

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD

JESSE FUSON (APPEAL NO. 2020-051)

AND

NATHAN FUSON (APPEAL NO. 2020-078)

APPELLANTS

VS.

FINAL ORDER SUSTAINING HEARING OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER AS ALTERED

JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS

APPELLEE

* * * * *

The Board, at its regular April 2021 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 9, 2021, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be altered as follows:

A. **Delete** Background paragraph 20 and substitute the following:

20. The Appellee called **Rodney Moore** as its last witness. Mr. Moore is the Division Director of Employee Management for the Justice and Public Safety Cabinet. He previously held a similar position with the Department of Corrections. He testified he was aware of disciplinary actions. Part of his job is to review these actions for consistency and policy violations. He was aware of the allegations against Jesse and Nathan Fuson and that they received a three- and ten-day suspension, respectively. He

testified he believed these suspensions were reasonable. Other employees have been fired for failure to conduct searches of vehicles. He introduced Appellee's Exhibit 22, which was the dismissal of an employee from Western Kentucky Correctional Complex where a failure to conduct a search led to an inmate escape.

B. **Delete** Conclusions of Law paragraphs 2 and 3 and substitute the following:

2. The Hearing Officer concludes that the ten-day suspension of Nathan Fuson was issued for just cause and was neither excessive nor erroneous. The fact that no search was conducted of a van that contained dangerous contraband was sufficiently serious to justify this penalty. KRS 18A.095(1) and (22)(c).

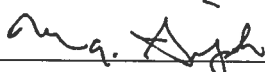
3. The Hearing Officer concludes that the penalty of a three-day suspension was issued with just cause to Jesse Fuson. His conduct of failing to conduct a search of the road crew van that contained contraband was sufficient to justify a three-day suspension especially in light of his previous record of performance. This three-day suspension was neither excessive nor erroneous. KRS 18A.095(1) and (22)(c).

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as Altered, 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 14th day of April, 2021.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
SECRETARY

A copy hereof this day mailed to:

Hon. Erik Carlsen-Landy
Jesse Fuson
Nathan Fuson
Rodney Moore

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD

JESSE FUSON (APPEAL NO. 2020-051)

AND

NATHAN FUSON (APPEAL NO. 2020-078)

APPELLANTS

VS.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS

APPELLEE

* * * * *

These consolidated matters came on for an evidentiary hearing on October 20, 2020, at 9:30 a.m., EST, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Mark A. Sipek, Hearing Officer. The evidentiary hearing was conducted by video teleconference using Amazon Chime. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Nathan Fuson, was present. The Appellant, Jesse Fuson, was not present at the beginning of the proceedings, but joined the proceedings during the testimony of Warden Brandy Harm. The Appellants were not represented by legal counsel. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Erik Carlsen-Landy.

BACKGROUND

1. The Appellant, Nathan Fuson, appealed from a ten-day suspension. The Appellant, Jesse Fuson, appealed from a three-day suspension. The suspensions arose out of the same set of facts, and all parties agreed to consolidate these appeals. The issue for the evidentiary hearing was whether or not there was just cause for the suspensions of the Appellants and whether the penalty was excessive or erroneous. The burden of proof was upon the Appellee and was by a preponderance of the evidence. **The suspension letters are included as Attachment A (Nathan Fuson) and Attachment B (Jesse Fuson) to this Recommended Order.**

2. At the start of the evidentiary hearing, the Appellee made a motion for default judgment for Jesse Fuson's failure to participate; the motion was **DENIED**, with

the possibility of revisiting it at the close of testimony. Jesse Fuson arrived during the evidentiary hearing and the Appellee did not renew the motion for default.

3. The parties waived opening statements.

4. The Appellee called **David Ramsey** as its first witness. Ramsey is a Correctional Lieutenant at Bell County Forestry Camp (BCFC). He was a Sergeant at the time of these incidents. While working as a Sergeant on the midnight shift in the early morning hours of February 4, 2020, Ramsey found contraband in two vans that were used to transport inmate road crews, who would pick up trash on the side of the road.

5. In Road Crew Van #2, Ramsey stated he smelled tobacco immediately. He found tobacco, a backpack with a knife, scissors, and women's underwear. In Road Crew Van #3, he found empty tobacco canisters and bags from pipe tobacco. Ramsey prepared an email to the Warden (Appellee's Exhibit 8) and an Extraordinary Occurrence Report (Appellee's Exhibit 9).

