

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-296, 2017-015 & 2017-016**

FELICIA HOWARD

APPELLANT

VS.

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

**JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS**

APPELLEE

** ** ** ** **

This matter came on for an evidentiary hearing on June 8 and June 30, 2017, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Roland Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Felicia Howard, was present and was not represented by legal counsel. Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Catherine Stevens. Also present was Ms. Elisha Mahoney, Paralegal, and Ms. DeEdra Hart, the Agency representative.

The first issue is whether there was just cause for the Appellee to have placed Appellant on directed sick leave, effective November 1, 2016, and whether such action was excessive or erroneous. Appellant requests a return of those accumulated hours. The burden is on Appellee to prove its case by a preponderance of the evidence.

The second issue is whether the three-day suspension letter of November 21, 2016, as well as the ten-day suspension letter of November 21, 2016, complied with the specificity requirements of KRS 18A.095(8). The burden is on the Appellee to prove its case by a preponderance of the evidence.

The third issue is whether there was just cause for Appellee to have suspended the Appellant for a period of three days, November 28, 2016, through November 30, 2016, from her position as Corrections Unit Administrator I with the Department of Corrections, Green River Correctional Complex, and whether such action was excessive or erroneous. The burden is on Appellee to prove its case by a preponderance of the evidence.

The final issue is whether there was just cause for the Appellee to have suspended the Appellant for a period of ten days, December 1, 2016, through December 14, 2016, from her

position as a Corrections Unit Administrator I with the Department of Corrections, Green River Correctional Complex, and whether such action was excessive or erroneous. The burden is on Appellee to prove its case by a preponderance of the evidence.

The rule separating witnesses was invoked and employed throughout the course of the proceedings. It was agreed any Exhibits that contained the names of inmates were to be sealed in the record as well as the DVD containing testimony. Witnesses would be directed to refer to inmates by their initials. Both parties presented their respective opening statements. By agreement and stipulation of the parties, Appellee's Exhibits 1, 2, and 3 were admitted.

BACKGROUND

1. The first witness for the Appellee was **Tina Moore**. For the past year, Ms. Moore has been employed as a Classification and Treatment Officer (Caseworker) at the Green River Correctional Complex (hereafter "GRCC"). She is trained and acts as a Prison Rape Elimination Act ("PREA") Investigator. PREA is a law passed by the US Congress. Anytime an inmate is involved in sexual contact they, or a third party on their behalf, may report it. If it is reported to a staff member, that staff member must immediately report it to a supervisor. Employees are trained on PREA at the initial academy and then on an annual basis. Informational documents pertaining to PREA are displayed throughout the facility. Sexual contact or abuse is a very serious matter that must be reported. Inmates are also given instructions how to use PREA procedures. She identified Appellee's Exhibit 4 as the pamphlet made available to all, titled "Understanding the Prison Rape Elimination Act (PREA) for Offenders."

2. In October of 2016, she was asked to investigate a PREA situation. When a PREA incident is reported, it goes to Debra Banks, the facility's PREA Coordinator. Ms. Banks then assigns the matter to a PREA Investigator. Banks assigned this matter to Ms. Moore.

3. Felicia Howard, a Corrections Unit Administrator I (CUA), was Ms. Moore's boss. Without going into details, Moore told her boss she had to perform a PREA investigation and view available footage. Keri Vincent was in the room at the time and asked if it was "the incident from yesterday." Vincent then described the situation and told Moore what she knew. Howard was present and also told Moore what she knew.

4. Vincent said inmate H reported the incident. Vincent then got Howard in the room. H said he could not live with another inmate because of a prior PREA issue; in Howard's presence, the inmate made comments about something sexual in the kitchen. Howard had agreed with what Vincent said and added that the inmate said there was something sexual going on in the kitchen.

5. Ms. Moore identified Appellee's Exhibit 5 (sealed in the record) as the October 17, 2016 report she authored following her investigation. On that same day, she delivered the report to Debra Banks. Moore had found insufficient facts to establish a PREA violation; that is, the allegations were unsubstantiated. Ms. Banks, the PREA Coordinator, reviewed what Moore gave her and made an ultimate decision.

6. A staff member who is made aware of a possible PREA incident must immediately notify their immediate supervisor so an investigation may proceed. When Vincent first learned of the matter from the inmate, she had her supervisor, Ms. Howard, come into the room. As Ms. Howard learned about the matter, she was required to report it to her immediate supervisor who would have been Ms. Banks in the Captain's office.

7. On a subsequent day, Howard came in upset about having to write another report about the incident. She said she was not going to write another report and wasn't going to be "manhandled" by Ms. Banks; that she would "knock her on her ass."

8. She identified Appellee's Exhibit 6 (sealed in the record), page one, as the Occurrence Information Report she wrote on October 18, 2016. She read the contents of her report into evidence.

9. Had an inmate told Moore that his roommate was "too touchy," she would ask him to elaborate. "Were we talking about touching his stuff, or touching him personally? There's a difference." One cannot just walk away without asking the inmate to elaborate what he meant by "too touchy". It has to be a sexual matter for PREA policy to apply.

