

22. Appellee's Exhibit 3 was introduced through the witness and is a copy of the May 29, 2012 notice of intent to demote letter delivered to the Appellant. Warden Meko explained that the letter was drafted by the personnel department at the LSCC and approved by the Division of Personnel in Frankfort. According to Warden Meko, ultimately the decision to demote the Appellant rested on the fact he had let him down and compromised the trust he had placed in him. Importantly, Warden Meko admitted the Appellant's actions were not in violation of Corrections Policy and Procedure 3.1 as alleged in the intent to demote letter.

B. **Delete** Background paragraph 24 and substitute the following:

24. Appellee's Exhibit 5 was introduced through the witness and is a copy of LSCC Policy and Procedure 03-01-01. Warden Meko specifically states that the Appellant's actions were in violation of section K (11) which states:

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

C. **Delete** Background paragraph 33 and substitute the following:

33. At this time, the parties stipulated that Warden Meko had given the Appellant "highly effective" performance evaluations between 2008 and 2012, including the Appellant's interim evaluation performed in February 2008 wherein the Appellant's attempt to disturb the hierarchy of the facility was mentioned.

D. **Add** Conclusion of Law, paragraph 9:

9. The Board concludes that the punishment of demotion of Appellant was excessive and erroneous under the circumstances and that instead of disciplinary action, a corrective action of a written reprimand is the proper remedy for Appellant's behavior. In making this determination, the Board notes that the inappropriate e-mail the Appellant sent was seen only by a high-ranking Corrections official and did not reveal any confidential information. The Board also concludes that the request to not let the Warden know was ill-advised and self-serving, but was not disloyal under all the surrounding circumstances.

E. **Delete** the Recommended Order, and substitute the following:

IT IS HEREBY ORDERED that the appeal of **PAUL HOLBROOK VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2012-156)** be **SUSTAINED to the extent** that the demotion of the Appellant be rescinded, and Appellant be restored to his previous position as Deputy Warden, or a position of like pay and status. The Board further **ORDERS** that Appellant shall be awarded back pay and benefits from the date of the demotion pursuant to KRS 18A.095(22), and to otherwise be made whole. The Appellee shall issue a written reprimand for his poor behavior as demonstrated in the evidence. Further, the Appellee is **ORDERED** to reimburse Appellant for any leave time attending the evidentiary hearing and any pre-hearing conferences at the Personnel Board. [KRS 13B.120, KRS 18A.105, and 200 KAR 12:030.]

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 the Appellant's appeal is **SUSTAINED to the extent** stated above.

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 February, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day mailed to:

Hon. Amber Arnett
Hon. Elmer J. George
Hon. Meredith Booth
Stephanie Appel

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-156**

PAUL HOLBROOK

APPELLANT

VS.

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

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

APPELLEE

*** *** *** *** ***

This matter came on for evidentiary hearing on September 23, 2013, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Geoffrey B. Greenawalt, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Paul Holbrook, was present at the evidentiary hearing and was represented by the Hon. Elmer George and the Hon. Meredith Booth. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and was represented by the Hon. Amber Arnett.

At issue at the evidentiary hearing was the demotion of the Appellant. The burden of proof was upon the Appellee to demonstrate by a preponderance of the evidence that the demotion of the Appellant was neither excessive nor erroneous and was taken for just cause.

BACKGROUND

1. Appellant, Paul Holbrook, was demoted from his position as Deputy Warden to the position of Corrections Program Administrator at the Little Sandy Correctional Complex (LSCC), effective beginning of business July 1, 2012.

2. The Appellant timely filed his appeal of his demotion from Deputy Warden to Corrections Program Administrator with the Personnel Board on July 11, 2012.

3. Prior to going on the record, the parties stipulated as to Joint Exhibit 1, which was so marked and entered, and is a copy of the transcript of the interviews of Paul Holbrook and Kevin Pangburn conducted May 1 and 2, 2012, by James Erwin and Jon Collett.

