hearing was determined to be **MOOT**.

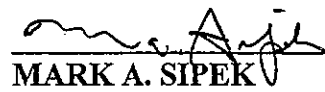
10. Even without evidence of the Appellant's refusal to cooperate in the Internal Affairs investigation, the Appellee has demonstrated, by a preponderance of the evidence, that the dismissal of Appellant from his position as Correctional Lieutenant with the Department of Corrections' Kentucky State Reformatory effective May 7, 2015, was taken for just cause, and was neither excessive nor erroneous. The motion by the Appellee to toll any back wage which might have been awarded to the Appellant is deemed **MOOT**.

**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 **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 22<sup>nd</sup> day of November, 2016.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK**  
**SECRETARY**

A copy hereof this day mailed to:  
Hon. Stafford Easterling  
Hon. Michael Boylan  
Mr. Rodney E. Moore

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2015-106**

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**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 July 6, 2016, 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 were authorized by virtue of KRS Chapter 18A.

The Appellant, Josh D. Deckard, was present and represented by the Hon. Michael Boylan. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Stafford Easterling. Also present was Ms. Elisha Mahoney, Paralegal, and Warden Aaron Smith, Agency representative.

The issue in this matter concerns the dismissal of Appellant from his position as Correctional Lieutenant with the Department of Corrections, Kentucky State Reformatory (KSR), pursuant to letter notices dated May 7, 2015, and May 14, 2015. The burden of proof was on the Appellee to show, by a preponderance of the evidence, that the dismissal of the Appellant was taken with just cause, and was neither excessive nor erroneous.

The rule separating witnesses was invoked and employed throughout the course of the hearing. The parties discussed a number of preliminary matters.

Counsel for the Appellee, Mr. Easterling, pointed out the Appellant had not filed an Exhibit List. Appellee moved that Appellant be excluded from introducing any documents as exhibits. Mr. Boylan responded the Appellant had no exhibits. The Hearing Officer indicated Appellant could still introduce or refer to any exhibits listed on the Appellee's Exhibit List, as such would not constitute unfair surprise or injustice to the Appellee.

Mr. Easterling next stated the last Interim Order had placed the burden of proof on the Appellee; this was prior to Appellant's acceptance of an Alford plea. He believed the plea constituted *res judicata*, and that the burden of proof should now be on the Appellant to

demonstrate the dismissal was improper. Mr. Easterling stated the criminal plea by the Appellant indicated he is guilty of the criminal charges brought against him.

Mr. Easterling stated that up until June 30, 2016, Appellant, by Court order, had been prevented from having contact with anyone in the Department of Corrections. Therefore, *res judicata* applied again, and in the event Appellant is successful in the appeal before the Personnel Board, back pay should be tolled for the period of time for which Appellant had been prevented from having contact with the Department of Corrections.

Mr. Boylan responded that the criminal charge against Mr. Deckard had been one of menacing, and the parties were ready for trial. On December 2, 2015, Mr. Deckard entered an Alford plea and sentencing was reserved. Deckard participated in a court-directed program, and the charge was dismissed without sentencing on June 1, 2016. Mr. Deckard was never convicted of any charge, and he maintained his innocence throughout. The written plea form indicated that should Appellant be reinstated to his job, he would have the ability to then have contact with the facility for purposes of performing his job. There is no *res judicata* because there is no conviction. The burden of proof remains on the Appellee.

The Hearing Officer cited KRS 13B.090(7), regarding burden of proof in administrative proceedings. The dismissal of the Appellant was a penalty imposed on him. The burden of proof under KRS Chapter 13B is not affected by outside proceedings. Furthermore, the entry of an Alford plea is not an admission of guilt. The burden of proof shall remain on the Appellee. With reference to the request to toll back pay, the ruling on that issue was **DEFERRED**.

Mr. Easterling moved he be allowed to take the testimony of Captain Kevin Mazza by telephone. Captain Mazza had been subpoenaed, but is now in western Kentucky. Mr. Easterling was not certain whether Captain Mazza would be coming to the hearing today. Appellant objected to the testimony being taken by telephone. The Hearing Officer cited KRS 13B.080(7) and **OVERRULED** the motion on the basis of the objection to same by the Appellant. There was no objection by either party to scheduling another date for Captain Mazza's testimony in the event he did not appear at the hearing. A ruling on that part of the motion was **DEFERRED**.

Each party presented an opening statement.

**BACKGROUND**

1. The first witness for the Appellee was the **Appellant, Josh Deckard**. On April 1, 2015, Mr. Deckard was employed as a Lieutenant at the Kentucky State Reformatory (KSR). He was supervisor of the Medical Unit. When he was first hired in 2004, he participated in one week of Correctional Officer training. Since that time, he has participated in annual in-service trainings of 16 hours per year.

2. He identified Appellee's Exhibit 1 as the April 7, 2015 letter that placed him on administrative leave with pay. He identified Appellee's Exhibit 2 as the April 13, 2015 letter notifying him of the employer's intent to dismiss him from his position as Correctional Lieutenant.

3. On April 1, 2015, Appellant was a Correctional Lieutenant assigned as Security Supervisor to Unit A at KSR. He worked the 7:00 a.m. to 7:00 p.m. shift. At approximately 7:00 p.m., during shift change, he noticed a volunteer at Gate 1 who normally assisted Correctional Treatment Officer (CTO) Joe Brosky at AA meetings. The volunteer was wearing a visitor's badge. Kimberly Klimer, Officer at the gate, said the visitor was "good to go," but needed an escort.