10. **Keri Vincent**, who for the past year has been employed by the GRCC as an Office of Support Assistant, was the next witness. In October of 2016, her supervisor was Felicia Howard.

11. Inmate H had come into the office and told Vincent he could not move into a cell as directed. He had some problems with the other inmate. The other inmate had been making advances toward inmate H in the kitchen. Upon hearing this, Vincent brought Ms. Howard into the room as Vincent thought it was a PREA matter.

12. Inmate H told Ms. Howard the same thing he had told Vincent. The inmate also showed her by making "grabbing motions," stating the other inmate had been trying to grab him while making advances toward him. Inmate H said he did not feel comfortable going into that cell. The inmate and Ms. Howard were communicating the entire time. Howard told the inmate he should talk to UA Mike Robinson, because he was the one who moved the inmate.

13. The following day, Ms. Vincent offered her help to caseworker Moore, the PREA Investigator. Vincent told her about inmate H and his problems with another inmate. Moore asked how she knew about that. Vincent responded that the inmate came to talk to her and Ms. Howard. Moore stated the matter had been assigned to her to investigate. Ms. Howard then entered the room.

14. Subsequently, PREA Coordinator Banks and Lieutenant Gee of Internal Affairs talked to Vincent and Howard about the matter. Vincent told them exactly what she said earlier. The investigators called her in a second time and told her that was not what Ms. Howard told them – that she (Howard) could not hear the inmate. Vincent replied she knew Howard had interactions with the inmate during that conversation.

15. Ms. Banks asked her to submit a written report, which Vincent emailed to Banks. Banks then asked her to sit down and write a more detailed report. Vincent wrote an Occurrence Information Report and gave it to Ms. Banks. She identified Appellee's Exhibit 6, pages 2 through 8 as the emails and reports she wrote and submitted.

16. One day as Vincent had been clocking into work, Ms. Howard appeared. She was upset and said she had to write a report. Howard started talking about Ms. Banks and that she would "whoop her ass if she didn't stop pushing." CTO Penrod came into the room and spoke with Howard. Howard stated Banks did not want to get near her because she would "knock her flat on her ass." She identified Appellee's Exhibit 6, page 9, as the Occurrence Information Report she had written about this incident.

17. The next witness was **Grant Penrod**. For the past three years, Mr. Penrod has been employed by the Kentucky Department of Corrections at GRCC as a Classification Treatment Officer. In October 2016, Ms. Howard was his direct supervisor. He heard her make comments about Debra Banks. He had come into Building E and entered the office. Ms. Howard was on the telephone talking to Ms. Vincent and Ms. Moore. Howard said she could possibly commit an assault against Ms. Banks; that she could "beat Debra Banks' ass." He identified Appellee's Exhibit 6, page 10, as the Occurrence Information Report he completed on October 21, 2016, about this incident. He read that report into evidence. He was subsequently questioned by Lieutenant Gee of Internal Affairs.

18. **Steven Gee**, who for the past week has been employed at GRCC as a Unit Administrator I, was the next witness. For two years prior he had been a Lieutenant serving in Internal Affairs at the institution. Last October he assisted Debra Banks with a PREA investigation. He sat in with her during interviews of Keri Vincent, Tina Moore, and Felicia Howard. He had also been requested by Warden Hart to investigate threatening statements allegedly made by Ms. Howard against Ms. Banks.

19. Mr. Gee interviewed Ms. Howard. The interview was recorded on audio. He recorded all interviews. He then wrote a report which he delivered to Warden Hart. At that time he had examined copies of the Occurrence Information Reports submitted by Howard, Moore, Vincent, and Penrod.

20. He identified Appellee's Exhibit 7 as the audio interview he conducted of the Appellant on October 24, 2016. The audio recording was played during the hearing. During the interview, Ms. Howard is heard to have admitted making the statements to knock someone "on their ass" and to not be "manhandled" by her, but said she did not identify any names and did not know how Ms. Banks could have concluded it was about her. She then admitted she had been talking about Ms. Banks; but she was ranting and upset. She was upset because Banks had interviewed her, then asked for faxes via email, and then the next day requested she write an Occurrence Information Report "...and I was just tired of it." "Let me run my building. I know what goes on down there, they don't... it's like she just swoops in and this is the way it's going to be done... I'm the boss." "It wasted my time, sitting there for 30 minutes writing this Information Report." She was upset "...for the simple fact that she smarted off to me that morning." Howard thought she had been told to go to Banks's office to fill out the report. She went to her office and when Banks walked in Banks said "I said the mailroom." "People just got tired of that smart attitude."

21. When asked during the interview if Howard had any intention of physically harming Ms. Banks, she replied "not here, no." "No, I know my place at work." She did not know whether she would have approached Banks outside on the street. "I won't be talked down to by nobody."

22. During the interview, Gee showed the Occurrence Information Reports written by Moore, Vincent, and Penrod to the Appellant. At the conclusion, he walked with Ms. Howard to Warden Hart's office. At that point, Warden Hart put Appellant on administrative leave. Hart asked Howard if she planned to do any harm to Ms. Banks. Howard stated she did not plan to shoot her.