6. Ramsey started the search around 4:50 a.m. and placed the items in the evidence locker around 7:30 a.m. He prepared chain-of-custody reports for items from both vans. (Appellee's Exhibits 10 and 11.) The tobacco, knife, and scissors were considered dangerous contraband. Before the items were placed in the evidence locker, they were locked in the Operations Office, to which Ramsey held the only key.

7. The Appellee called **Deputy Warden Josh Hart**. He testified he was familiar with the contraband that was found and the fact that it was placed in the evidence locker. He believed appropriate action was taken. As Deputy Warden, he was responsible for closing out the report.

8. The Appellee called **Captain David Partin**, who has worked at BCFC for fourteen years. He is responsible for supervising all security staff and also serves as the Internal Affairs Officer. In his role, he has responsibility over the security footage from video cameras at BCFC. Through his testimony, the Appellee moved to admit video of the parking lot showing the Road Crew Vans returning to the facility on Monday, February 3. The entire video was three hours long. There was an eight-minute section that the Appellee viewed as relevant. The Appellant, Nathan Fuson, stated he had not previously reviewed this video. It was not admitted into evidence through Captain Partin's testimony.

9. The Appellee called **Warden Brandy Harm**. Warden Harm is responsible for all operations at BCFC. She is familiar with institutional policies and serves as the

Appointing Authority for the facility. With respect to disciplinary actions, she makes the decisions with consultation with Human Resources.

10. She became aware of the conduct of Jesse and Nathan Fuson when she arrived at the institution. She reviewed the Extraordinary Occurrence Reports prepared by Sergeant David Ramsey. She stated that vehicles should have been searched by the correctional officers when the road crews returned. She stated that the items found - a knife, scissors, and tobacco - are considered dangerous contraband. She stated that inmates often fight over tobacco; the knife and scissors could have been used as a weapon against another inmate, staff, or a member of the public.

11. Warden Harm verified that Jesse and Nathan Fuson were the officers who had these vehicles. She stated they both signed Post Orders indicating they had taken road crews out in vans. She stated they also signed out the vehicles: Nathan signed out the Ford van, which is designated Road Crew Van #2, and Jesse signed out the Chevrolet van, which is designated Road Crew Van #3. (Appellee's Exhibits 17 and 18.)

12. Warden Harm testified that she reviewed the security footage that revealed neither Nathan Fuson nor Jesse Fuson searched the vehicles at all when they returned them to the facility. She stated she could see Sergeant Trey Bolling and Officer Paul Powers. The video showed all these officers were gathered around one of their personal vehicles after they brought the vans back in. There was time to search the vehicles, however, no searches were done. Eventually, Sergeant Bolling came by in a golf cart and took Nathan and Jesse to the Administration Building. After the video was shown and Warden Harm testified about it, the video was admitted into evidence as Appellee's Exhibit 14.

13. The Warden submitted Appellee's Exhibit 15, which was a video of a properly conducted search. She testified that a proper search would involve a search in all compartments, the door area, under the seats, under the mats, and the back compartment. These vans also have a cooler for storing inmate lunches. The cooler should be taken out and searched as well as the area underneath the cooler.

14. Warden Harm also introduced the Post Orders showing that the vehicles must be searched. (Appellee's Exhibit 16.) Item 27 on the Post Orders reads as follows: "Ensure a search is completed of the vehicle daily upon returning to the institution."

15. Employee evaluations for Jesse Fuson and Nathan Fuson show that they are to conduct searches and follow Post Orders. (Appellee's Exhibits 19 and 20.)

16. Warden Harm testified that she issued an Intent to Suspend Nathan Fuson for thirty days. She stated she made this decision based on the type of dangerous

contraband - the tobacco, knife, and scissors - found in his van. After meeting with Nathan, however, she reduced the suspension to ten days. A Notice of Suspension for Nathan Fuson was introduced into evidence as Appellee's Exhibit 3. Warden Harm testified she reduced the suspension to ten days because she was convinced that Nathan Fuson was remorseful, and he understood the seriousness of this incident. She stated these actions are really corrective in nature, and she felt that ten days was sufficient. In his statement, Nathan Fuson admitted he did not conduct the search. (Appellee's Exhibit 12.) Also, in his statement, Nathan Fuson stated he was instructed that he needed to sign his timesheet and clock out. The Warden stated she would have approved any necessary overtime for the search to be conducted.

