

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-021**

RICHARD A. LYONS

APPELLANT

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

**EDUCATION AND WORKFORCE DEVELOPMENT CABINET,
THOMAS O. ZAWACKI, APPOINTING AUTHORITY**

APPELLEE

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

This appeal came on for an evidentiary hearing on September 10, 2013, at 9:30 a.m., ET, at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Roland Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment as authorized by virtue of KRS Chapter 18A.

The Appellant, Richard A. Lyons, was present and not represented by legal counsel. The Appellee, Education and Workforce Development Cabinet, was present and represented by the Hon. Rosemary Holbrook. Also present as the agency representative was Mr. Mark White.

The Appellant has appealed the disciplinary action taken against him in the nature of a three-day suspension. Subsequently, the parties entered into a Stipulation As To Facts, which had been filed with the Personnel Board on March 28, 2013. Due to the stipulations agreed to by the parties, the issue in this case has been narrowed. The Appellee is required to prove, by a preponderance of the evidence, that the three-day suspension of Appellant from January 16, 2013, through January 18, 2013, from the position as Maintenance Superintendent I in the Division of Administrative Services, Facilities Management Branch, was neither excessive nor erroneous.

The rule separating witnesses was invoked and employed throughout the course of the proceedings. The parties each waived presentation of an opening statement.

BACKGROUND

1. The first witness called by the Appellee was **Captain Richard LeMay**, who, for the past seven years, has been employed as Deputy Jailer of the Franklin County Regional Jail. He serves as Chief Deputy, Director of Service Operations, and Director of Government Services Provider (GSP). In the GSP program, the Jail provides inmate labor to various state agencies and LeMay served as the program's liaison. The GSP program saves state agencies thousands of dollars on an annual basis through the provision of inmate labor.

2. Routine inspections are conducted of the job sites where inmates provide such labor. On October 23, 2012, an inspection was conducted at the Workforce Development Cabinet site of 601 East Main Street, Frankfort, Kentucky. During the inspection, certain contraband was found, to wit: cigarette rolling machine, cigarette rolling paraphernalia, and several adult magazines. The contraband was found in a bathroom used by inmates. Inmates were present on the premises when the contraband was found. Captain LeMay identified Appellee's Exhibit 1 as a photograph of the seized contraband materials.

3. Mr. Brian Easton, Assistant Director of Workforce Development, provided Captain LeMay copies of completed questionnaires Easton had handed out to Cabinet employees who worked at 601 East Main Street. Appellant was among the supervisors working at that location. Captain LeMay concluded that GSP supervisors had not properly monitored inmate labor. Inmates were inappropriately given access to contraband material. As a result, this worksite was suspended from participation in the GSP program.

4. The next witness was **Mr. Mark White**, Director of Human Resources for the Education and Workforce Development Cabinet. He is the designated Appointing Authority for the Cabinet.

5. The GSP program benefits the Cabinet financially due to the low cost of inmate labor. The Regional Jail conducted an inspection on October 23, 2012, at the 601 East Main Street site, and found contraband. A questionnaire had been handed out to Cabinet employees at that site to determine if they had knowledge of such contraband. Mr. White identified Appellee's Exhibit 2 as the questionnaire which had been completed and signed by Appellant on October 31, 2012.

6. On November 16, 2012, Mr. White interviewed the Appellant. During that interview, Appellant stated he indeed had known about the contraband, and had brought the adult magazines to the worksite. Appellant indicated he answered, "No" to all questions on the questionnaire because it was none of their business for purposes of the investigation.

7. The Cabinet employs a progressive disciplinary policy. Mr. White considered Appellant's spotless employment record of service to the Cabinet, which spanned more than 24 years. He reviewed prior, similar incidents for which disciplinary action had been issued, but found no prior incidents had the same combination of violations and outcome as this matter. He noted that possession of pornography on the worksite had, in the past, resulted in the termination of employees. After such consideration, Mr. White determined a three-day suspension without pay was appropriate.

8. White concluded a three-day suspension was proper based on the facts of the incident, Appellant's Lack of Good Behavior, Unsatisfactory Performance of Duties, and violations of the Workforce Development Cabinet's policy on Discriminatory Harassment, Section V, Policy, and Section VI, Procedures, A. Prohibited Behavior, (4). (Appellee's Exhibit 4.) Furthermore, Appellant had misled individuals during the course of the investigation, by having given false answers in the questionnaire (Appellee's Exhibit 2). Based on the above and foregoing, Mr. White authored and signed the January 16, 2013 letter, which notified Appellant he had been suspended from duty and pay for a period of three work days (Appellee's Exhibit 3).