23. Mr. Gee has known the Appellant for 15 years and had never known her to be dangerous or carry out a threat.

24. **Felicia Howard**, the Appellant, was the next witness. For the past six years she has been employed by the Kentucky Department of Corrections at GRCC as a Unit Administrator I. She had participated in the initial PREA training and then annual training on that subject. She acknowledged that any report to her of circumstances that she felt would be a PREA matter obligated her to make a report. She remembers inmate H had told her he did not want to move in with the other inmate because that other inmate was "too touchy". She did not ask any follow-up questions for clarification. She told inmate H to speak to Mr. Robinson as it

was Robinson and Ms. Banks who arranged for the move. She sent the inmate to a person who was a PREA Investigator. She never told the inmate she was sending him to a PREA Investigator. "A PREA Investigator didn't come into play." She had not sent him to Robinson because he was a PREA Investigator; she had sent him because Robinson had arranged the move. "Never at one point in my head did I think it was a PREA issue."

25. Debra Banks interviewed Ms. Howard and asked her to send an email with the facts. She was later asked to submit an Occurrence Information Report. She identified Appellee's Exhibit 6, page 11, as the October 17, 2016 email she sent to Banks, and page 12 as her Occurrence Information Report.

26. On November 14, 2016, she was given a letter of intent to suspend her for three days as well as a separate letter of intent to suspend her for ten days. She wrote a letter of response to each of those intent letters.

27. **DeEdra Hart**, who has been the Warden at GRCC since August 1, 2015, offered her testimony. Ms. Hart also serves as the Appointing Authority for the institution.

28. PREA is very important. They have a duty to report any sexual harassment or sexual abuse and take immediate action. Staff are trained that once there is a report, to immediately notify a supervisor. "We keep inmates separate and safe until we decide a proper course of action."

29. She identified Appellee's Exhibit 5, pages 3 through 8, as the October 20, 2016 report submitted to her from PREA Compliance Manager Debra Banks. The report pertained to the prior allegations and incidents that followed. She reviewed the report and discussed it with Ms. Howard's supervisor, Deputy Warden Higgs. She determined she would issue disciplinary action.

30. It was Warden Hart, working with Ms. Banks, who ordered reports be submitted on Occurrence Information Report forms, as she did not like information coming to her through a string of emails. She requested, through Banks, that Vincent and Howard submit Occurrence Information Reports to include a full report to her.

31. She also heard about a threat incident. A few days later, she received Occurrence Information Reports from Vincent, Moore, and Penrod alleging workplace violence. The Warden sought guidance from the Personnel Director at Central Office. Thereafter, she launched an Internal Affairs investigation.

32. After Appellant's interview with Lieutenant Gee, the Warden spoke to Howard about the incident and then placed her on administrative leave with pay pending the investigation.

33. She identified Appellee's Exhibit 8, pages 1 and 2, as the October 24, 2016 letter that placed Howard on special leave with pay. She decided to place Appellant on special leave prior to having known the contents of Howard's interview. The Warden did have other Occurrence Reports and knew the investigation had begun.

34. In meeting with the Appellant, Warden Hart explained she was placing her on investigative leave and read the entirety of the letter to her. Howard was asked if she had indeed made the statements. Appellant admitted she did and that those statements were directed towards Ms. Banks. She stated "but I know my place at work, and I wouldn't do anything here." The Warden asked her if it meant Banks needed to fear for her safety outside work. Appellant responded "Well, I'm not going to do anything to her here, but I don't know what I'll do to her if I see her outside of here...well, I'm not going to shoot her."

35. The Warden was surprised to hear what Howard said. She had expected Appellant to say this had been blown out of proportion and she had no intent to cause any harm. Had she said that, the Warden would have considered options other than the suspension.

36. Lieutenant Gee provided the Warden summaries of his four interviews as well as a report. She contacted Department of Correction's Director of the Division of Personnel Services, Rodney Moore, to advise the investigation had been completed. They discussed requiring a Fitness for Duty statement from the Appellant. Mr. Moore instructed the Warden to bring the Appellant off investigative leave and place her on directed sick leave until Appellant could present a Fitness for Duty document signed off by a mental health provider.

37. She identified Appellee's Exhibit 8, pages 4 and 5, as the October 31, 2016 letter to Appellant advising she was being returned from investigative leave and placed on sick leave. She identified pages 6 and 7 as an amended letter, changing only the substantive dates set out in the October 31, 2016 letter. In the amended letter, Appellant was advised that the action was taken based on statements made by her at which time she is alleged to have demonstrated behavior that convinced the Warden that Appellant posed a danger to herself or others. She described that the regulations, 101 KAR 2:102 and 101 KAR 2:095 set out when sick leave is appropriate and addressed the Commonwealth's Workplace Violence Policy.

38. Ms. Howard returned a completed Fitness for Duty form signed by her physician on November 9, 2016 (Appellee's Exhibit 8, pages 8 and 9).

39. On November 9, 2016, Ms. Howard was advised by letter from Rodney Moore, that, effective November 10, 2016, she was removed from sick leave without pay. (Appellee's Exhibit 8, page 10). Warden Hart testified Appellee's Exhibit 8, pages 11 through 16, show the types of leave the Appellant was on during the pertinent time periods.