17. The Warden testified she issued an Intent to Suspend Jesse Fuson for three days. (Appellee's Exhibit 5.) She received a written statement from Jesse Fuson stating he took a glance in the van but did not conduct a thorough search. From the Warden's review of the video, she did not believe he conducted any search. The Warden suspended Jesse Fuson for three days. (Appellee's Exhibit 6.) She felt this was the appropriate action based on progressive discipline. Jesse Fuson had two prior one-day suspensions and two prior written reprimands. (Appellee's Exhibits 21A, B, C, and D.)

18. The Warden believed that the suspensions of Nathan Fuson for ten days and Jesse Fuson for three days were appropriate.

19. On cross-examination, Warden Harm admitted there was a road crew that went out on Friday and the officer involved did not conduct a thorough search. She stated this was addressed with that officer and he also received disciplinary action.

20. The Appellee called **Rodney Moore** as its last witness. Mr. Moore is the Division Director of Employee Management for the Justice and Public Safety Cabinet. He previously held a similar position with the Department of Corrections. He testified he was aware of disciplinary actions. Part of his job is to review these actions for consistence and policy violations. He is aware of the allegations against Jesse and Nathan Fuson and that they received a three- and ten-day suspension, respectively. He testified he believed these suspensions were reasonable. Other employees have been fired for failure to conduct searches of vehicles. He introduced Appellee's Exhibit 22, which was the dismissal of an employee from Western Kentucky Correctional Complex where a failure to conduct a search led to an inmate escape.

21. **Nathan Fuson** testified as the only witness in his case-in-chief. He has been a Correctional Officer at BCFC for eight years. He has never been in any trouble and has had no previous disciplinary action. He stated that when they arrived back with the road crew vans on the afternoon in question, they were rushed by their Captain and Sergeant to sign their timesheets and clock out.

22. Nathan Fuson testified they were short-handed that day and arrived back with the road crew around 2:30 p.m. Normally a supervisor and other officers search the inmates when they return, however, on this date Nathan and Jesse Fuson searched all the inmates themselves. When they were finished, they drove the vans to the parking lot. Captain Fuson told them they needed to sign their timesheets, clock out, and they could not have any overtime. The Sergeant came on the golf cart; they got on and clocked out.

23. Nathan Fuson stated that he always followed Post Orders and always conducted searches. On cross-examination, he admitted that, on this occasion, he did not conduct the searches required by policy.

24. He testified he believed a ten-day suspension was too much. He agreed that he messed up, but he thought he should have received a written reprimand.

25. **Jesse Fuson** was the only witness in his case-in-chief. He testified that he is currently working for the Department of Juvenile Justice as a Youth Worker I. As of February 2020, he was a Correctional Officer at BCFC. He worked there for a total of four and one-half years.

26. Jesse Fuson stated that on February 3, 2020, they were rushed by Captain Fuson and Sergeant Bolling and told they would not receive any overtime. On cross-examination, he admitted he did not conduct the search.

27. Neither Appellant wished to offer a closing argument. Counsel for the Appellee stated that, based on the video, the Appellants had seven minutes to conduct a search before they rode back on the golf cart to the Administration Building.

FINDINGS OF FACT

1. On February 3, 2020, Nathan Fuson and Jesse Fuson were Correctional Officers working at the Bell County Forestry Camp. On that date, Nathan Fuson took out inmates in Road Crew Van #2 to pick up trash along the road. Jesse Fuson took out inmates in Road Crew Van #3 for the same purpose. (Testimony of Nathan Fuson, Jesse Fuson, and Warden Brandy Harm. Appellee's Exhibit 18.)

2. On their return to BCFC, the facility was short-handed, and Nathan Fuson and Jesse Fuson conducted searches of the inmates. Normally, a supervisor and other officers performed these searches. When they had completed the inmate searches, they drove the vans to the parking lot. Captain Fuson told them that they needed to sign

their timesheets, clock out, and they could not have overtime. (Testimony of Nathan Fuson and Jesse Fuson.)

3. Upon their return from parking the vans, neither Nathan Fuson nor Jesse Fuson searched the vans, but walked to one of their personal cars and spent five minutes there until a Sergeant came by in a golf cart to pick them up and take them back to the Administration Building for them to sign their timesheets and clock out. (Testimony of Warden Brandy Harm and Appellee's Exhibit 14.)

4. According to Post Orders, the Appellants were required to search the vans upon their return to the facility. (Testimony of Warden Brandy Harm, Sgt. David Ramsey, and Appellee's Exhibit 16.)