4. Lieutenant Steinbergen was the Shift Operator that day. It was up to Lt. Steinbergen to arrange an escort for the visitor. Appellant had never been assigned that task on that evening.

5. CTO Brosky had been calling for assistance for the visitor. Appellant went to the Captain's office and asked Steinbergen about the escort. Steinbergen said, "Fuck that guy." Deckard went to the front gate and escorted the visitor.

6. Deckard returned to the Captain's office about 7:05 p.m. and asked Steinbergen what was going on. Present in the office at that time was Lt. Steinbergen, Andrew Chinn, Sergeant Tom Brooks and Sergeant Dennison. When Deckard posed his question, Steinbergen told him that the guy was being a "prick" to him over the radio. Deckard tried to encourage him to work together with everyone in the organization. He told Steinbergen that his (Steinbergen's) comment was "fucked up." After they argued, Steinbergen said he had just been joking. Deckard admitted he was loud during that discussion, but not angry.

7. Deckard began to leave the Captain's office when Captain Patrick Kessinger arrived, grabbed him and brought him back into the office. Deckard and Lt. Steinbergen continued their argument while Captain Kessinger stood off to the side and said nothing for several minutes.

8. Kessinger agreed with Steinbergen that an escort had previously been arranged. Deckard testified he was already loud in voice at that time, but was not screaming. He yelled at Steinbergen, but not at the Captain. Captain Kessinger told Deckard he was making a scene. Deckard asked, "Why didn't you take him?"

9. Senior Captain Kevin Mazza then walked into the office, went to the right side of the room and stood there. At no time did Mazza try to intervene or calm Appellant down. About one minute later, Deckard said to Mazza, "You're a Senior Captain and sit up here and allow this?" He started yelling at Mazza. Deckard never approached him.

10. Mazza approached Deckard and they got four to six inches apart. Mazza took his glasses off and pointed his finger in Deckard's chest. Deckard closed his eyes and clenched his fists. Appellant then began yelling at Senior Captain Mazza.

11. Over the course of 10 to 15 minutes, no one tried to calm Appellant down. At one time, Mazza told Deckard to leave, and that he "didn't have any balls" and needed to quit. Deckard replied, "If I ain't got balls, then we can go out here and see who ain't got balls."

12. When he was asked to leave during the argument, Appellant refused. He eventually left about 7:15 p.m. He testified, "I'm at fault for my actions." He stated he was justified for taking up for his staff, but he did it in the wrong manner by yelling. He denied ever having threatened Senior Captain Mazza, or that he would "kick his ass."

13. He identified Appellee's Exhibit 5 as Kentucky State Reformatory, Policies and Procedures, Policy No. KSR-03-00-14, Prohibited Employee Conduct, Disciplinary Actions, and Appeal Process. He had been asked by Internal Affairs to come to an interview. He told them he would cooperate, and answered one or two initial questions. At first, he asked to have an EEO counselor or witness present, and when that was denied, stated he wished to have an attorney present. Employees of the Department of Corrections are required to cooperate with Internal Affairs' investigations.

14. When asked if he failed or refused to cooperate in the investigation as required by paragraph I(C) (Appellee's Exhibit 5), Deckard testified he believes he cooperated fully. He also believes he did not violate paragraph I(K), and that Mazza had ordered him to leave and quit his job. He did leave several minutes later. He had a problem believing that what Mazza told him was a "properly given order."

15. Lt. Steinbergen was Appellant's superior on the shift. Appellant had yelled at Steinbergen. Captain Kessinger and Senior Captain Mazza were also Appellant's superior officers, and he had yelled and screamed at them. He admitted he violated paragraph I(O) (Appellee's Exhibit 5).

16. At one time in his career, Deckard had been a supervisor in Internal Affairs. His duties at the time required him to conduct investigations, fact-finding and submit reports. In that position he had reported to Captain Schantz.

17. Deckard identified Appellee's Exhibit 6 as Kentucky State Reformatory, Post Order #1, General Post Order For All Employees. He testified he did violate this policy, specifically Item 17 (page 6 of the Exhibit). He failed to remain calm once Lt. Steinbergen cursed him.

18. He identified Appellee's Exhibit 7 as Kentucky Corrections Policies and Procedures, Policy No. 3.1, Code of Ethics. When Counsel for the Appellee, Mr. Easterling, began to ask Appellant questions on the Code of Ethics, the Hearing Officer inquired whether Appellant had received notification of violation of this policy in any of his letters. Counsel replied in the negative, and that he had not been charged specifically with a violation. Appellant's objection to submission of Appellee's Exhibit 7 was **SUSTAINED** and the exhibit was withdrawn.

19. Deckard identified Appellee's Exhibit 8 as a June 6, 2011 Written Reprimand he received for misconduct, specifically for having violated rules of confidentiality.

20. He identified Appellee's Exhibit 9 as the Criminal Complaint brought against him by Senior Captain Mazza for the incident of April 1, 2015. During the incident, Mazza had asked Appellant one or two times to leave the facility. As part of the plea in the criminal matter, Appellant was barred for a time from any contact with KSR. The diversion was lifted June 1, 2016, by Order of the Judge.