40. On November 14, 2016, Warden Hart issued and had delivered to Ms. Howard a letter advising of the intent to suspend her from duty and pay for a period of 3 days for allegations of poor work performance and violating PREA policy (Appellee's Exhibit 9, pages 1 through 3) and the intent to suspend her from duty and pay for a period of 10 days for allegations of poor work performance and violation of the Commonwealth's Workplace Violence Policy (Appellee's Exhibit 9, pages 7 through 9).

41. Ms. Howard submitted a written response to each of the intent letters. The Warden read and examined the letters and decided to retain the disciplinary actions of a three-day suspension and a ten-day suspension. On November 21, 2016, Appellant was given notice of the actual three-day suspension as well as the ten-day suspension (Appellee's Exhibit 9, pages 4 through 6, and pages 11 through 13, respectively). She testified inmates are not to touch staff or other inmates. When one says someone is "too touchy" that is a red flag and should prompt staff to obtain more information. She considered "too touchy" to be "PREA words."

42. In handing out the discipline, she considered statements made by Appellant in front of multiple staff; a few days later, in her interview with Lieutenant Gee, Howard stood by her statements that she did not know what she would do to Ms. Banks outside work. Warden Hart felt that there was still intent by Ms. Howard to commit some violence against Ms. Banks. That is why the ten-day suspension was issued.

43. She identified Appellee's Exhibit 10 as Kentucky Corrections Policies and Procedures, (CPP) 14.7, Sexual Abuse Prevention and Intervention Programs. This policy incorporated the Federal PREA law and made it part of policy for the Department of Corrections. It defines "sexual contact" and sets out initial reporting requirements and duties. She believed Ms. Howard violated this policy.

44. She identified Appellee's Exhibit 11 as 101 KAR 2:095, Classified Service General Requirements. She believed Appellant had violated section 9, workplace violence policy.

45. She identified Appellee's Exhibit 12 as 101 KAR 2:102, Classified Leave General Requirements. Section 2(2), Use and Retention of Sick Leave, set out the authority of the Appointing Authority to require the use of sick leave with or without pay by an employee when one or more prerequisites in the regulation have been met. She believed prerequisite number 4 was met and, therefore, placed Appellant on sick leave without pay.

46. The Agency employs progressive discipline. Ms. Howard had a prior one-day suspension. The three-day suspension was issued because of the possibility that by her inaction, Howard placed an inmate in danger. The ten-day suspension was issued due to a threat of violence against a staff member. Both were very serious incidents that justified the length of their respective suspensions.

47. The Cabinet stipulated Appellant had been placed on sick leave without pay. Warden Hart had no knowledge why such sick leave was without pay nor did she know how a decision was made whether sick leave would be with or without pay.

48. The Hearing Officer engaged the parties and counsel for Appellee in a general discussion about the regulation pertaining to directed sick leave. He made it known that, while he had heard testimony about the reasons for placing Appellant on sick leave, he had heard no testimony giving a reason why such sick leave was without pay instead of with pay. As Appellant had requested restoration of the time she was required to use for sick leave, such question required further examination. Counsel for Appellee requested a continuance to have someone testify about that portion of the regulation. The Agency desired to call one additional witness on the sick leave issue raised by the Hearing Officer and to do so on another day. The Appellee had no objection to Appellant presenting evidence out of turn on the first day of hearing.

49. It was agreed a second day of hearing to complete presentation of evidence by the Appellee was necessary. Ms. Howard was given the option to present all, part, or none of her case testimony on the first day, particularly as she had a medical professional present and ready to testify. She chose to elicit her witnesses' testimony on the first day and present her own testimony after completion of Appellee's case. The parties agreed the second day of hearing would commence at 10:30 AM on June 30, 2017. Appellant presented her witness out of turn.

50. The first witness for Appellant was **Pamela Hayes**. Ms. Hayes is a Psychotherapist and a Licensed Clinical Social Worker, employed as a partner in Sabrina L West LCSW Counseling Service. She described her background and experience. She has 13 years in clinical social work and 23 years as a social worker. She obtained her Bachelor's degree in social work from Western Kentucky University and her Master's of Social Work from the University of Louisville.

51. Appellant was referred to her by Appellant's physician in January 2017. At no point in time has Appellant seemed dangerous to Ms. Hayes. Appellant's demeanor, the way she expressed problems, and the way she worked on her depression and anxiety all indicated this. It was Ms. Hayes who diagnosed Appellant with adjustment disorder in reaction to stressful

situations. They are currently in the process of adjusting Appellant's medications. Appellant is not dangerous and has been compliant with all counseling requests.

52. Testimony and evidence was completed for the first day of the evidentiary hearing. It was agreed that the witnesses who testified this day were to be released and excused from day two of the hearing.

53. The first witness on the second day of the evidentiary hearing was **Lesley Bilby**. Ms. Bilby has, since December of 2015, been employed as the Executive Director, Office of Legal Services, Personnel Cabinet. She also serves as General Counsel where she advises on the implementation of KRS Chapter 18A and corresponding regulations including 101 KAR 2:102.