4. The first to testify was **Mr. Kevin Pangburn** who has been the Director of the Division of Mental Health, Substance Abuse Program, with the Department of Corrections for approximately nine years. He oversees the clinical aspects of the Substance Abuse Programs (SAP) located in various correctional facilities throughout Kentucky. Mr. Pangburn is a licensed mental health therapist and a certified alcohol and drug counselor. He has been with Corrections for twenty-one years and was in the private sector for approximately twelve years.

5. Mr. Pangburn stated that he got to know the Appellant over the years having been introduced to him at various trainings, etc. Appellee's Exhibit 1 was introduced through Mr. Pangburn and is a copy of an e-mail sent by the Appellant and received by Mr. Pangburn on April 27, 2012. As background, Mr. Pangburn explained that LSCC had been chosen to house a new SAP. As Deputy Warden of programming, the Appellant was to be heavily involved with this project. However, the Appellant was out of town when the first meeting regarding the implementation of the SAP was held at LSCC. Appellee's Exhibit 1 was drafted by Mr. Holbrook following his return to work.

6. The subject e-mail speaks for itself. However, what caught Mr. Pangburn's eye and concerned him was that the Appellant asked him to refrain from telling Warden Meko about the e-mail. Mr. Pangburn explained that he had been trained not to keep anything from his superiors and that he did not want to be part of maintaining a secret from the Warden no matter how mundane the issue was.

7. Mr. Pangburn spoke to Warden Meko after receiving the subject e-mail and shortly thereafter, was contacted by Jon Collett to be interviewed in connection with a Professional Standards Unit investigation which had been initiated. [See Joint Exhibit 1.]

8. Mr. Pangburn testified that the Appellant had sent him another e-mail prior to the one marked as Appellee's Exhibit 1 which also asked him to refrain from letting the Warden know about the contents of the same. This e-mail was not produced at hearing.

9. Mr. Pangburn explained that a SAP meeting at LSCC was held on April 20, 2012, while the Appellant was on vacation and thus could not attend. Mr. Pangburn knew the Appellant would be involved with this program. He stated that on or about March 27, 2012, LSCC was first notified it was eligible and in-line for SAP. LSCC was also notified that funding was available to implement this program. As such, the meeting was called to start feeling out the staffing and other issues involved in implementing the same.

10. Mr. Pangburn stated he was only involved with program development and the implementation of the clinical aspects of the same and that he had nothing to do with how monies were to be spent at the facility level. However, Mr. Pangburn did state that whether SAP would pay for the erection of a fence at LSCC was a legitimate question. Finally, Mr. Pangburn stated he did not respond to the Appellant's e-mail marked as Appellee's Exhibit 1 or the prior e-mail which was not produced at hearing. However, following receipt of the e-mail marked as

Appellee's Exhibit 1, he notified his immediate supervisor and forwarded the same to Warden Meko. According to Mr. Pangburn, the fence in question was eventually put in place.

11. The next to testify was **Mr. James Erwin**, the Deputy Commissioner for Adult Institutions with the Department of Corrections. Mr. Erwin's duties included overseeing all institutional operations, medical services, mental health, substance abuse, food services, policy and procedure and the Professional Standards Unit. Mr. Erwin is Warden Meko's immediate supervisor and the Appellant's second-line supervisor. Mr. Erwin explained that the Professional Standards Unit is the Department of Corrections' Internal Affairs operation.

12. Appellee's Exhibit 2 was introduced through Mr. Erwin over the objection of the Appellant. The same is the Professional Standards Unit investigative report prepared in conjunction with the subject incident. Mr. Erwin explained that once he received the Appellant's e-mail in question he forwarded the same to Warden Meko and on down the chain of command as was normal protocol. He also contacted Kevin Pangburn regarding his concerns. Mr. Erwin explained that Warden Meko was not involved in the investigation.

13. Mr. Erwin accompanied Jon Collett, the investigator assigned to this matter, to the interview of the Appellant, because the Appellant was at a higher pay grade than Mr. Collett. Mr. Erwin stated that although he had provided input, the investigative report was drafted by Mr. Collett.