21. The parties stipulated to the following facts:

1. Appellant's diversion was completed on June 1, 2016;
2. Appellant's diversion began December 2, 2015.

22. **James Coyne**, who has been the Deputy Warden of Security at KSR for the past two years, was the next witness for the Appellee. He has been employed at the institution for a total of five years.

23. Following the April 1, 2015 incident, Coyne took all written reports from witnesses, the report of the Internal Affairs (IA) investigation, and discussed it with Warden Smith. He then wrote up a report for Warden Smith's review and approval.

24. He sat in on the IA interview of the Appellant, which took place in the interview room of the IA office. At that time, Appellant asked for the presence of an EEO representative. Captain Williams told Deckard this was not an EEO issue. Deckard then said he would not make a statement without an attorney, and asked that his attorney be present. That ended the interview, and no further questions were asked.

25. When a person interviewed by IA asks for the presence of an attorney, the questioning should stop and the interview end. One asking for an attorney is not improper nor does it constitute non-cooperation with Internal Affairs. Deckard interfered with the investigation by not having provided anything pertaining to his side of the story. He could have supplied a written report. He does not know if Appellant was asked thereafter to provide a report or statement.

26. It was Coyne who had drafted the Intent to Dismiss letter of April 13, 2015 (Appellee's Exhibit 2). He testified that on page 2 of the letter he had mistakenly included a citation to "Promoting Contraband in the Second Degree," which should not have been included. However, citation of item 17 was correct.

27. He identified Appellee's Exhibit 11 as the Report of Investigation generated by the Internal Affairs Office that referenced the subject incident. He had reviewed this report, which was consistent with what he had written in the April 13, 2015 letter.

28. Lt. Steinbergen had cursed when Appellant asked him about the escort for the visitor. He also believed Senior Captain Mazza raised his voice to speak over the Appellant and get him to calm down. He does not believe others during that incident raised their voices. No one other than the Appellant received discipline for this incident.

29. The next witness for the Appellee was **Michael D. Williams**. Mr. Williams is a Captain employed at KSR, and has been the IA supervisor the past six years.

30. He identified Appellee's Exhibit 12 as Kentucky Corrections Policies and Procedures, Policy No. 3.23, Internal Affairs Investigations. Under paragraph II(D)(2), IA has the authority to interview any staff member. Under paragraph II(G)(1), all staff are required to report violations of policy, procedures, and law. This would include a staff member who, himself, violates policy.

31. When one asserts a right to counsel during an IA interview, all communications cease at that point. Captain Williams does not ask for anything else from the person, as he believes any further communication would be a violation of that individual's civil rights. That is what was done in this instance. If someone invokes the right to counsel, they, however, have not cooperated in an IA investigation.



32. Captain Williams had been notified by Senior Captain Mazza of an incident that occurred in the Captain's office on April 1, 2015. He requested written reports be submitted from all persons who were in the Captain's office during the incident. He received written reports and conducted recorded interviews with everyone except the Appellant (whose interview ceased when he requested counsel).

33. After reviewing all the reports and hearing the witness interviews, Williams believed there was no indication Senior Captain Mazza had threatened or cursed the Appellant. It appeared Lt. Deckard was upset about an escort that one of the CTOs had requested for certain volunteers. Deckard went to the Captain's office and perceived that no one was doing the escort and he became upset. His behavior escalated to a point where other staff tried to calm him down. Deckard's intensity became louder. Based on the information, Williams concluded Appellant had been insubordinate, and at some point, threatened Senior Captain Mazza. Williams forwarded the results of his investigation up-the-chain.

34. Williams and Appellant never had any prior interpersonal conflicts. When conducting interviews with other employees, Williams always has another person present. The two people he usually asked to be present were not present at the facility the morning he interviewed Appellant. He then asked Deputy Warden Coyne to be that second witness, who consented.

35. He identified Appellee's Exhibit 13 as the written reports provided by staff members who were present during the incident, and the attached email request of CTO Brosky.

36. He identified Appellee's Exhibit 7 as the KSR Code of Ethics.<sup>1</sup> The Kentucky Corrections Policies and Procedures, Policy No. 3.1, Code of Ethics was not included in the Intent to Dismiss letter or in the dismissal letters, and Appellant had no prior notice of any alleged violation of this policy.

37. Deckard had not said he would answer all of Williams' questions in the presence of his attorney. Appellant was terminated for having made a threat. Williams subsequently testified that Appellant told him he would cooperate, but he needed his attorney present. Williams stopped the recorder and had no further communication with Appellant. Deckard was entitled to his constitutional right, but such constituted a violation of Department policy by failing to cooperate with the investigation. The exercise of this constitutional right does not constitute "good or sufficient cause" per the policy. Deckard failed to cooperate by not providing anything. The burden was on the Appellant to come forward.

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<sup>1</sup> This document was admitted at the time for the limited purpose of it having been considered by Captain Williams in his report (see Appellee's Exhibit 11), and will not be considered pertaining to any charges brought against Appellant which were alleged as violations constituting grounds for his dismissal.

38. The investigation was concluded April 29, 2015. Captain Williams did not know whether Mr. Boylan represented the Appellant until approximately one month later.

39. The next witness for the Appellee was **Patrick Kessinger**. At the time of the April 1, 2015 incident, Kessinger was a Captain employed at KSR. He is now a CU Administrator I, and has held that position since April 1, 2016. When he was the Administrative Captain at KSR, he was in charge of day-to-day security. All the Captains were in Deckard's line-of-command.