54. In examining Appellee's Exhibit 12, she confirmed that Section 2 pertained to sick leave. Under the regulation, an Appointing Authority may require an employee to take sick leave, particularly if the employee had a communicable condition or there existed a situation that endangered the employee or others.

55. When a decision is made by the Appointing Authority to place an employee on Agency-directed sick leave, the employee, if she has any available leave balances (such as, sick leave, annual leave, or compensatory leave), can use those leave balances in order to be paid during the time of sick leave. If the employee has no available leave balances, she would be on Agency-directed sick leave without pay. Ms. Bilby was not aware of any authority either in KRS 18A or the regulations that would allow an Appointing Authority who places an employee on directed sick leave, to allow continuation of receipt of pay by an employee while not using their own accumulated leave balances.

56. She reviewed Appellee's Exhibit 8, page 4, and gave her opinion that such letter directing sick leave complied with the regulation.

57. If an employee is placed on special investigative leave, the employee is paid without having to use their own leave balances. In the subject regulation, "sick leave with pay" is discussed and described in the "accumulations" section.

58. The next witness was **DeEdra Hart**. Warden Hart had been in the midst of cross-examination at the end of day one of the evidentiary hearing when that hearing was suspended. She was recalled to the stand to continue cross-examination by the Appellant.

59. She identified Appellee's Exhibit 8, page 4, as the letter advising Appellant of the ending of the Investigative Leave and the beginning of sick leave. She identified Appellee's Exhibit 8, page 6, as the November 15, 2016, amended letter advising Appellant of the end of Investigative Leave and beginning of sick leave. She was not sure why the amended letter had

been issued. She believed the first letter, which was issued from the Personnel Office at her institution, after it had been sent on to Mr. Moore, spurred Mr. Moore to advise that such letter should have come from his office. Therefore, the second letter was issued by Mr. Moore and it also changed the ending date of the investigative leave.

60. The Appellee's case was closed.

61. The Appellant, **Felicia Howard**, testified on her own behalf. Ms. Howard has, since November 2011, been employed by the Department of Corrections at the Green River Correctional Complex as a Unit Administrator I.

62. In her testimony, Ms. Howard desired to point out certain contradictions she noted from day one of the hearing and compare same to certain exhibits. She noted that on Appellee's Exhibit 5, page 3, paragraph 1, the individual had been assigned the case on October 13, 2016. She noted that on Appellee's Exhibit 5, page 4, paragraph 1, she herself had never made the statement that she heard the inmate say the other inmate had been touching him in the kitchen. Appellant never knew the inmates had worked together in the kitchen. All she heard in the conversation was the inmate say "he's too touchy." Ms. Howard did not take that statement to rise to the level of a PREA matter because the inmate had never moved in with the other inmate. She sent the inmate to Mr. Robinson and Ms. Banks. Appellant stated that due to her hearing loss, it was possible the inmate had said something about an incident in the kitchen, but she may not have heard it.

63. She believed the three-day suspension should be reversed because of the conflicting statements of Moore and Vincent, and that the Internal Affairs investigation found allegations to be "unsubstantiated" and the inmate had lied. Appellant did not see that matter as a PREA issue because one hears things everyday at work, especially if one is on the yard. Inmates often say "he's touchy" or "I'm not going to live with him." Many inmates' statements are based on what they hear from other inmates. She believed the inmate had just heard something on the yard.

64. She identified Appellant's Exhibit 1 as the November 8, 2016 notes of her visit with her family doctor, Joseph Glenn Harrison, MD. The notes show an October 20, 2015 diagnosis of hearing loss.

65. She identified Appellant's Exhibit 2 as the results of the February 14, 2017 hearing test which confirmed that she needed hearing aids.

66. She identified Appellant's Exhibit 3 as progress notes written by Doctor Harrison pertaining to his exam of Appellant on November 8, 2016, which was prior to her return to work.

67. She believed the ten-day suspension should also be reversed. In her interview with Lieutenant Gee, she admitted she ranted and was upset. She had no intent to harm Ms. Banks. Her own medications had not yet been regulated and she faults her behavior partially to this.

68. Other employees have made similar comments throughout their employment and received no discipline. Lieutenant Gee testified that in the eleven plus years he has known Appellant, she has never given him any reason to think that she would hurt anyone.

69. She believes her sick leave time should be reinstated. She was out and had to use her sick leave balances for November 1, 2, 3, 4, 7, and 9, a total of six days (she was also off work on November 10, but this was by her own choice and she took compensatory leave.)

70. The parties stipulated a Post Order exists that prohibits employees from sleeping at their post and that such infraction could lead to disciplinary action. Appellant testified that one employee she knew slept in class but did not receive any discipline.

71. Ms. Howard did not know why, at the time of her interviews, she never told the Warden or Lieutenant Gee that she would not harm Ms. Banks either at or away from the facility. "The statement I made was 'not here.' Why does it matter on the outside?"