5. The following morning, Sergeant David Ramsey conducted a search of the road crew vans. He found tobacco, a backpack with a knife, scissors, and women's underwear in Road Crew Van #2. He found an empty tobacco canister and bags from pipe tobacco in Road Crew Van #3. Sergeant Ramsey secured these items in the office and, ultimately, in an evidence locker. He prepared an Extraordinary Occurrence Report regarding his findings. (Testimony of Sergeant David Ramsey and Appellee's Exhibit 9.)

6. The facility is equipped with a number of video cameras for security purposes. There is a camera on the parking lot where the vans were parked. The video from February 3, 2020, was entered into evidence. It shows that when Nathan Fuson and Jesse Fuson parked the vans in the parking lot, they did not search the vans and, instead, they walked over to a personal vehicle and were eventually picked up in a golf cart and taken to the Administration Building. According to the videotape, they had at least five minutes to conduct a search of the vans. According to Warden Harm's testimony, a complete and thorough search of the vans might last longer than five minutes, however, they certainly could have performed some type of search in the time they had. (Testimony of Warden Brandy Harm, Appellee's Exhibit 14.)

7. Warden Harm initially issued an Intent to Suspend for thirty days to Nathan Fuson and an Intent to Suspend for three days to Jesse Fuson. She reduced the suspension to ten days for Nathan Fuson. She suspended Jesse Fuson for three days. (Testimony of Warden Brandy Harm and Appellee's Exhibits 1, 4, 5, and 6.)

8. The Hearing Officer finds that the failure to search the road crew vans by Nathan Fuson and Jesse Fuson constitutes misconduct pursuant to 101 KAR 1:345 and subjected them to disciplinary action.

9. The Hearing Officer finds that there was just cause for a ten-day suspension for Nathan Fuson based on his failure to search Road Crew Van #2. The items found in his van - tobacco, a knife, and scissors - constitute dangerous contraband. It was Nathan Fuson's responsibility to locate these items and see they did not remain in this van. This penalty was neither excessive nor erroneous.

10. The Hearing Officer finds there was just cause for a three-day suspension for Jesse Fuson. His failure to search Road Crew Van #3 upon its return to BCFC as well as the fact that an empty tobacco canister and bags from pipe tobacco were located in the vehicle is sufficiently serious misconduct to justify the three-day suspension. This is especially true in light of Jesse Fuson's disciplinary history, which included two previous suspensions and two previous reprimands. This penalty was neither excessive nor erroneous.

11. The Hearing Officer finds credible the testimony from Nathan Fuson and Jesse Fuson that they were rushed by the Captain and Sergeant on duty to quickly park the vans, complete their timesheets, and clock out for the day. If these Appellants had made any effort to search the van, these actions by their supervisors might have mitigated any potential discipline for failing to conduct complete and thorough searches. The Hearing Officer finds that the discipline in these cases was warranted based on the fact that although they had time to conduct a search of the vans, they made no effort to do so. The Agency is cautioned, however, to make sure that supervisors are not discouraging staff from following their post orders.

CONCLUSIONS OF LAW

1. Based on the Findings of Fact, the Hearing Officer concludes that the Department of Corrections carried its burden of proof to establish that Appellants Nathan Fuson and Jesse Fuson committed misconduct when they failed to search the road crew vans upon their return to BCFC. Pursuant to 101 KAR 1:345, this misconduct constitutes just cause for disciplinary action.

2. The Hearing Officer concludes that the ten-day suspension of Nathan Fuson was issued for just cause and was neither excessive nor erroneous. The fact that no search was conducted of a van that contained dangerous contraband was sufficiently serious to justify this penalty. KRS 18A.095(2) and (22)(c).

3. The Hearing Officer concludes that the penalty of a three-day suspension was issued with just cause to Jesse Fuson. His conduct of failing to conduct a search of the road crew van that contained contraband was sufficient to justify a three-day suspension especially in light of his previous record of performance. This three-day suspension was neither excessive nor erroneous. KRS 18A.095(2) and (22)(c).

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeals of JESSE FUSON (APPEAL NO. 2020-051) AND NATHAN FUSON (APPEAL NO. 2020-078) V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS, 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 the Hearing Officer this 9th day of March, 2021.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:
Hon. Erik Carlsen-Landy
Mr. Jesse Fuson
Mr. Nathan Fuson
Hon. Rosemary Holbrook (Personnel Cabinet)

February 19, 2020

Nathan Fuson

Dear Nathan Fuson:

This is to advise you of the intent of the appointing authority to suspend you from duty and pay for a period of ten (10) working days.

Pursuant to KRS 18A.095 you are notified that you are suspended from duty and pay for a period of ten (10) working days, effective beginning of business on **February 23, 2020**, through the close of business on **March 5, 2020**. You are to return to work at your regularly scheduled time on **March 8, 2020**.

