

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-240

DAYMON DUVALL

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

** **

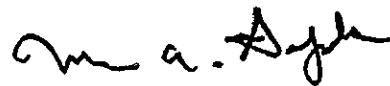
The Board at its regular July 2013 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated June 17, 2013, and being duly advised,

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 16th day of July, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Wesley Duke
Daymon Duvall
Stephanie Appel

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
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DEPARTMENT OF CORRECTIONS,
J. MICHAEL BROWN, APPOINTING AUTHORITY**

APPELLEE

* * * * *

This matter came on for an evidentiary hearing on March 4 and March 5, 2013, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Daymon Duvall, was present at the evidentiary hearing and was not represented by legal counsel. Mr. Duvall was accompanied by Donnie Styles. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Wesley Duke. Also present for the Appellee were Warden Clark Taylor and Paralegal Ann Smith.

BACKGROUND

1. The **Appellant, Daymon Duvall**, filed his appeal with the Personnel Board on October 19, 2012, alleging "retaliation." The Appellant is a Correctional Officer employed at the Kentucky State Reformatory. He stated that while working he was not allowed to go to the emergency room and later learned he had shingles. The Appellant alleged this was retaliation for past grievances and appeals he has filed. He stated that supervisors have told staff and inmates that he is a racist. He has been screamed at, and supervisors have asked him about his appeals at the Personnel Board.

2. Duvall alleges his work assignments have been a part of the retaliation. His current assignment is to work an outside hospital. He stated he is not allowed to work inside the institution, even though he has attempted to obtain a number of positions.

3. Following a pre-hearing conference held on November 29, 2012, the Appellant filed a More Definite Statement of his claims of retaliation. The Agency filed a denial, stating they had not retaliated against the Appellant. This matter was scheduled for an evidentiary hearing. The burden of proof was assigned to the Appellant to establish he had been retaliated against.

4. The Appellant called **Anthony Carter**, a Correctional Officer at the Kentucky State Reformatory as witness. Carter testified that Sergeant Graham stated he heard Duvall was a racist. Carter stated he told him it was not true.

5. The Appellant called **Sergeant Joseph Graham** as his next witness. Sergeant Graham testified he never told anyone that he had heard the Appellant was a racist. Graham stated Lieutenant Banta told him that Duvall was a racist. He stated Lieutenant Hogan and Sergeant Weathers had not. He also stated that CO Carroll said that Duvall was a racist.

6. **Lieutenant Thomas Noonan** said he heard the Appellant verbally express an interest in a position in Dorm Three. He stated that a former officer had quit in Unit A but the position was never re-posted.

7. Noonan reported an incident in Correctional Psychological Treatment Unit (CPTU) in 2012. He did not remember anyone being called a racist or an incident where the radio had to be turned down or rattling of keys.

8. Noonan stated he is very close to Captain Chisholm and considers him a mentor, but they are not friends outside of work.

9. The next witness was **Lieutenant Janie Rochelle Hogan**. She stated she has worked with the Appellant a few times and found him to be argumentative. She stated that an inmate had said that Duvall had called him the "N" word, and this was a particularly dangerous inmate.

10. Hogan stated she watched the video regarding this matter and an incident report was filed. She reported it to the Unit Administrator. Hogan stated that as a result of this incident the Appellant had not worked in CPTU. She did not know the Appellant well enough to state whether he was a racist or not.

11. The next witness called was **Lieutenant Joshua Decker**. He is employed at the Kentucky State Reformatory and is assigned as the Nursing Care Supervisor. Decker stated that at one point he was assigned to Internal Affairs. The Appellant asked him if he recalled the Appellant coming to him with concerns about the inmate in CPTU, and the CPTU staff. The Appellant also asked about reporting Lieutenant Hogan had stated he was a racist. Decker said he did not remember the Appellant reporting any of those things.

12. The Appellant offered the testimony of **Ms. Amy Robey**, Unit Administrator in Unit A at the Kentucky State Reformatory. She stated that in the past she recalled there was a request to remove the Appellant from being assigned to the CPTU. She stated there were reports of the Appellant calling inmates names using racial slurs, and there were several complaints from inmates. She never told the Appellant about these complaints; she simply had him reassigned.