14. Mr. Erwin explained that the Appellant's e-mail presented a problem because the Department of Corrections operates under a very strict chain of command and the e-mail was an example of the Appellant making a request to someone outside the chain of command. Mr. Erwin explained that due to the seriousness and heightened responsibility associated with operating a correctional facility, the Department of Corrections requires a clear flow of operations with no informal decision making.

15. Mr. Erwin testified he had been involved in two previous "chain of command" incidents between the Appellant and Warden Meko. The first occurred in 2008 at a Department of Corrections staff gathering at which time the Appellant approached him and said, "I don't know what we are going to do about this federal warden." Mr. Erwin responded by telling the Appellant his comment was not appropriate. The second incident also took place in 2008. Here, the Appellant spoke to the local County Judge Executive and in addition to disparaging Warden Meko, discussed what his plans would be in the event he was ever appointed to the position of Warden at LSCC. The Appellant objected to this testimony because it involved an incident which occurred some five years previous. This incident is touched upon in the Investigative Report (Appellee's Exhibit 2), and notes that rather than request disciplinary action, Warden Meko handled the matter by counseling the Appellant and referring to the same in the Appellant's first interim performance review dated February 21, 2008. See Appellant's first interim performance review dated February 21, 2008, which is green-tagged in Appellee's Exhibit 2.

16. Once the Investigative Report was complete, it was sent to Warden Meko for possible disciplinary action. Mr. Erwin and the Commissioner also discussed the matter and Mr. Erwin testified he supported the decision to demote the Appellant because the Appellant's actions were not in line with the prison leadership or chain of command. In Mr. Erwin's opinion, progressive disciplinary action was not appropriate in this instance because Warden Meko had already allowed a similar activity to occur back in 2008 and with this being a second similar incident, it was time to remove the Appellant from his prison leadership role.

17. On cross-examination, Mr. Erwin stated that Kevin Pangburn is in charge of SAP for the Department of Corrections and helps coordinate the implementation of these programs throughout the state. As such, he is available to answer certain questions from delegated people in charge of local programs. Mr. Erwin explained that the Appellant got his authority through Warden Meko and was put in charge of SAP at LSCC. However, it was not logical for the Appellant to ask questions directly of Mr. Pangburn regarding the placement of a fence because Mr. Pangburn was clearly outside the chain of command when it came to such operational decisions.

18. Mr. Erwin acknowledged that the alleged conversation he had with the Appellant in 2008 regarding what should be done with Warden Meko was never documented. He also acknowledged that no disciplinary action had been initiated against the Appellant regarding the second incident which occurred in 2008. Mr. Erwin further acknowledged that Warden Meko scored the Appellant as "highly effective" on all his performance evaluations. Finally, Mr. Erwin acknowledged there had been no similar "chain of command" issues between the Appellant and Warden Meko other than the most recent matter and the two incidents which occurred in 2008.

19. The next to testify (on behalf of the Appellant and taken out of order per agreement) was **Ms. Gladys Gilbert**. Ms. Gilbert is a staff nurse at LSCC and has been since its opening in 2005. Ms. Gilbert's only input was that she heard Warden Meko indicate that the Appellant would be checking on how other SAPs ran in other institutions.

20. The next to testify was **Warden Joseph Meko**. Warden Meko has been the Warden at LSCC since September 1, 2007. Warden Meko is the appointing authority at LSCC.

21. Warden Meko explained that when he was first appointed as Warden at LSCC, he inherited the Appellant as his first Deputy Warden over the medical facilities and inmate programming. Warden Meko explained that his working relationship with his first deputy wardens had to be close and required his ultimate trust. According to Warden Meko, running LSCC is an enormous responsibility. Thus his deputy wardens had to be topnotch, be able to take care of business in his absence, and had to keep him informed at all times.