40. On April 1, 2015, there was a shortage of staff at KSR. Kessinger heard on the radio that a visitor had requested an escort to get across the yard. He (Kessinger) was up in the Captain's office hallway dealing with transportation issues. Lt. Steinbergen was running the Captain's office at the time, and had made arrangements for the next shift to perform the escort.

41. Kessinger went downstairs. When he came back upstairs, he heard yelling in the Captain's office. He entered the office and closed the door behind him so those on the shift change would not hear the noise. Lt. Deckard was yelling at Lt. Steinbergen about the escort. Deckard was very upset, both in tone of voice and demeanor. He was irate and very worked-up over a minute detail. Sgt. Dennison was also in the room, but did not say anything.

42. Deckard kept saying, "You all don't care about us." Steinbergen was not known to raise his voice or yell at people.

43. Kessinger asked what was going on. He found out that an escort was needed and Deckard performed the escort himself. Deckard had returned to the Captain's office to confront Steinbergen about his not having provided the escort. Deckard had been telling Steinbergen how to do his job. Steinbergen told Deckard arrangements had already been made and the escort would be performed after rollcall.

44. Kessinger tried to calm Deckard and mediate between the two lieutenants. Deckard became more and more upset. He stated, "You sit up here all day and don't do anything." Kessinger had turned Deckard's attention away from Steinbergen and towards himself and asked why he was so upset. Deckard said, "Why didn't you do it yourself?" Kessinger told Deckard he was doing his own job.

45. At no time did Kessinger touch Deckard. No one stood between Deckard and the office door or prevented him from leaving. Steinbergen had been sitting behind the desk. Deckard was standing at the desk, in front of Steinbergen.

46. In Kessinger's experience, when Deckard became upset, all it took was someone to talk to him and he usually calmed down. In this situation, Deckard did not do the right thing.

Deckard continued to escalate. That is when Senior Captain Mazza came through the door, went to the desk, put down his sunglasses, and walked to the corner of the desk. Mazza never touched Deckard. No one touched Deckard the entire time.

47. Mazza asked what was going on. Everyone in the room tried to answer. Deckard started yelling at Mazza, and told him that they could take this outside. At that point, Kessinger stepped in between Deckard and Mazza, and told Deckard to leave and get out of the building. Deckard replied, "I'm not fucking leaving."

48. Mazza never threatened to kick anyone's ass. Deckard was the one who stated that they could take this outside to the parking lot. Deckard stated, "I'll whoop your ass in the parking lot." As he said this, spit flew out of his mouth. The situation escalated and Mazza told Appellant "You need to leave."

49. Mazza had asked Appellant why he wanted to work here, and told him that if he hated his job so much, to just put his badge down and walk away. Deckard replied, "I'm not going to quit." Mazza told him he was not asking him to quit, but if Appellant hated his job, why did he continue to work here?

50. Deckard took a step towards Mazza and balled up his fists. Kessinger took a step to get between the two of them because he saw Deckard was now directing all his anger toward Mazza. Kessinger told him to leave. Deckard replied that he could not make him leave. At which point Mazza stated they would have to call the State Police. Deckard replied he did not care. Kessinger testified he told Appellant to leave approximately four times and Deckard never listened. Deckard did eventually leave.

51. The witness examined the written report he had submitted (part of Appellee's Exhibit 13). The quotes in his report were, indeed, made during the incident. He did not specifically record that Deckard said he would kick anyone's ass, but it was what Lt. Deckard said. Staff were working a double shift that night. Kessinger typed his report that night after the incident. He recalled Mazza never told Deckard that Appellant "didn't have the balls" to take the matter outside.

52. Upon request of Appellant's counsel, Captain Kessinger sketched out a diagram of the Captain's office where the incident took place, indicating the approximate locations of the individuals present at that time. That document was admitted as Appellant's Exhibit 1.

53. The next witness was **Erick Steinbergen**. Mr. Steinbergen is currently an employee of the Horseshoe Casino and Little Dave's Restaurant. At the time of the incident, he was a Lieutenant at KSR. He left the employ of the Department of Corrections on February 29, 2016.

54. On April 1, 2015, Steinbergen had been running the daily operations of the prison in the absence of the Captain. He was also that day's shift supervisor.

55. CTO Brosky called Steinbergen and asked to have a volunteer at the front gate escorted to Brosky's location. Steinbergen told Brosky he did not have anyone available at the time. Brosky told him to do it. Steinbergen then made arrangements for an escort.

56. Lt. Deckard came into the Captain's office and said he would do the escort. Steinbergen responded, "Ah, fuck that guy." Deckard took offense, believing Steinbergen had been talking about Brosky. Steinbergen had vented his frustration about the volunteer. Deckard got on the witness about respecting his staff. Deckard performed the escort and then returned to the Captain's office.

57. Upon return, Deckard's mannerisms escalated into an argument. Deckard's voice was raised, but he was not yelling. Their voices were loud enough to be heard in the hall, as the door was open at that time.

58. Captain Kessinger came in the office and tried to calm Deckard down. Deckard turned his attention toward Kessinger and did not calm down.