13. Robey testified that the Appellant recently interviewed to work in her dorm and the interview went well. The Appellant was not selected for the position.

14. Robey testified no staff ever told her directly that the Appellant was a racist, and she was aware the Appellant stated the inmates were lying when they complained about him.

15. The Appellant called **Scott Hewitt**, a Correctional Officer at KSR as a witness. Hewitt stated he met the Appellant in Dorm 3. Hewitt wrote a letter requesting to be assigned to work in that dorm and was interviewed for the post. He stated that before the interview there was a discussion regarding the five levels of force, and he could not recall all of them. At this time, Officer Hewitt stated that as of November 16, 2012, he is permanently in Dorm 3 and now has Sundays and Mondays off.

16. Hewitt testified before he interviewed for the position he tried out and worked there in relief.

17. **Sergeant Patricia Weathers** testified she never told Sergeant Graham that the Appellant was a racist.

18. **Sergeant Douglas Webb** testified he is a Certified Emergency Response Team (CERT) team member and he does not have any problems with the Appellant. He was a supervisor over a position in Prison Industries. Although the Appellant applied for the position, he did not interview the Appellant. He stated he does not have to interview everyone, and he went through the applicants. Webb testified he decided who to interview by how well staff got along with inmates, reports on their time and attendance, and what type of experience they had.

19. The Appellant called **Officer Daniel Perkinson**, who testified that he has worked with the Appellant since he started working at KSR. He is not aware of the Appellant being a racist. He testified that inmates are not unhappy working around the Appellant.

20. **Lieutenant Ben Mitchell** testified he is a CERT team member and is assigned to Dorm 3. On September 3, 2012, he testified the Appellant reported he was sick and had bumped his head. He noted red skin and that the Appellant had his head in his hands. He stated there were a rash and a knot on his head.

21. Mitchell stated he did not recall the Appellant telling him he had been to the emergency room. He also did not recall the Appellant specifically asked to go home, that he did not feel good and he did not think he could make it.

22. Mitchell stated he called the captain's office, spoke to Lieutenant Robinson and stated that the Appellant did not feel well. Mitchell stated that Lieutenant Robinson responded they were doing breaks right now, but don't worry about it. Allegedly, Mitchell did not recall saying, "It's your lawsuit, not mine."

23. Mitchell stated he had only been at the Kentucky State Reformatory for one month. He stated he previously worked at Luther Luckett, and the policy was to let an officer return home if they reported they were sick. He stated that Lieutenant Robinson was the Operations Lieutenant that night, and this matter was out of his hands. Mitchell stated he was still learning the job at that time.

24. Mitchell stated they were short staffed that night. Mitchell stated he had no problems with the Appellant's work.

25. **Lieutenant Jonathan Robinson** testified that on September 3, 2012, he recalled Lieutenant Mitchell saying the Appellant was sick and was asking to be sent home. Robinson reported they were short staffed and he could not let anyone go home. He stated there were six call-ins, and they were down a total of seven people on that shift.

26. The Appellant called **Lieutenant Iva Bockman**, who did not testify directly about anything relating to retaliation.

27. The Appellant called **Danny Perry**, a Unit Administrator, at KSR assigned to CPTU. He stated he interviewed the Appellant once over the phone for a position in CPTU. He did not hear Lieutenant Hogan say the Appellant was a racist. Perry testified he prefers to have officers right out of the academy, before they learn bad habits. He stated he was not aware the Appellant had worked in CPTU previously.

28. The Appellant called **Captain Arnold Chisholm**. He is currently assigned to the day shift, although during the events concerning this appeal he was assigned to third shift.

29. Chisholm stated he once spoke to the Appellant about his previous appeal. He testified, "I heard you won, I don't know how you did it. Congratulations."

30. Chisholm testified he was aware the Appellant was assigned to work at University Hospital. He was not aware of an occasion when the Appellant was told to drive back and forth between KSR and the hospital when there was confusion over what post he was supposed to work. He also reported he did not recall staff laughing at him over the incident.

31. Chisholm testified he has never been the Appellant's direct supervisor. He stated he has spoken to officers about issues in their particular assigned post if he is their direct supervisor. He testified he has not singled-out the Appellant to be excluded from this.