72. The Appellant's case was closed. Appellee offered no further witnesses for rebuttal. The Hearing Officer ordered that the DVD recording of day 2 of the evidentiary hearing also be sealed in the record.

FINDINGS OF FACT

The Hearing Officer makes the following Findings of Fact:

1. Felicia Howard, the Appellant, is a classified employee with status. For the past six years, she had been employed by the Kentucky Department of Corrections at Green River Correctional Complex (GRCC) as a Unit Administrator I. She had participated in initial and annual PREA (Prison Rape Elimination Act) training.

2. Employees of the GRCC receive PREA training at the Training Academy and then on an annual basis. The Kentucky Department of Corrections employs zero tolerance toward all forms of sexual abuse and sexual harassment. Whenever an employee is told by an inmate, or learns there has been a threat of, or actual sexual abuse or sexual harassment, the employee is required to report the matter to their immediate supervisor.

3. In October 2016, inmate H informed Keri Vincent, an Office Support Assistant, that he could not move in and live with a certain other inmate because he was “too touchy” and there had been “something sexual” going on from that inmate when they were previously in the kitchen. Vincent immediately contacted her supervisor, Felicia Howard, and brought her into the room with inmate H. The inmate repeated what he had told Vincent in Howard’s presence. Vincent believed this was a PREA matter.

4. Once a PREA incident is suspected, an employee is required to report it so an investigation may proceed. Appellant did not report the matter to anyone. Instead, she directed the inmate to discuss the matter with the staff member who had moved the inmate: UA Mike Robinson. Howard did not believe the incident was a PREA matter.

5. The matter was determined to have been a PREA incident by others and so it was assigned to Tina Moore, PREA Investigator. After her investigation, she authored a report (Appellee’s Exhibit 5 – sealed in the record) which she tendered to Debra Banks, the facility’s PREA Coordinator. Moore found the inmate’s allegation to be “unsubstantiated.”

6. Prior to receipt of the PREA Investigative Report, Warden DeEdra Hart had received statements about the incident through emails. She directed, through Ms. Banks, that Vincent and Howard each rewrite statements on Occurrence Information Report (OIR) forms. This directive was passed on to Vincent and Howard by Banks.

7. On October 18, 2016, Tina Moore, while in her office, saw Howard enter the office, upset that another written report had been required. In her October 18, 2016 OIR (Appellee’s Exhibit 6 – sealed in the record) Moore reported that Howard had said:

“She better watch her shit. I will knock her on her ass.” “How many times do we need to fill out a statement, if she ask me again I will tell her absolutely not.” “I am not afraid to knock her on her ass, I won’t be manhandled by her.”

8. Also present in the room at that time were OSA Vincent and CTO Penrod. Vincent reported in her OIR (Appellee’s Exhibit 6 – sealed in record) that Howard had said: Banks did not want to keep pushing her as she would knock her on her ass before she knew it.

9. In his OIR (Appellee’s Exhibit 6 – sealed in record), CTO Penrod reported Howard made a comment that she was frustrated with some issue and that she had to do something again; that she made the comment she “could knock Debra Banks on her ass and that she wasn’t going to be manhandled by her.”

10. Warden Hart directed Steven Gee, a Lieutenant in Internal Affairs, to investigate the threatening statements allegedly made by Howard. By this date, Gee had already assisted Debra Banks with the PREA investigation.

11. Gee conducted and recorded an interview with the Appellant (Appellee's Exhibit 7 – sealed in record). On the recording, Howard is heard to have admitted making statements to knock someone "on their ass" and to not be "manhandled". She admitted she had been talking about Ms. Banks, but was ranting because she was upset. When asked if she had any intention of physically harming Banks, Howard replied "not here, no ... no, I know my place at work." She did not know whether she would have approached Banks outside on the street.

12. After interviewing other individuals, Lieutenant Gee wrote and submitted his report to Warden Hart.

13. Ms. Howard testified that when asked by Lieutenant Gee, and separately by Warden Hart, whether she would harm Ms. Banks, she replied "not here." She further testified "Why does it matter on the outside?"

14. Warden Hart testified Howard told her she was not sure what she would do to her (Banks) outside the facility and "I'm not going to shoot her."

15. Warden Hart placed Appellant on administrative leave with pay, effective October 25, 2016, pending the investigation of alleged threatening statements (Appellee's Exhibit 8).

16. Once the investigation was completed, Warden Hart consulted with Department of Correction's Director of the Division of Personnel Services, Rodney Moore. Moore instructed Hart to bring Appellant off investigative leave and place her on sick leave until Appellant could present a Fitness for Duty document signed off by a mental health provider.

17. On October 31, 2016, Warden Hart issued a letter to Appellant advising Howard she was being returned from investigative leave on October 31, 2016 and, effective November 1, 2016, placed on sick leave without pay based on alleged behavior that "... posed a danger to yourself and others." Appellant was required to submit a statement from a "qualified licensed psychologist or psychiatrist" verifying she was fit to return to duty and could perform the essential job functions of her job.¹

¹ It was later determined this letter should have been issued by Rodney Moore. An amended letter dated November 15, 2016, returning Appellant from investigative leave on November 1, 2016, and placing her that same day on sick leave without pay, was issued by Mr. Moore (Appellee's Exhibit 8).