59. About a minute or two later, Senior Captain Mazza entered the office and interjected himself in the conversation. He told Deckard to calm down. Steinbergen testified, "That's when it really started to escalate." Mazza told Deckard to leave. Deckard did not leave. Both became physically closer to each other, face-to-face as they were yelling. Mazza repeatedly told Deckard to get out and leave. At one point, Deckard said that they were going to have to make him leave. Deckard then said, "Let's take it across the street, Mazza." Mazza responded either "You don't have the balls, big boy" or "You don't want to do that, big boy."

60. A few seconds later, Deckard left. No one touched Deckard during the entire time; no one touched anyone else. Captain Kessinger had asked Deckard to leave three to four times. Mazza asked the same thing five to six times. The entire episode in the office transpired over six to ten minutes.

61. Steinbergen reviewed the written report he had submitted pertaining to the incident (part of Appellee's Exhibit 9). Deckard was irate and became more irate as the incident progressed. Steinbergen has been around the Appellant for ten years, and had never seen him behave like that before.

62. The next witness was **Kevin Mazza**. Mr. Mazza is currently the Deputy Warden at the Western Kentucky Correctional Complex. On April 1, 2015, he was employed as Senior Captain at KSR.

63. On April 1, 2015, he was coming upstairs from the basement Assembly where the staff were getting their post assignments. He walked into the Captain's office and shut the door behind him. He observed Lt. Deckard and Captain Kessinger in a heated discussion. There was no yelling or screaming at the time.

64. Mazza stood back for about a minute to listen to what was going on. Deckard started raising his voice and started to scream. Mazza stepped up to try to calm him down and get him to lower his voice. "He turned his aggression towards me; we both gradually approached each other and he got real close to my face; he was spitting as he was screaming."

65. At that point, Decker said, "Well let's take it outside and I'll whoop your ass." Appellant's fists were balled. Mazza told Appellant to go home. Mazza denied ever having responded in any manner or stating that Deckard "didn't have the balls." He did ask Deckard several times to leave the office and go home for the day.

66. He raised his voice at one time so Deckard could hear what Mazza was telling him; so Deckard could hear him over his (Deckard's) own yelling. Mazza told Deckard that if he was not happy about work, he could lay his badge on the desk and leave. No one touched anyone during the entirety the witness was present. Mazza had asked Appellant to leave four to five times. Finally, Deckard opened the door and left.

67. **Aaron Smith**, Warden of KSR, was the next witness for the Appellee.

68. The incident of April 1, 2015, had been reported to Warden Smith by Deputy Warden Coyne and Captain Williams on or about April 2, 2015. He noted Appellee's Exhibit 11 shows that the Internal Affairs investigation had been completed on April 29, 2015. Captain Williams had turned this in to the Warden with attached witness statements.

69. Warden Smith placed Appellant on administrative leave, as this was a serious incident. Prior to doing so, he discussed the matter with the HR Manager. He then issued the April 7, 2015 letter (Appellee's Exhibit 1).

70. Warden Smith reviewed the various witness statements. It was clear to him what had happened; based on what was reported to him at the time. Senior staff members made a number of attempts to de-escalate the matter. Deckard threatened physical harm against a Senior Captain. Appellant had been insubordinate and threatening, which constituted very serious behavior. He therefore issued the April 13, 2015 Notice of Intent to Dismiss letter (Appellee's Exhibit 2).

71. On April 24, 2015, a pre-termination hearing was held where Warden Smith met with Appellant and his counsel, Mr. Boylan. He listened to Appellant's side and discussed the

matter with them. He considered their statement, the prior report, weighed the evidence and believed there was consistent evidence to support a dismissal. Thereafter, he issued the dismissal letters dated May 7, 2015 (Appellee's Exhibit 3) and the amended dismissal letter of May 14, 2015 (Appellee's Exhibit 4).

72. Warden Smith testified about Deckard's policy violations. He believed Deckard did have a right to request the presence of an attorney during the IA questioning, and that it was appropriate for Captain Williams to cease the questioning once that request was made. From the Department's standpoint, a request for Appellant to make a statement was to elicit his side of the story. That request was a standing request. Although it would not have been appropriate to contact Deckard after he stated he wanted to have an attorney present, it was incumbent on him to thereafter cooperate with Internal Affairs. He did not do so, and that constituted a failure to cooperate.

73. Appellant also failed to obey orders. It was clear Captain Kessinger and Senior Captain Mazza intervened and gave Deckard repeated orders to calm down and to leave. Deckard did not comply. Both Captains had given Deckard direct orders.

74. Once the incident began, it interfered with Steinbergen's duties and may have interfered with staff outside the Captain's office who may have overheard the arguing. Therefore, he violated the policy pertaining to "any other conduct."

75. The manner in which Appellant conducted himself during the incident was not professional. He, therefore, violated the post order pertaining to professional attitude and courtesy.

76. Warden Smith weighed everything. Deckard had been insubordinate and threatened Senior staff. Even had the Warden not considered Appellant's failure to cooperate in the investigation, such would not have changed his decision to terminate Deckard. The incident itself was what was of greatest importance.

77. Appellant's administrative leave began April 17, 2015, up through the May 7, 2015 date of termination.

78. The Appellee closed its case. Appellant made a motion for directed verdict. After having heard the arguments of counsel for both parties, the motion was **OVERRULED**. Appellant then presented his case.