22. Appellee's Exhibit 3 was introduced through the witness and is a copy of the May 29, 2012 notice of intent to demote letter delivered to the Appellant. Warden Meko explained that the letter was drafted by the personnel department at the LSCC and approved by the Division of Personnel in Frankfort. According to Warden Meko, ultimately the decision to demote the Appellant rested on the fact he had let him down and compromised the trust he had placed in him. Importantly, Warden Meko admitted the Appellant's actions were not in violation of Corrections Policy and Procedure 3.1 as alleged in the intent to dismiss letter.

23. Appellee's Exhibit 4 was introduced through the witness and is a copy of the demotion letter dated June 22, 2012. Said letter speaks for itself and notified the Appellant he was being demoted beginning of business July 1, 2012, from his position as Deputy Warden to the position of Corrections Program Administrator.

24. Appellee's Exhibit 5 was introduced through the witness and is a copy of LSCC Policy and Procedure 13-01-01. Warden Meko specifically states that the Appellant's actions were in violation of section K (11) which states:

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

25. Appellee's Exhibit 6 was introduced into the record and demonstrates that the Appellant had received a copy of policy LSCC 03-01-01 back in May of 2007. Finally, Appellee's Exhibit 7 was introduced through the witness and is a copy of the LSCC Conditions of Employment signed off on by the Appellant on May 1, 2007. Specifically, Section 10 was referred to and indicates that the Appellant was responsible for keeping current on policy and procedure.

26. Warden Meko explained that in connection with the implementation of SAP at LSCC, he authorized the Appellant to call Kevin Pangburn to set up visitations at other facilities in order to familiarize himself with how other SAPs ran. He did not authorize the Appellant to formulate an opinion regarding the building of any fence at LSCC.

27. Warden Meko stated that it was not necessarily wrong for the Appellant to be discussing the fence issue with Mr. Pangburn and further explained that he was not tyrannical. He knew that the Appellant had been on vacation and was trying to catch up. However, when the Appellant stated in his e-mail "not to tell the Warden" that constituted a trust issue with him. In other words, it was not because he asked the question of Kevin Pangburn, but because he told him "not to tell the Warden" which caused him concern.

28. According to Warden Meko, during the pre-demotion hearing, the Appellant back-pedaled and said his e-mail contained a typo and should have said "do tell the Warden." The Warden stated that this was the first time the Appellant had raised his "typo" defense and noted that nothing about a typo was mentioned during his interview with Mr. Collett and Deputy Commissioner Erwin. Warden Meko stated that had the Appellant just come to him about any concerns he had with the fence then there would not have been any issue. However, due to the problem he encountered regarding trust back in 2008, Warden Meko did not believe the Appellant's "typo" defense.

29. Warden Meko stated that he has now encountered two trust related issues with the Appellant and that he was not going to allow it to happen three times. He simply no longer wants the Appellant working for him. However, rather than to terminate him, he decided a demotion was proper in this instance because the Appellant still had value as an employee and that ultimately this particular disciplinary action would have the desired effect.

30. On cross-examination, Warden Meko stated that on or about March 27, 2012, the state informed him that LSCC qualified for SAP. Since the Appellant was going to be in charge of SAP at LSCC, he decided to send him out to other facilities to become familiar with the way they ran their SAP. Thereafter, the Appellant informed Warden Meko that there were two ways to go about things. Either separate the SAP inmates physically from the general population or allow them to co-mingle and differentiate them by wearing different color vests. Warden Meko explained that SAP inmates were the "baddest of the bad." He also stated that the higher-ups in Frankfort were the ones who determined which inmates got into these programs. The Appellant and Warden Meko, along with others had talked about utilizing Dorm B at LSCC for this particular program. Building a fence around Dorm B had also been discussed. Since ultimately Warden Meko wanted a fence built around the entire facility, he determined that building a fence around Dorm B would help get that done sooner.

31. Warden Meko opined that a good employee would try to catch up after being on vacation and that he would have expected the Appellant to do the same, but within reason. Warden Meko stated that he had a problem with the Appellant discussing the potential promotion of another employee via e-mail and would have counseled him not to use e-mail for that particular purpose.