18. Ms. Howard's physician completed the Fitness for Duty assessment after evaluating Appellant on November 8, 2016, and certified she could return to work without restrictions on November 9, 2016 (Appellee's Exhibit 8).

19. By letter of November 9, 2016, Rodney Moore advised Appellant that, effective November 10, 2016, Ms. Howard was removed from sick leave without pay and returned to work, effective November 10, 2016 (Appellee's Exhibit 8).

20. Appellee employs progressive discipline of employees. Appellant had a previous one-day suspension.

21. The parties stipulated to the facts that:

- 1) When Appellant had been placed on sick leave it was sick leave without pay;
- 2) A facility Post Order exists that prohibits employees from sleeping at their post, and that such an infraction could lead to disciplinary action.

22. On November 14, 2016, Warden Hart issued and had delivered to Appellant a letter advising of the intent to suspend her from duty and pay for three days based on allegations of poor work performance and violation of the PREA Policy. Warden Hart issued and had delivered that same day a separate letter advising Appellant of the intent to suspend her for ten days based on allegations of poor work performance and violation of the Commonwealth's Workplace Violence Policy (Appellee's Exhibit 9).

23. Ms. Howard submitted a written response to each letter. After consideration of the response, Warden Hart, on November 21, 2016, issued a letter suspending Appellant from duty and pay for three days, from November 28, 2016, through close of business November 30, 2016, and a separate letter suspending Appellant for ten days beginning December 1, 2016, through close of business December 14, 2016 (Appellee's Exhibit 9).

24. Appellant has documented that since at least October 20, 2015, she has suffered and been diagnosed with hearing loss.

25. At the times of the incidents described above, the following regulations and policy were in full force and effect:

- 101 KAR 2:095. Classified Service General Requirements. Section 9. Workplace Violence Policy (Appellee's Exhibit 11);

- 101 KAR 2:102. Classified Leave General Requirements. Section 2. Sick Leave. (2) Use and retention of Sick Leave. (Appellee's Exhibit 12);
- Kentucky Corrections Policies and Procedures, Policy number 14.7, Sexual Abuse Prevention and Intervention Programs (Appellee's Exhibit 10);
- PREA Standard Section 115(3)(61)

26. Appellant timely filed her appeal with the Kentucky Personnel Board.

CONCLUSIONS OF LAW

1. A classified employee with status shall not be dismissed, demoted, suspended or otherwise penalized except for cause. KRS 18A.095(1). At the time Appellant was placed on directed sick leave, she was a classified employee with status.

2. As defined by the Kentucky Revised Statutes, a "penalization" includes "... any action that diminishes the level, rank, discretion, or responsibility of an employee without proper cause ..." KRS 18A.005(24).

3. Pursuant to 101 KAR 2:102 Section 2(2)(a)(4), Use and Retention of Sick Leave, an Appointing Authority shall grant or may require the use of sick leave with or without pay if an employee [behavior or act] would jeopardize the health of the employee or others at the employee's work station, because of a contagious disease or demonstration of behavior that might endanger the employee or others. The evidence has shown that as a result of Warden Hart making an authorized and lawful request to the Appellant to write an official report of the incident pertaining to inmate H, Appellant became extremely upset. She made physical threats of violence, while at the institution, in the presence of CTO Grant Penrod, Office Support Assistant Keri Vincent, and PREA Investigator Tina Moore. She admitted to Internal Affairs Investigator Lieutenant Steven Gee, that she had been ranting and was upset, and when asked directly by Lieutenant Gee whether she had any intent of physically harming Banks, she replied "Not here, no...no, I know my place at work." She went on to state that she did not know whether she would have approached Banks outside on the street. In a pre-suspension interview with Warden Hart, Ms. Howard stated she was not sure what she would do to Banks outside the facilities and told the warden "I'm not going to shoot her."

4. Such behavior and statements provided more than sufficient cause for the Appointing Authority to require Appellant to be placed on sick leave without pay after having demonstrated behavior that might endanger Ms. Banks. Appellee has shown by a preponderance

of the evidence that there was just cause to have placed Appellant on directed sick leave, effective November 1, 2016, and that such action was neither excessive nor erroneous.

5. Under the requirements of KRS 18A.095(8):

A classified employee with status who is demoted, suspended, or otherwise penalized shall be notified in writing of:

- (a) The demotion, suspension, or other penalization;
- (b) The effective date of the demotion, suspension, or other penalization;
- (c) The specific reason for the action including:
 - 1. The statutory or regulatory violation;
 - 2. The specific action or activity on which the demotion, suspension, or other penalization is based;
 - 3. The date, time, and place of the action or activity; and
 - 4. The name of the parties involved; and
- (d) That he or she has the right to appeal to the board within sixty (60) days, excluding the day that he or she received notification of the personnel action.

6. According to the testimony, and upon the examination of the November 21, 2016 letter informing Appellant she had been suspended from duty and pay for a period of three days, as well as the letter dated November 21, 2016, advising she was suspended from duty and pay for a period of ten days (Appellee's Exhibit 9), Appellee has shown by a preponderance of the evidence that it complied with the specificity requirements of KRS 18A.095(8).