32. Chisholm testified that when he works with officers he tries to utilize their strengths. He specifically stated that Lieutenant Noonan was good at cell searches. He would use Lieutenant Noonan when he had a report of contraband being suspected. He stated that Noonan had a good rapport with inmates and was able to calm them down to the point where they would reveal information to him.

33. Chisholm did not recall an incident being called to the Warden's office with Noonan over allegations of excessive force against an inmate. He testified that Noonan advanced from Officer to Sergeant to Lieutenant. He stated that Noonan wanted to learn and did a good job with things he was asked to do.

34. Chisholm testified that as a Captain, he directs officers to their chain-of-command. When he was a Unit Supervisor, he would take officers under his wing and try to assist them in doing a good job.

35. Chisholm did not specifically recall an incident where the Appellant brought him coffee he had found that an inmate had stolen; however, he stated it might not have been a high priority. He stated he did recall an incident where he was watching video regarding possible Oxycontin in the facility. He stated this issue was much more important and part of his job as a Captain is to prioritize. He stated if an inmate had coffee, that would be an issue to be handled within the unit.

36. Chisholm testified that if a situation doesn't work out exactly the way the Appellant wants it to, he always feels that it is retaliation.

37. Chisholm testified he did not tell Lieutenant Noonan not to select the Appellant to be assigned to Dorm 3. He did tell Lieutenant Noonan that he did not think the Appellant was a good fit for Dorm 3. He stated that the Appellant's communication skills are not the best. He stated the Appellant comes across as argumentative and abrasive, and in order to work in Dorm 3 you have to be able to work with people.

38. Although the Appellant has not been permanently assigned to Dorm 3, Chisholm stated he has had the Appellant work there several times. He stated one of the reasons he has placed the Appellant in Dorm 3 is that it is a one-man post. He stated he has received complaints from inmates about the Appellant. He does not receive complaints from other officers when the Appellant is working a one-man post.

39. While working other posts, Chisholm testified he has talked to the Appellant about problems he has heard about from the other officers.

40. Chisholm stated he has not assigned the Appellant to one-man posts in order to isolate him or retaliate against him. He testified he has done this in order to give the Appellant the best chance to succeed and to limit the number of complaints he receives from other officers. Chisholm has received reports from other officers that the Appellant has encouraged them to file grievances against supervisors such as Sergeant Graham. Chisholm stated he chose to handle these matters informally with the Appellant and did not pursue any type of disciplinary action. He saw these as primarily he-said/she-said situations, which were difficult to prove or handle as a specific disciplinary matter.

41. Chisholm testified there are no officers that are guaranteed to work a particular post. He said that even those officers who have an assigned post can be moved from time to time due to institutional needs. He stated the Appellant has never had an assigned post. He testified he has assigned the Appellant to posts such as Dorm 9, Dorm 3, OSP and Outside Hospital. He described all of these as one-man posts which need to be filled. He also testified that his approach is to work with officers and to take corrective action. His goal is not to try to fire officers, but to try and improve them so that they can do a good job.

42. Introduced as an exhibit during Chisholm's testimony was Appellee's Exhibit 1, the shift roster for the Kentucky State Reformatory, 12 to 8 shift on September 3, 2012. This document showed they had five officers working overtime from the second shift. They also had at least seven officers who were new and could not be assigned to work a post alone. He stated that, in addition to regular days off, there were two employees on military leave, five on annual leave, and five on either sick leave or FMLA.

43. Chisholm stated that Lieutenant Robinson approached him and told him they had received a phone call that Officer Duvall was sick and wanted to go home. He did not receive any further details. Based on this information, he could not relieve Officer Duvall. He had already heard that Officer Day wanted to go home sick. Officer Day was eventually allowed to leave after working 3.75 hours. Chisholm testified he could not afford to allow another officer to go home that evening given the amount of staff he had and the posts he needed to man.

44. Chisholm testified that had he been told the Appellant felt like he needed to go to the emergency room, he would have handled it by having medical staff review the Appellant to see if he needed medical attention. He testified he did not take these steps that evening, because all he had heard was the Appellant was sick and wanted to go home. Chisholm testified he was not motivated in any way by retaliation in taking these actions regarding the Appellant.