32. A pre-disciplinary hearing was held with the Appellant and his attorney at which time the Appellant indicated there were two typos contained in his e-mail. One was the use of "loose" rather than "lose" and the other was it should have said "do tell the Warden" instead of "don't tell the Warden."

33. At this time, the parties stipulated that Warden Meko had given the Appellant "highly effective" performance evaluations between 2008 and 2012, including the Appellant's interim evaluation performed in February 2012 wherein the Appellant's attempt to disturb the hierarchy of the facility was mentioned.

34. Warden Meko's testimony marked the end of the Appellee's case in chief.

35. The Appellant made his motion for a directed verdict. The Appellant noted that his demotion all hinged on one e-mail and that his questions to Mr. Pangburn contained therein were all legitimate. The one hang-up being that said e-mail included the phrase, "Don't let him (Warden Meko) know that I passed this on to you." The Appellant argued that one sentence in an e-mail was not enough to support the decision to demote him and cost him \$5,000 a year in salary. The Appellant further argued that the LSCC policy and procedure cited in the demotion letter never transpired. Rather, the goal in this case was to implement SAP at LSCC and the evidence of record demonstrates that the Appellant never interfered with the same or acted in any way detrimental to such cause. As such, the demotion of the Appellant was both excessive and erroneous.

36. The Appellee responded by noting there were actually two e-mails sent by the Appellant to Mr. Pangburn each requesting that the same not be discussed with the Warden. These e-mails made it look like the Appellant was going behind the Warden's back. As the Appellant was the Warden's right-hand man, who was heavily relied upon, his actions conflicted with an important working relationship that requires both open lines of communication and unquestioned trust. The Appellee also noted that the Appellant had not mentioned his "typo" defense during his investigative interview and that the same only cropped up after he received his intent to demote letter and legal representation was acquired.

37. The Appellant's motion for a directed verdict was **DENIED**.

38. The first to testify on behalf of the Appellant was the Appellant, **Paul Holbrook**. Mr. Holbrook has been with the Department of Corrections for twenty-three plus years, the last five of which at LSCC. He began as a Deputy Warden at LSCC and is now the SAP Administrator at LSCC.

39. Appellant testified that after LSCC had been notified it qualified for a SAP, Warden Meko called a meeting between various department heads, unit administrators, and deputy wardens letting them know the program was going to be implemented. Per Warden Meko's directive, to gain a further operational insight, the Appellant toured several other correctional facilities with SAPs. Prior to the e-mail in question, the Appellant and the Warden talked about segregating SAP inmates from the general population by either building a fence around Dorm B (which is where the SAP inmates at LSCC would be contained) or by having them wear colored jackets to distinguish them. In fact, according to the Appellant it was he who first mentioned the possibility of building a fence to the Warden. According to the Appellant, at the time of the e-mail marked as Appellee's Exhibit 1, the Warden was still studying on the fence question and no decision had been made. Also, prior to the e-mail in question, Warden Meko instructed him to call Kevin Pangburn with any questions he had regarding how other SAPs had been implemented.

40. The Appellant further explained that he e-mailed Mr. Pangburn about the fence and the funding of the same because when he spoke with Warden Meko after he had returned from vacation, specifics were still up in the air, such as the fence funding, and interviewing dates for prospective employees for the new program. The Appellant did not know anything about SAPs and as Mr. Pangburn was the big guy from the state regarding these programs when he thought of SAPs in Kentucky, he thought of Kevin Pangburn.

41. The Appellant testified that he never telephoned Mr. Pangburn. He also stated he could not find any evidence of any other e-mail that he had sent to Mr. Pangburn. The Appellant further testified that the e-mail marked as Appellee's Exhibit 1 contained two typographical errors, the most important of which was that the e-mail should have stated, "Do tell the warden about this" instead of "don't tell the Warden about this." Finally, the Appellant noted that he did not know Mr. Pangburn well enough to entrust him with keeping a secret from the Warden.