79. The **Appellant, Josh Deckard**, took the stand. Prior to the April 1, 2015 incident, Deckard had some animosity with Senior Captain Mazza. There was an incident in a nursing care facility where he had embarrassed Mazza. An inmate on a hunger strike was being

force-fed. A nurse got too close to the inmate, and Deckard asked her to keep her distance. Mazza told him it was under control, and the inmate said he would comply. Deckard asked if the inmate said he would comply, why was he strapped in a chair and being force-fed? Mazza became upset and stormed off.

80. Senior Captain Mazza has also been named by Mr. Deckard's wife in a recently-filed EEO matter as a principle actor who allegedly discriminated against her.

81. During the April 1, 2015 incident, Mazza, Kessinger, Steinbergen and Deckard had all been yelling. Mazza approached Deckard and said something to the effect, "You need to go on and quit. We know you don't want to be here." Deckard responded, "If I wanted to quit, why am I here standing up for my staff?" Mazza again told him to quit, and said, "You don't have the balls." Deckard replied, "Well, if I don't have the balls, we'll go out in the parking lot and see who don't have the balls." Mazza then stated, "That's all I need boys. Write statements." At that point, Deckard left the office.

82. Upon review of Post Order #1 (Appellee's Exhibit 6), Deckard testified that after getting cussed at, he responded by getting loud and argumentative; that they had all violated this policy. Mazza had poked him in the chest and yelled at him. Kessinger yelled, was irate and upset. Steinbergen did the same, having cursed, argued, and yelled loudly. Deckard also testified that all the actors had violated Post Order #1, Item 17, including himself.

83. With regard to the IA investigative interview, Appellant testified that prior to going into the interview room, he requested the interview be conducted in another room or that he be allowed to sit by the door. He told them he is diagnosed with PTSD and mood disorders, and has problems being in confined spaces.

84. The interview took place in the normal interview room. Present was Appellant, along with Captain Williams and Deputy Warden Coyne. Appellant first asked that there be a witness or EEO Officer present on his behalf. When that request was denied, Deckard requested his attorney be present.

85. Deckard was immediately told by Deputy Warden Coyne that he was on administrative leave, and they walked him out of the room after Captain Williams said he was going to "press charges against [my] ass." This entire incident took no more than ten minutes.

86. Deckard was off work from April 2, 2015, through receipt of the April 7, 2015 letter which then placed him on administrative leave.

87. Appellant's case was closed. The Appellee called no witnesses in rebuttal. The parties waived presentation of closing arguments or submission of briefs.

**FINDINGS OF FACT**

1. Josh Deckard, the Appellant, was a classified employee with status. In early 2015, he was employed by the Justice and Public Safety Cabinet, Department of Corrections, at the Kentucky State Reformatory (KSR) as a Lieutenant. He was the supervisor of the Medical Unit.

2. On April 1, 2015, Appellant was assigned as Security Supervisor to Unit A on the 7:00 a.m. to 7:00 p.m. shift. At about 7:00 p.m., Correctional Treatment Officer Joe Brosky called on the radio and asked for assistance. He required someone to escort a visitor/volunteer who was waiting at Gate 1, to a scheduled AA meeting.

3. Appellant entered the Captain's office and asked Lieutenant Erick Steinbergen (the shift operator) about the escort. Lt. Steinbergen, whose duty included arranging such an escort, replied, "Fuck that guy." Of his own accord, Appellant went to Gate 1 and escorted the visitor/volunteer.

4. Deckard returned to the Captain's office where he and Lt. Steinbergen got into an argument. Their voices were loud enough to be heard out in the hall, when Captain Patrick Kessinger entered. After asking what was going on, Kessinger was advised the argument was about provision of an escort for a visitor. Lt. Steinbergen told Deckard arrangements had already been made. When Kessinger tried to calm Deckard down, Appellant turned his attention to the Captain and became more irate. He asked the Captain, "Why didn't you do it yourself?" Kessinger asked Appellant to leave the room no less than three times. Deckard refused, even when told the State Police would be called if he did not leave.

5. Senior Captain Kevin Mazza then entered the room. When he asked what was going on, Appellant turned his attention to Mazza and started yelling at him. Senior Captain Mazza directed him to calm down. Appellant escalated the matter further. Mazza told Deckard to leave, but Appellant did not. Both got closer to each other physically and continued arguing. Mazza told Deckard to leave no less than five times. At one point, Deckard threatened Mazza, telling him they should take the matter "across the street," meaning off the property to be settled. Appellant testified he told Senior Captain Mazza "if I ain't got balls, then we can go out here and see who ain't got balls." (sic) A short time later, Deckard left the Captain's office.

6. On April 2, 2015, the incident of the prior day was reported to Warden Aaron Smith by Deputy Warden James Coyne and Captain Michael Williams. Warden Smith discussed the matter with the Human Resources Manager and, on April 7, 2015, placed Appellant on administrative leave with pay (Appellee's Exhibit 1). He also ordered an Internal Affairs investigation.



7. Captain Michael Williams, Internal Affairs Supervisor at KSR, conducted the investigation. He requested and reviewed written reports from all persons present during the incident (Appellee's Exhibit 13). He did not receive a report from Appellant. He conducted personal interviews with all witnesses. Prior to beginning Appellant's interview, Deckard requested an EEO official or someone else be present. He was told this was not an EEO matter, and the request was denied.

8. During Appellant's interview, he, as well as Captain Williams and Deputy Warden Coyne, were present. Appellant answered a few preliminary questions, and then requested his attorney be present. Williams turned the recorder off and ended the interview. From that point, neither Deckard nor anyone on his behalf made any contact with Internal Affairs.