7. The evidence has shown that the Appellee, the Green River Correctional Complex, and all employees thereunder, are required by federal law, as well as internal policy, to report to a supervisor any suspected incidents of sexual contact or sexual harassment of inmates. Such is clearly set out in:

- PREA Standard Sect. 115(3)61: "Staff shall be required to immediately report any knowledge, suspicion, information regarding an incident of sexual abuse."
- CPP Policy No. 14.7, Sexual Abuse Prevention and Intervention Programs, where "sexual contact" is defined as: "... any touching or physical contact of the sexual or other intimate parts of a person ... either directly or through clothing, that is unrelated to official duties or done for the purpose of arousing or gratifying the sexual desire of any person or humiliating, harassing or degrading any person."

And

“If at any time it is learned that an offender is subject to substantial risk of imminent sexual abuse, immediate action shall be taken to protect the offender.”

And

“Staff members shall immediately report all knowledge, suspicion or information of an incident of a sexual offense within a Kentucky or other correctional facility.” “...They shall also report any knowledge of staff who neglects to report the above incidents.” (Appellee’s Exhibit 10).

8. The evidence has clearly shown that in October 2016, inmate H at GRCC, reported to Keri Vincent he could not move in with another inmate as previously ordered, as that inmate had been “too touchy” and made sexual advances towards him while they both had worked in the Kitchen. Vincent followed procedures correctly by finding and bringing Felicia Howard, Vincent’s supervisor, into the room with inmate H. Inmate H reiterated in the presence of both Vincent and Howard what he previously told Vincent. The inmate apparently also made “grabbing motions” of a sexual nature illustrating what had happened.

9. In this appeal, it matters not that the PREA investigation resulted in an “unsubstantiated” finding of the allegations by inmate H. The issue is whether the mere statements by inmate H gave rise to staff members being required to report such allegations to their immediate supervisor. The testimony revealed that if an inmate reports another inmate as being “too touchy”, such words constitute a “red flag,” that PREA policy applies and a report is to be made. In this instance, Felicia Howard was required to report this matter directly to her immediate supervisor. She failed to do so. Instead, she pushed the matter onto others by directing the inmate to speak with the person who had ordered the inmate’s relocation.

10. Appellee has shown by a preponderance of the evidence that it had just cause to suspend the Appellant for a period of three days, November 28, 2016 through November 30, 2016, from her position as a Corrections Unit Administrator I with the Department of Corrections, Green River Correctional Complex, and that such action was neither excessive nor erroneous.

11. The evidence and testimony has also shown that, as a result of the PREA incident, Appellant and others were required to submit written reports of their observations. Appellant admitted during the hearing, as well as during the Internal Affairs investigation, that she had been angry with Debra Banks, had ranted, and did make statements about knocking Ms. Banks “on her ass.” When asked directly by Warden Hart (and previously by Lieutenant Gee) whether she had any intention to do harm, instead of directly stating that she would not harm Ms. Banks, she made statements that led others to believe that violence would not occur at the facility, but that she was unsure what she would do if she met Ms. Banks outside on the street. She then added the comment that she would not “shoot her.”

101 KAR 2:095. Classified Service General Requirements.
Section 9. Workplace Violence Policy.

- (1) Workplace violence shall be prohibited and shall include:
 - (a) The attempted, threatened, or actual conduct of a person who endangers or is likely to endanger the health and safety of state employees or the general public; or
 - (b) A threatening statement, harassment, or behavior that gives a state employee or member of the general public reasonable cause to believe that his health or safety is at risk.
- (2) Examples of prohibited workplace violence shall include:
 - (a) Threats of harm;
 - (b) Brandishing or displaying a weapon or an object that looks like a weapon in a manner that would present a safety risk to a state employee or a member of the general public or threatens or intimidates them;
 - (c) Intimidating, threatening, or directing abusive language toward another person, either verbally, in writing or by gesture;
 - (d) Stalking;
 - (e) Striking, slapping, or otherwise physically attacking another person; or
 - (f) Disobeying or failing to follow the reasonable directive of a supervisor to take action or cease actions that create a risk to the health or safety of a state employee or the public or threatens or intimidates them.
- (3) Violation of this section shall constitute grounds for disciplinary action and referral for criminal prosecution.

12. The evidence has shown that her words, the behavior exhibited by Appellant, and her evasive statements during the investigation and in meeting with the Warden, all gave reasonable cause for the Appointing Authority to institute disciplinary action for the Appellant's behavior and threats. Appellee has shown by a preponderance of the evidence that it had just cause to suspend the Appellant for a period of ten days, December 1, 2016 through December 14, 2016, from her position as a Corrections Unit Administrator I with the Department of Corrections, Green River Correctional Complex, and that such action was neither excessive nor erroneous.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **FELICIA HOWARD VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NOS. 2016-296, 2017-015 & 2017-016)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

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

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

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

ISSUED at the direction of **Hearing Officer Roland Merkel** this 5th day of September, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Amy Barker
Ms. Felicia Howard