42. Appellant's Exhibit 1 was introduced through the record and is a copy of the Appellant's Annual Employee Performance Evaluations for the years 2008 through 2012.

43. The Appellant stated that Warden Meko instructed him to go see Deputy Commissioner Erwin at the central office on May 2, 2012. At that time, Deputy Commissioner Erwin and Jon Collett interrogated him. The Appellant stated that during the interrogation he was nervous and felt intimidated and had no clue why he had been sent there as Warden Meko never mentioned what the meeting was about.

44. The Appellant testified that he stands by his answers contained in the transcript marked as Joint Exhibit 1. It should be noted that during said interview the Appellant never mentioned that his e-mail(s) to Kevin Pangburn contained critical typographical errors. He further never denied that he had sent Mr. Pangburn two e-mails which each contained a request to keep them from Warden Meko. Finally, no specific reason for making the request(s) to keep the e-mails from Warden Meko was ever provided by the Appellant. Instead, the Appellant continued to state that he simply wanted to have a one-on-one conversation with Mr. Pangburn regarding the matters contained in his e-mail(s) and that he had been concerned about the fence matter mainly because it was he who first suggested that a fence be built and he wanted to be sure his suggestion was the right one to make.

45. The Appellant opined that he never discussed anything with Kevin Pangburn that he should not have. He also testified that the SAP was successfully implemented at LSCC on October 1, 2012, and that he continues to meet with Warden Meko regarding the operation of the same about once a month. The Appellant stated he did nothing to disrupt the implementation of the SAP and that he does not keep any information from Warden Meko.

46. On cross-examination, the Appellant admitted that he would like to be a warden one day and that it is a professional goal of his. He admitted to discussing his professional ambition with Commissioner Thompson and explained that since the Commissioner had once been his supervisor, he knew her well enough to divulge the same. As such, the e-mails to Commissioner Thompson contained in Appellee's Exhibit 2 were admitted to by the Appellant. Finally, the Appellant reiterated that he was the first to make the fence recommendation to the Warden, so his e-mail to Kevin Pangburn was to see whether or not he made a bad suggestion. He simply wanted to know.

47. The Appellant marked the end of his case in chief.

48. This matter is governed by KRS 18A.095(1) which states:

A classified employee with status shall not be dismissed, demoted, suspended, or other penalized except for cause.

49. The Hearing Officer has considered the entire administrative record, including the testimony and statements contained therein.

FINDINGS OF FACT

1. The Appellant, Paul Holbrook, was demoted from his position as Deputy Warden to the position of Corrections Program Administrator at the Little Sandy Correctional Complex (LSCC), effective beginning of business July 1, 2012; for conduct in violation of Little Sandy Correctional Complex Policy and Procedure 03-01-01, General Guidelines for LSCC Employees, Item K. [See Appellee's Exhibits 3 and 4.]

2. The Appellant, a classified employee with status, timely filed his appeal with Personnel Board on July 11, 2012, appealing from his demotion as noted above.

3. The Appellant held the position of Deputy Warden at the LSCC on September 1, 2007, when Joseph Meko was appointed as Warden at the facility. According to Warden Meko, his working relationship with his first Deputy Warden had to be close and required the ultimate trust. Further, to facilitate operations, according to Warden Meko and Deputy Commissioner Erwin, the Department of Corrections required strict adherence to the chain of command.

4. In early 2008, Warden Meko discovered that the Appellant and the local County Judge Executive had had a conversation about him as Warden and about how things would change in the event the Appellant was ever appointed as warden at LSCC. Limited details about this conversation emerged at hearing. However, the Appellant admitted to his role in this conversation. Although Warden Meko considered this incident a breach of trust, rather than formally disciplining Appellant, he chose to counsel the Appellant and documented the same in the Appellant's first interim performance evaluation in 2008. [See Appellee's Exhibit 2, at the green tag.]

5. In late March of 2012, LSCC was informed by the Department of Corrections that it had qualified to implement an inmate Substance Abuse Program (SAP) and that the same had been funded.