9. Captain Williams examined all the information he had gathered. He wrote and submitted to Warden Smith his April 29, 2015 Report of Investigation (Appellee's Exhibit 11). Williams concluded, "...Investigators are able to conclude that Lieutenant Josh Deckard violated CPP policy 3.1 Code of Ethics by his actions displayed on April 1, 2015 therefore this case will be ruled as 'Substantiated.' Based on this misconduct, Investigators were able to obtain a criminal complaint against Lieutenant Deckard via the Oldham County Attorney's Office on April 7, 2015."<sup>2</sup>

10. On April 13, 2015, Appellant was notified of Appellee's intent to dismiss him from his position, based on allegations of misconduct, including the incident of April 1, 2015, and Appellant's alleged subsequent failure to cooperate with the Internal Affairs investigation (Appellee's Exhibit 2).

11. A pre-termination hearing was held on April 24, 2015, in which the participants were the Appellant, his attorney and Warden Smith. On May 7, 2015, Warden Smith issued a letter advising Appellant he was dismissed from duty and pay effective May 7, 2015 (Appellee's Exhibit 3). Due to a typographical error in citation of a date (first paragraph: date changed from April 7, 2015, to April 13, 2015), an amended letter of dismissal was issued May 14, 2015 (Appellee's Exhibit 4).

12. As a result of the April 1, 2015 incident, a criminal complaint was filed by Senior Captain Kevin Mazza against Joshua Deckard in the Oldham District Court. Deckard was charged with the offense of "menacing." Deckard entered an Alford plea and entered a diversion program. The parties stipulated Appellant's diversion began December 2, 2015, and ended June 1, 2016. During such time, Appellant had been barred from any contact with KSR. Upon

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<sup>2</sup> The Appellant was never given notice of any alleged violation of Policy 3.1, Code of Ethics. No such allegation appeared in either the Intent to Dismiss or the two dismissal letters.

completion of the diversion program, the charge was dismissed June 1, 2016 (Appellee's Exhibit 9).

13. During all times relative to the incidents described above, the following policies were in full force and effect:

- Kentucky State Reformatory, Policies and Procedures, Policy No. KSR 03-00-14, Prohibited Employee Conduct, Disciplinary Actions, and Appeal Process (Appellee's Exhibit 5);
- Kentucky State Reformatory, Post Order #1, General Post Order For All Employees (Appellee's Exhibit 6);
- Kentucky Corrections Policies and Procedures, Policy No. 3.1, Code of Ethics (Appellee's Exhibit 7);<sup>3</sup>
- Kentucky Corrections Policies and Procedures, Policy No. 3.23, Internal Affairs Investigations (Appellee's Exhibit 12).

14. During his testimony, Appellant admitted:

- He told Senior Captain Mazza "If I ain't got balls, then we can go out here and see who ain't got balls.";
- "I'm at fault for my actions.";
- He violated Paragraph I(O) of KSR Policies and Procedures, Policy No. KSR 03-00-14 (Appellee's Exhibit 5); and
- He violated Post Order #1, specifically Item 17 (Appellee's Exhibit 6).

15. Appellant timely filed his appeal with the Kentucky Personnel Board.

### **CONCLUSIONS OF LAW**

1. A classified employee with status shall not be dismissed, demoted, suspended or otherwise penalized except for cause. KRS 18A.095(1). Appointing authorities may discipline

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<sup>3</sup> Although the Code of Ethics was in full force and effect at the time of the incident, Appellant was not provided prior notice of a violation of this policy and, therefore, such policy was not considered by the Hearing Officer.

employees for lack of good behavior or the unsatisfactory performance of duties. 101 KAR 1:345, Section 1. At the time of his termination from employment, Appellant, Josh D. Deckard, was a classified employee with status.

2. On May 7, 2015 (Appellee's Exhibit 3), and again on May 14, 2015 (Appellee's Exhibit 4), Warden Aaron Smith authored letters directed to the Appellant advising Mr. Deckard he was officially dismissed from duty and pay effective May 7, 2015. The grounds cited for dismissal were alleged violations of KSR IPP 03-00-14, Prohibited Employee Conduct, Disciplinary Actions, and Appeals Process; Policy and Procedure, I. Prohibited Activities and Conduct, C. "Failure or refusal to cooperate in an investigation into alleged illegal activities or alleged violations of Department of Corrections' rules and regulations without good or sufficient cause;" K. "Failure to obey a properly given order by a supervisor;" and O. "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."

3. It was also alleged Appellant violated Kentucky State Reformatory's Post Order #1, General Post Order for All Employees, B. Purpose, 4. "A staff member shall perform their duties according to the rules and regulations of the institution with a professional attitude;" and KRS 520.060 Promoting Contraband in the Second Degree; and Paragraph 17. "All staff members shall maintain a courteous manner and professional decorum while communicating with supervisory staff, fellow staff members, or visitors." Pursuant to the testimony of Deputy Warden James Coyne, the citation of KRS 520.060 Promoting Contraband in the Second Degree was a mistake, and should not have been included. Therefore, that charge has not been considered herein. Paragraph 17 has been considered as part of this appeal.<sup>4</sup>

4. During the course of his testimony, Appellant admitted: he told Senior Captain Mazza "If I ain't got balls, then we can go out here and see who ain't got balls."; that he himself was "...at fault for my actions."; that he had violated Paragraph I(O) of KSR Policies and Procedures, Policy No. KSR 03-00-14 (Appellee's Exhibit 5), and Post Order #1, specifically Item 17 (Appellee's Exhibit 6).