Based upon your poor work performance and a search conducted of the road crew vehicle you were responsible for, camera footage, as well as your own admission, and the authority of 101 KAR 1:345, Section 1 and 4, there is reason to believe that this suspension is justified based up the following reason:

— **Recommended Order**
Attachment A —

Appellee Exhibit 3



Kathleen M. Kenney
Commissioner

DEPARTMENT OF CORRECTIONS
Bell County Forestry Camp
560 Correctional Drive
Pineville, Kentucky 40977
Phone: 606-337-7065

Brandy Harm
Warden

Poor Work Performance, Violation of BCFC Post Order 6 (#27), ensure a search is completed of the vehicle daily upon returning to the institution.

Specifically, on February 3, 2020 at approximately 2:30 pm Correctional Officer Nathan Fuson, returned to Bell County Forestry Camp with Road Crew Van #2. Correctional Officer Nathan Fuson did not search Road Crew Van #2. Upon the Road Crew Van #2 being searched by other staff, several dangerous contraband/contraband items were found consisting of knife, scissors, backpack, female underwear and a keister pack of smoking tobacco.

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





Kathleen M. Kenney
Commissioner

DEPARTMENT OF CORRECTIONS
Bell County Forestry Camp
560 Correctional Drive
Pineville, Kentucky 40977
Phone: 606-337-7065

Brandy Harm
Warden

In accordance with KRS 18A.095, you may appeal this action to the Personnel Board within sixty (60) days after receipt of this notice, excluding the date notification is received. Such appeal must be filed in writing using the attached appeal form and in the manner prescribed on the form.

Sincerely,

Brandy Harm, Warden

Attachment: Employee Response Form

Cc: Gerina D. Whethers, Secretary – Personnel Cabinet
Kathleen Kenney, Commissioner – Department of Corrections
Rodney Moore, Director – Division of Personnel
Personnel File





JUSTICE AND PUBLIC SAFETY CABINET

Andy Beshear
Governor

Department of Corrections
P.O. Box 2400
Frankfort, Kentucky 40602
Phone (502) 564-4726
Fax (502) 564-5037
www.kentucky.gov

Kathleen M. Kenney
Commissioner

February 13, 2020

Jesse Fuson

Dear Mr. Fuson:

This is to advise you of the intent of the appointing authority to suspend you from duty and pay for a period of three (3) working days. Pursuant to KRS 18A.095 you are notified that you are suspended from duty and pay for a period of three (3) working days, effective beginning of business on February 17, 2020, through the close of business on February 19, 2020. You are to return to work at your regularly scheduled time on February 20, 2020.

Based upon a search conducted of the road crew vehicle you were responsible for, camera footage, as well as your own admission, and the authority of 101 KAR 1:345, Section 1 and 4, there is reason to believe that this suspension is justified based up the following reason:

Poor Work Performance, Violation of BCFC Post Order 6 (#27), ensure a search is completed of the vehicle daily upon returning to the institution.

Specifically, on February 3, 2020 at approximately 2:30 pm Correctional Officer Jesse Fuson, returned to Bell County Forestry Camp with Road Crew Van #3. Correctional Officer Jesse Fuson did not search Road Crew Van #3. Upon the Road Crew Van #3 being searched by other staff, several dangerous contraband/contraband items were found consisting two smokeless tobacco tubs and one Kentucky Best Bag of smoking tobacco all of which were empty.

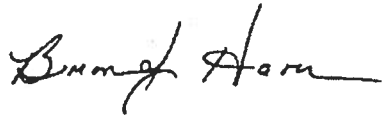
— **Recommended Order**
Attachment B —

Appellee Exhibit 6
An Equal Opportunity Employer M/F/D

For your information, the Kentucky Employee Assistance Program (KEAP) is a voluntary and confidential assessment and referral service for state employees. This service may help you with any personal problems that may be affecting your job performance. KEAP can be reached at (800) 44-5-5327 or (502) 564-5788.

In accordance with KRS 18A.095, you may appeal this action to the Personnel Board within sixty (60) days after receipt of this notice, excluding the date notification is received. Such appeal must be filed in writing using the attached appeal form and in the manner prescribed on the form.

Sincerely,

A handwritten signature in cursive script, appearing to read "Brandy Harm".

Brandy Harm, Warden

Attachment: Appeal Form

Cc: Thomas B. Stephens, Secretary - Personnel Cabinet
Personnel File