45. The Appellant Daymon Duvall testified he has been a Correctional Officer at the Kentucky State Reformatory for just short of three years. He stated that in order to prepare his

case and discover what was going on, he spoke to people at work. He mentioned officers, Lieutenant Mitchell and Lieutenant Noonan. He said these individuals told him a number of things and they would not repeat them on the stand.

46. With respect to September 3, 2012, the Appellant testified that before he had went to work that evening, he went to the hospital and had received a pain shot and pain medication. He said he was feeling okay, so he came into work. He met with Lieutenant Robinson before the shift, said that he felt good and would try to work, but that he had been to the hospital earlier, and he may need to go back. He stated Lieutenant Robinson joked, "I need you here, don't go to the hospital."

47. Later while working the shift, the Appellant testified he started to feel bad, and his face actually fell and hit on the table. He stated he was sitting there holding his head when Lieutenant Mitchell came by and asked how he was. He stated Lieutenant Mitchell said, "Damn, look at you." The Appellant stated he went into the restroom, looked into the mirror and saw he had a rash on his face and a knot on the back of his head.

48. When he went back, Appellant told Lieutenant Mitchell he wanted to go to the ER. He was standing while Lieutenant Mitchell called the Captain's office and said the Appellant had a knot on his head and a mild rash. Appellant testified Mitchell stated, "You've got to let him go home." He stated he heard Lieutenant Mitchell say to whoever he was talking to on the phone, "This is your lawsuit."

49. The Appellant learned he was not allowed to leave the facility and stayed the remainder of the day in Dorm 3. He worked 15 minutes overtime. The Appellant claims that as he was walking out at the end of the shift, Sergeant Cross made fun of him and asked him if he was alright because he heard he wanted to go home.

50. The Appellant stated he has learned that complaints have been filed against him for asking for information to help him with his case. He stated he felt he was allowed to do this. He also stated that several Lieutenants and Sergeants volunteered information and were interested in being helpful to him. He stated they came into the hearing and would not say these same things. He specifically mentioned Lieutenant Mitchell as being helpful with respect to evaluations and other issues. He stated he was surprised when Lieutenant Mitchell would not repeat these things when he was testifying.

51. The Appellant stated the same thing regarding hearing people say that he was a racist around the facility. He stated that several people would come to him and tell him this, and they did not back this up when they came to testify. He stated that being labeled a racist is very harmful to a career in Corrections.

52. The Appellant testified regarding an incident where he found an inmate with a stolen jewelry box. He stated he searched the inmate and found marijuana. The inmate acted like he was ready to fight, so the Appellant cuffed the inmate. When Lieutenant Hogan saw that he had cuffed the inmate, she became upset and told the Appellant to leave. Later, he saw the inmate walking back uncuffed.

53. The Appellant testified that he learned a lot from this hearing. He stated he would try to communicate more when he returned to work. He stated he wants to be promoted to Sergeant, and is trying to figure out what he needs to do to accomplish this.

54. The Appellant introduced five exhibits during his case. Appellant's Exhibit 1 was an incident report regarding an inmate who used profanity with the Appellant and interrupted his count. Appellant's Exhibit 2 were certificates of recognition given to Appellant for exemplary performance, outstanding time and attendance and finding institutional home brew in CPTU.

55. Introduced as Appellant's Exhibit 3 were a series of requests from Appellant to be assigned to particular posts.

56. Introduced as Appellant's Exhibit 4 were copies of the Appellant's evaluations. He specifically highlighted comments from his supervisors, stating that he demonstrates team work and works well with other staff.

57. Lastly, introduced as Appellant's Exhibit 5, were hospital bills from Sts. Mary and Elizabeth Hospital. These records demonstrate the Appellant visited the emergency room on September 1, 2012, and received a CAT scan, injections and other treatment on that date. He also returned to the emergency room on September 3, 2012, and received additional treatment. The Appellant testified he was diagnosed with shingles.

58. The Appellee called **Senior Captain Scott Jordan** as its first witness. He has been employed at the Kentucky State Reformatory since July 2012, and has worked in Corrections since 2001.