5. It appears, from a preponderance of the evidence, that Appellant, by his actions exhibited on April 1, 2015, had been insubordinate to Captain Kessinger and refused direct orders from the Captain no less than three times. Furthermore, there is a preponderance of the evidence to show Appellant, on that same date, had been insubordinate to Senior Captain Mazza, refused to obey a direct order from the Captain no less than five times, and physically threatened the Captain. All such actions constituted violations of Kentucky State Reformatory's Policies and Procedures, KSR IPP 03-00-14, Prohibited Employee Conduct, Disciplinary Actions, and Appeals Process; Policy and Procedure, I. Prohibited Activities and Conduct, K. "Failure to obey

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<sup>4</sup> The numbering of paragraphs in Post Order #1 (Appellee's Exhibit 6) was noted at hearing to be confusing.

a properly given order by a supervisor,” and O. “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.” Such conduct also violated Kentucky State Reformatory’s Post Order #1, General Post Order for All Employees, B. Purpose, 4. “A staff member shall perform their duties according to the rules and regulations of the institution with a professional attitude;” and 17. (Page 6 of 7) “All staff members shall maintain a courteous manner and professional decorum while communicating with supervisory staff, fellow staff members, or visitors.”

6. The next matter considered is whether Appellant, by his actions subsequent to the April 1, 2015 incident, failed or refused to cooperate in an Internal Affairs investigation in violation of KSR IPP 03-00-14, I. Prohibited Activities and Conduct, C. “Failure or refusal to cooperate in an investigation into alleged illegal activities or alleged violations of Department of Corrections’ rules and regulations without good or sufficient cause.”

7. When Appellant requested the presence of his attorney during his Internal Affairs interview, the questioning immediately stopped. This was proper in all respects, as Appellant’s request was honored. From that point forward, neither Appellant nor any representative on his behalf made any contact with Internal Affairs. The Internal Affairs investigation continued, without further involvement from Appellant, and resulted in the generation of a report submitted to the Warden. Thereafter, the Warden issued his Intent to Dismiss, and included an allegation of “Failure or refusal to cooperate in an investigation...” as one of the grounds.

8. It is not clear from the evidence whether, at the start of or at any time during the Internal Affairs interview, Appellant was advised that he could refuse to answer any question that would tend to incriminate him, or if he did answer, neither the statements, information nor evidence gained as a result of the statements would be used against him in any criminal proceeding.

9. In *Chavez v. Martinez*, 538 US 760, 768 (2003), Justice Thomas, delivering the opinion for the majority, stated:

“We have also recognized that governments may penalize public employees and government contractors (with the loss of their jobs or government contracts) to induce them to respond to inquiries, so long as the answers illicit (and their fruits) are immunized from use in any criminal case against the speaker. See *Lefkowitz v. Turley*, 414 US 70, 84-85 (1973).”

10. The Court, in the earlier case of *Gardner v. Broderick*, 392 US 273 (1968), stated:

“Public employees may constitutionally be discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunities.”

11. There is no evidence in the case at bar that Mr. Deckard was required to surrender his constitutional immunity or face discharge. The evidence does show that when the Internal Affairs interview was terminated, neither Appellant, nor anyone on his behalf, contacted Internal Affairs to offer cooperation in the investigation, and, Appellee properly did not engage in further attempts to interrogate Appellant. Once the allegation of “Failure or refusal to cooperate in an investigation...” was made a part of the Intent to Dismiss letter, Appellant and his attorney did participate in a pre-termination hearing with the Warden. While the substantive discussions of that pre-termination hearing were not made a part of the evidence here, Appellant was afforded a full and fair opportunity to respond to all allegations, including the “Failure or refusal to cooperate...”. Therefore, inclusion of such allegation as a ground for termination was not improper. The evidence showed Appellant failed or refused to cooperate in an investigation conducted by Internal Affairs, and, therefore, violated KSR IPP 03-00-14.

12. As Senior Captain Mazza did appear and offer his personal testimony at the hearing, the motion to schedule a second day of evidentiary hearing was determined to be **MOOT**.

13. Even if one were to omit consideration of the evidence pertaining to Appellant’s refusal to cooperate in the Internal Affairs’ investigation, Appellee has demonstrated by a preponderance of the evidence that the dismissal of the Appellant from his position as Correctional Lieutenant with the Department of Corrections, Kentucky State Reformatory, effective May 7, 2015, was taken for just cause and was neither excessive nor erroneous. The motion by the Appellee, to toll any back wages that might have been awarded to the Appellant, is deemed **MOOT**.

#### **RECOMMENDED ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Personnel Board that the appeal of **JOSH D. DECKARD V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS, (APPEAL NO. 2015-106)** be **DISMISSED**.

**NOTICE OF EXCEPTION AND APPEAL RIGHTS**

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

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

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

**ISSUED** at the direction of **Hearing Officer Roland Merkel** this 15<sup>th</sup> day of September, 2016.

**KENTUCKY PERSONNEL BOARD**

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

A copy hereof this day mailed to:

Hon. Stafford Easterling  
Hon. Michael Boylan