6. Kevin Pangburn, the Director of the Division of Substance Abuse for the Department of Corrections, oversees the clinical aspects of all SAPS operating under the Kentucky Department of Corrections.

7. Once notified that LSCC would be implementing a SAP, Warden Meko delegated the operation of the soon-to-be program to the Appellant. Warden Meko instructed the Appellant to tour the various facilities throughout the state containing SAPs in order to familiarize himself with how they operated. He further instructed the Appellant to inquire of Kevin Pangburn in the event he had any questions regarding the same.

8. On or about April 20, 2012, Kevin Pangburn came to LSCC to meet with Warden Meko and others at LSCC involved with the implementation of SAP. The Appellant was out of town at that time and could not attend the meeting.

9. Kevin Pangburn testified that he received two e-mails from the Appellant, both of which included requests not to let Warden Meko know that the inquiries contained therein had been made. One such e-mail was allegedly sent prior to April 20, but a copy could not be found and was not produced at hearing. As such the contents thereof remain unknown and have not been established conclusively herein. The second such e-mail was dated April 27 and is marked as Appellee's Exhibit 1.

10. In part of the e-mail marked as Appellee's Exhibit 1, the Appellant essentially put in a good word for an employee he considered to be a qualified candidate for promotion. According to Warden Meko, this in itself was troubling, but he would have handled it by admonishing the Appellant not to communicate this type of information via e-mail. The remaining contents of said e-mail triggered an investigation of the Appellant's conduct by the Department of Corrections, Professional Standards Unit.

11. Therein, the Appellant told Kevin Pangburn that Warden Meko wanted to put up a fence around the outside of Dorm B at LSCC and thought the new SAP would pay for the same. The Appellant then asked Mr. Pangburn if "we wanted to do this?" Finally, the Appellant stated to Mr. Pangburn, "Don't let him know that I passed this on to you."

12. According to Kevin Pangburn, the receipt of two e-mails from the Appellant requesting that he refrain from passing information on to the Warden concerned him. As such, he spoke to his immediate supervisor and the e-mail marked as Appellee's Exhibit 1 was forwarded on to Warden Meko. Within approximately thirty minutes, Deputy Commissioner James Erwin directed that a Professional Standards Unit investigation be undertaken.

13. Jon Collett was assigned to the investigation which eventually lead to his authorship of the investigation summary dated May 3, 2012, and marked as Appellee's Exhibit 2. During the course of this investigation, Mr. Collett and Mr. Erwin had the opportunity to interview both the Appellant and Mr. Pangburn.

14. During his interview, the Appellant did not provide a direct answer as to why he asked Mr. Pangburn to keep his e-mail from Warden Meko. Instead, he repeatedly stated that he just wanted to have a one-on-one conversation with Mr. Pangburn which would remain between the two of them. The Appellant admitted that his requests did not look good, and stated he was not questioning the Warden's authority or his decision regarding the fence, but was simply wondering what Mr. Pangburn thought about it. See Joint Exhibit 1.

15. The Appellant testified that he was the person who first told Warden Meko about the possibility of building a fence around the recreational area adjacent to Dorm B at LSCC and that he never opposed the same. This evidence is found to be credible. According to the evidence at hearing, the SAP at the LSCC was implemented on October 1, 2012, and the fence in question was ultimately built and funded by said program.

16. The Appellant further testified at hearing that the e-mail marked as Appellee's Exhibit 1 contained a critical typographical error, specifically that he intended to write "Do let him know that I passed this on to you" instead of "Don't let him know that I passed this on to you." This testimony is not found to be credible.

17. Warden Meko performed the Annual Performance Evaluations for the Appellant for the years 2008 through 2012, each of which rated the Appellant's performance as "highly effective."

18. At the hearing, the Appellee stipulated that it was not relying upon Corrections Policy and Procedure 3.1 as authority for the demotion of Appellant herein.