59. On September 3, 2012, the Appellant called him saying that the previous shift he had worked and was near death and was not allowed to leave work. Jordan asked the Appellant to document his complaint and provide him with any medical documentation. Jordan stated the Appellant sent him an internet page explaining what shingles were. He stated this is not exactly what he needed.

60. Jordan asked the Appellant how he was doing, and the Appellant stated he was fine. Jordan looked into this matter by first checking the shift roster. He noted they had five call-ins, had a number of new employees, and needed all the staff they had at the institution for September 3, 2012. He spoke with Captain Chisholm who stated he had no idea, and did not

hear from the Appellant that evening. Lieutenant Robinson stated he had third-party information that the Appellant did not feel well and wanted to go home. Based on the staffing of the shift that night, they did not feel they could let him go. Jordan stated he would have made the same decision, given the staffing pattern and the information conveyed to Captain Chisholm and Lieutenant Robinson.

61. Jordan testified that supervisors make decisions on assigned posts. He stated they generally review applicants and look for those who are the best fit to work with the staff and inmates in that particular area. He stated that communication is a very big factor.

62. Jordan testified he has not had a lot of direct contact with the Appellant, although he has met with the Appellant when he has had problems. He also sat on interview panels when the Appellant applied for Sergeant approximately three times.

63. The Appellee called **Warden Clark Taylor** as its last witness. Warden Taylor testified that after reviewing the shift roster for September 3, 2012, he felt that security was probably already compromised based on the level of staffing for that night. He stated that KSR is a unique facility in that they house 2000 inmates, including the medical and mental health inmates. He also stated that the staff is responsible for a 40-acre facility. He stated that because it is the medical facility, KSR averages more hospital runs and unscheduled emergency medical runs than any other facility. They operate their own ambulance service. He testified there always has to be enough staff present in order to make an ambulance run. He stated that even if they have to call Oldham County, they still have to use two officers to accompany the outside ambulance service.

64. Given his review, he did not disagree with Captain Chisholm's decision on September 3, 2012, to not allow the Appellant to go home, given what he knew about the situation.

65. Warden Taylor testified there is no right to a particular post. When a post is vacant, it can be posted for applicants who can make a written request. He stated that most supervisors look at issues like time and attendance, the ability to communicate and look for hard workers. Clearly they are looking for an officer who would be well suited to work in that particular area. The Warden testified that certain posts, such as the nursing home, CPTU, and segregation particularly require officers who are level-headed.

66. Warden Taylor testified he is not aware of any retaliation against the Appellant.

67. Although Warden Taylor has only been Warden at the facility since June 1, 2012, he testified this is his third time at the facility and he has previously worked there a number of years.

68. The Warden testified there is no set way to fill a post. He stated he thought the best way would be to review anyone who applies for the position, to talk to their supervisor, and if possible, interview the top candidates. He felt that just selecting someone random to work a particular post or selecting a supervisor's buddy would be inappropriate.

69. In response to a question from the Hearing Officer, the Warden testified that on September 3, 2012, he wished the communication had been better between Officer Duvall, Lieutenant Mitchell, Lieutenant Robinson and Captain Chisholm. He felt that if they had asked a few more questions, the situation might have been handled better.

FINDINGS OF FACT

1. The Appellant, Daymon Duvall, is a Correctional Officer employed at the Kentucky State Reformatory. He has been employed there for approximately three years. (Testimony of Appellant.)

2. The Appellant previously filed an appeal with the Personnel Board from a suspension he received. The Appellant's appeal was sustained, and his suspension was set aside. (Testimony of Captain Arnold Chisholm.)

3. Some of the supervisors the Appellant worked with were aware of his Personnel Board appeal and talked to the Appellant about it. (Testimony of the Appellant and Captain Arnold Chisholm.)

4. Correctional Officers can be assigned to work any post. The assignments are usually made by the Captain's office. Some officers have an assigned post, however, the Captain's office reserves the right to move these officers based on institutional needs. (Testimony of Captain Arnold Chisholm and Warden Clark Taylor.)

5. For the overwhelming majority of the Appellant's career as a Correctional Officer, he has not had an assigned post. While working in the Corrections Psychiatric Treatment Unit and some other posts, the supervisors have received complaints from African-American inmates regarding the Appellant. (Testimony of Amy Robey and Lieutenant Janie Hogan.) Some staff members and at least one supervisor, Lieutenant Banta, have stated the Appellant is a racist. (Testimony of Officer Anthony Carter and Sergeant Joseph Graham.)