CONCLUSIONS OF LAW

1. The Appellant, a classified employee with status, timely filed his appeal with Personnel Board on July 11, 2012, appealing from his demotion as noted above.

2. The Appellant was demoted on the basis that he violated LSCC policy and procedure 03-01-01, item K(11), when he sent the e-mail marked as Appellee's Exhibit 1 to Kevin Pangburn.

3. Regardless of the contents of the offending e-mail, there is clearly no evidence to support an allegation that the Appellant's actions came into conflict with the attainment of the goals and the mission of the Department and LSCC as the subject SAP was implemented successfully at LSCC on October 1, 2012, and the fence, which was the subject of the e-mail (marked as Appellee's Exhibit 1) was constructed and funded out of this program.

4. The preponderance of the evidence supports the allegation that the Appellant's conduct was detrimental to the proper performance of the Appellant's duties as an employee of the Department of Corrections and LSCC.

5. The question thus becomes was the disciplinary action taken against the Appellant excessive or erroneous under the circumstances. Warden Meko and Deputy Commissioner Erwin each opined that the subject disciplinary action was neither excessive nor erroneous given the fact that the Appellant had been counseled regarding trust issues dating back to 2008. According to Warden Meko, the trust in his working relationship with the Appellant has been broken and he no longer wants the Appellant under his direct supervision. Although in a perfect world, Warden Meko would like his deputy warden to be completely loyal and trustworthy, the fact remains that Paul Holbrook works for the Commonwealth of Kentucky and not Joseph Meko. In this instance, by seeking the silence of Mr. Pangburn, the Appellant clearly exercised poor judgment, and damaged his working relationship with his immediate superior. However, moving forward, assuming the Appellant fully respects the Warden's authority and does nothing to purposefully undermine the same, there is no reason these two men cannot work together again.

6. The critical consideration is whether the Appellant's actions were made in disregard of the chain of command or were made in order to undermine the ultimate decisional capacity or authority of Warden Meko. The answer to both questions is no. First, the Appellant did not ignore the chain of command. The questions asked of Kevin Pangburn were both legitimate and properly directed to him given his acknowledged SAP expertise and because Warden Meko himself instructed the Appellant to make use of Mr. Pangburn's expertise. It would appear that someone with Kevin Pangburn's experience has valuable input regarding any aspect of implementing SAP even though he would not have ultimate decisional capacity as it relates to segregating SAP inmates or insuring the security of LSCC. To this end, the Appellant did not seek to undermine the ultimate decisional capacity or authority of the Warden. His offending e-mail was sent before a final decision had been made regarding the building of the fence and other personnel issues and only sought Mr. Pangburn's expert opinion regarding the same. Further, the said e-mail in no way solicits Mr. Pangburn's support in sabotaging any decision of the Warden.

7. Although the Appellant's actions were detrimental to his performance of duties as an employee of the Department of Corrections and LSCC, they were not such that his distinguished twenty-year career path with the Department of Corrections should be ignored.

8. The Appellee has failed to demonstrate by a preponderance of the evidence that the disciplinary action taken against the Appellant, the same being his demotion from Deputy Warden to the position of Corrections Program Administrator at LSCC effective beginning July 1, 2012, was neither excessive nor erroneous and was appropriate under the circumstances.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **PAUL HOLBROOK VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS, (APPEAL NO. 2012-156)** be **SUSTAINED to the extent** and that he be reinstated to his previous position and further awarded lost pay and benefits and that he otherwise be made whole. However, the Appellant shall be suspended from duty and pay for a period of ten (10) days, and any award for lost pay and benefits should be reduced by said ten-day period. Further, the Appellee is ordered to reimburse Appellant for any leave time he used attending the hearing and any pre-hearing conferences at the Board. [**KRS 18A.105, KRS 18A.095(25), and 200 KAR 12:030.**]

NOTICE OF EXCEPTION AND APPEAL RIGHTS

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

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

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 Geoffrey B. Greenawalt** this 5th day
of December, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Elmer George
Hon. Meredith Booth
Hon. Amber Arnett