6. No testimony was offered that Lieutenant Banta made any decisions regarding the Appellant's employment, such as post assignments.

7. The Appellant has also filed grievances while employed at the Kentucky State Reformatory. (Testimony of the Appellant and Senior Captain Scott Jordan.)

8. No evidence was presented that the Appellant was labeled or called a racist by Lieutenant Banta or anyone else as a result of his previous appeal to the Personnel Board or his previous grievances.

9. The Appellant has filed numerous requests to be assigned to work particular posts. (Testimony of the Appellant, Lieutenant Thomas Noonan, Amy Robey, Sergeant Douglas Webb, Danny Perry, Captain Arnold Chisholm, and Appellant's Exhibits 2 and 3.)

10. These requests have been denied, except the Appellant was selected and assigned to CPTU and SEG Relief in October 2010. He stayed in this post for a brief period of time. (Testimony of Appellant and Appellant's Exhibit 2.)

11. According to policy, there is no set procedure to be used in filling assigned posts. The Appellant has been interviewed for some posts and has not been interviewed for others. The evidence did not establish the Appellant was denied being assigned to any permanent post as a result of his previous Personnel Board appeal or any of the grievances he has filed. (Testimony of Captain Arnold Chisholm and Warden Clark Taylor.)

12. The Appellant was not chosen for posts because he did not have good communication skills and has difficulty working with other officers. The Appellant is viewed by many as being abrasive in how he deals with other staff and inmates. (Testimony of Captain Arnold Chisholm.)

13. On September 1, 2012, the Appellant visited the emergency room at Sts. Mary and Elizabeth Hospital and also had a CAT scan. (Testimony of the Appellant and Appellant's Exhibit 5.)

14. The Appellant was working midnight shift on the morning of September 3, 2012. At the start of his shift, he felt okay, although he had been on pain medication and blood thinners. The Appellant had a brief conversation with Lieutenant Robinson at the start of his shift about his medical condition. (Testimony of the Appellant.)

15. Approximately one hour into his shift, the Appellant began experiencing more symptoms. Lieutenant Mitchell found him sitting at a desk with his head in his hands and asked what was wrong. At that time, the Appellant had a rash and a knot on his head. The Appellant stated he needed to leave the facility to obtain medical treatment. Lieutenant Mitchell called the Captain's office. (Testimony of the Appellant and Lieutenant Ben Mitchell.)

16. Lieutenant Mitchell was talking to Lieutenant Jonathan Robinson in the Captain's office. The message which was understood by Lieutenant Robinson was that the Appellant was sick and wanted to go home. After discussing this matter with Captain Chisholm, Lieutenant

Robinson and Captain Chisholm could not allow the Appellant to go home due to staffing levels. (Testimony of Lieutenant Ben Mitchell, Lieutenant Jonathan Robinson and Captain Arnold Chisholm.)

17. Staffing levels for the third shift were dangerously low on September 3, 2012. The facility had five call-ins, several officers on military leave, sick leave and FMLA. Prior to the Appellant's request, one other officer had been authorized to go home because of illness. He did not leave until after the Appellant's request, although he had already been approved. It is important for the Kentucky State Reformatory to have sufficient staff manning its posts in order to maintain safety and security, and to carry out its mission as the medical and mental health facility for the Department of Corrections. (Testimony of Lieutenant Jonathan Robinson, Captain Arnold Chisholm, Senior Captain Scott Jordan and Warden Clark Taylor and Appellee's Exhibit 1.)

18. The Appellant was denied the opportunity to leave the facility because of staffing levels. There was no testimony that the decision was based in any way on the Appellant's previous appeal or grievances. (Testimony of Lieutenant Jonathan Robinson and Captain Arnold Chisholm.)

19. The communication between the Appellant, Lieutenant Mitchell, Lieutenant Robinson and Captain Chisholm could have been better on September 3, 2012. If the communication had been better, the Appellant might have been examined by medical staff at the Kentucky State Reformatory to see if it was appropriate for him to continue working. (Testimony of Captain Arnold Chisholm and Warden Clark Taylor.)

20. The Appellant was diagnosed with shingles. (Testimony of the Appellant.)

CONCLUSIONS OF LAW

1. Retaliation for filing a grievance is prohibited by 101 KAR 1:375, Section 2(3), which reads as follows, "An employee shall be entitled to file a grievance without interference, coercion, discrimination, or reprisal." Thus retaliation against an employee for filing a grievance constitutes an appealable penalization. KRS 18A.095(24).

2. Although retaliation for filing an appeal with the Personnel Board is not explicitly prohibited by the language contained in KRS 18A and the regulations thereunder, the Board has long held that retaliation for filing an appeal is an appealable action to the Personnel Board.

3. KRS 18A.095(14)(a) allows an employee "who believes he has been discriminated against" to appeal to the Board. The Supreme Court in *Martin v. Corrections Cabinet*, 822 S.W. 2d 858, 860 (Ky., 1992), ruled this provision is broader than the prohibition

against discrimination contained in KRS 18A.095(12), which prohibits discrimination due to race, color, religion, national origin, sex, disability or age. The Kentucky Supreme Court advised in *Martin v. Corrections Cabinet*, 822 S.W. 2d 858, 860 (Ky., 1992), that KRS 18A.095(14) “permits appeals of all forms of illegal discrimination.” The United States Supreme Court, in *Jackson v. Birmingham Board of Education*, 544 U.S. 167, (2005), held that Title IX’s prohibition on discrimination in educational opportunities and programs included claims for retaliations for plaintiffs who had protested and opposed wrongful practices. The Supreme Court stated, “Retaliation is, by definition, an intentional act. It is a form of ‘discrimination,’ because the complainant is being subjected to differential treatment.” Discrimination as used in KRS18A.095(14) is used broadly and covers a wide-range of intentional unequal treatment, including unequal treatment for filing an appeal. This reading of KRS 18A.095(14) is also consistent with the language contained in KRS 61.102, which prohibits reprisal against public employees for disclosure of violations of law.

4. In order to prove retaliation, the Appellant must establish that he engaged in protected activity, that the Appellee knew he had exercised his rights, that the Appellee took an adverse employment action against the Appellant, and there was a causal connection between the protected activity and the adverse employment action. *Kentucky Department of Corrections v. McCullough*, 123 S.W. 3d 130 (Ky., 2003).

5. The Appellant established that he engaged in protected activity by filing a previous appeal to the Personnel Board and by filing grievances while employed with the Appellee.

6. The Appellant proved that some supervisors who made employment decisions knew he had filed an appeal and a grievance.

7. With respect to the claims that the Appellant has been called a racist at the facility, while the Appellant was able to prove that some staff members and at least one supervisor have called him a racist, he has failed to establish that this was an adverse employment action, or that there was any causal connection between his appeals or his grievances and the action of calling him a racist.

8. Although the Appellant does not have a right to a particular post assignment pursuant to Appellee’s policies and 101 KAR 2:095, Section 2(4), the Hearing Officer concludes that the denial of an assigned post could be an adverse employment action. The Appellant’s claim fails, however, in that he was unable to establish a causal connection between the denial of permanently assigned posts to his protected activity of filing an appeal or grievances. Although not required to, the Appellee articulated legitimate, non-retaliatory reasons for its decisions, including the Appellant’s difficulty in communicating with other staff and inmates and his manner, which has come across as abrasive to some. These are legitimate reasons to deny him particular post assignments.

9. The decision on September 3, 2012, to refuse to allow the Appellant to leave the facility and seek medical attention constitutes an adverse employment action. The Appellant's retaliation fails, however, in that he failed to establish any causal connection between his appeal or grievances and this decision. While the communication on September 3, 2012, certainly could have been better, and while in retrospect the Appellant perhaps should have been reviewed by medical staff to see if he should be allowed to leave the facility, the Appellant failed to establish that the decision to not allow him to leave the facility on that occasion was the result of illegal retaliation.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **DAYMON DUVALL V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS, (APPEAL NO. 2012-240)** 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 Mark A. Sipek** this 17th day of June, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day hand-delivered to:

Hon. Wesley Duke
Mr. Daymon Duvall