9. Mr. White identified Appellee's Exhibit 5 as an acknowledgement by Appellant that Appellant had attended sexual harassment prevention training and received a copy of the Cabinet for Workforce Development's Harassment Policy. The acknowledgement was signed December 11, 2000.

10. This incident had received publicity through published articles that appeared in the February 3, 2013 State Journal (Appellee's Exhibit 6) and on-line at Kentucky.com (Appellee's Exhibit 7).

11. The first witness for the Appellant was the **Appellant, Richard Lyons**. Appellant is employed by the Education and Workforce Development Cabinet as a Maintenance Superintendent I at 601 East Main Street, Frankfort, Kentucky. He has

been so employed since 1995, and has been a State employee for nearly 25 years. With the exception of the current incident, Appellant has had no prior disciplinary action.

12. As part of his training, Appellant engaged in GSP Supervisor's Training, as evidenced by his Certificate of Achievement issued March 1, 1995 (Appellant's Exhibit 1).

13. Appellant admitted he was wrong in having the adult magazines at the worksite. The magazines were kept in a basement bathroom, which was accessible to the GSP inmates, as well as to the male and female employees of the Cabinet. However, he contends that due to his devotion to his employer and his prior spotless record, the discipline should have been something less than a three-day suspension. He suggested perhaps a letter be placed in his personnel file.

FINDINGS OF FACT

1. The Appellant, Richard A. Lyons, is employed by the Education and Workforce Development Cabinet, as a Maintenance Superintendent I. His workstation is at 601 East Main Street, Frankfort, Kentucky. He was so employed on or about October 23, 2012, and had been so employed since 1995.

2. The Education and Workforce Development Cabinet (Cabinet) participates in the Government Services Provider Program (GSP). In that program, the Franklin County Regional Jail provides inmates who perform labor services for the Cabinet. Such inmate labor results in an annual cost savings in labor to the Cabinet.

3. Agency worksites which participate in the GSP are subject to routine inspections. Such an inspection was conducted on October 23, 2012, at the Cabinet's site of 601 East Main Street, Frankfort, Kentucky. During that inspection, certain contraband was found, to wit: cigarette rolling machine, cigarette rolling paraphernalia, and several adult magazines. The contraband was found in a bathroom used by inmates and accessed by male and female employees of the Cabinet.

4. During the October 23, 2012 inspection, Sgt. Justin Muravchick confiscated the following magazines considered contraband at the 601 East Main Street facility:

- a. Rock Star Magazine: Issue Date: 08/2007
- b. Cheri Magazine: Issue Date: 07/1993
- c. Swank Magazine: Issue Date: 09/1993
- d. Penthouse Magazine: Issue Date: 04/2008
- e. Genesis Magazine: Issue Date: Holiday, 1994
- f. High Society Magazine: Issue Date: 07/1993
- g. Coming Attractions Magazine: Issue Date: 10/2009
- h. Club Confidential Magazines: Issue Dates: 04/1993, 07/1993, 06/2009
- i. Hustler Magazines: Issue Dates: 01/2004, 12/2008, 04/2009, 07/2009, 08/2009, 10/2009, 12/2009
- j. Playboy Magazines: Issue Dates: 03/2009, 04/2009, 05/2009, 06/2009, 08/2009, 09/2009, 10/2009, 05/2011
- k. Barely Legal Magazines: Issue Dates: 03/2009, 04/2009, 05/2009, 06/2009, 09/2009, 10/2009, 11/2009, 12/2009

5. Following confiscation of the contraband, the Franklin County Regional Jail personnel began an investigation into the incident.

6. Mr. Mark White, on behalf of the Cabinet, required Cabinet employees at such worksite to provide written answers to a questionnaire. The questionnaire was completed by the Appellant, who answered in the negative to all three questions listed thereon (Appellee's Exhibit 2). By his answers, Appellant denied having any knowledge about the contraband found at 601 East Main Street, or that he had observed inmates with any contraband in their possession, or that he knew how such contraband came to be located on this State property.

7. Mr. White interviewed the Appellant on November 16, 2012. Appellant then stated he indeed knew about the contraband, and that it was he who had brought the adult magazines to the worksite over the course of several years.

8. As a result of the existence of such contraband, the Cabinet was suspended from participation in the GSP program.

9. The incident received widespread publicity via publication on the front page of the February 3, 2013 State Journal (Appellee's Exhibit 6) and on-line through Kentucky.com (Appellee's Exhibit 7).

10. From and since May 11, 2000, the Cabinet has had in full force and effect its policy on Discriminatory Harassment (Appellee's Exhibit 4). Appellant stipulated as part of his employment he received training on the Cabinet's policy on Discriminatory Harassment on December 11, 2000, and at that time received a copy of the Cabinet's Harassment policy.

11. Appellant stipulated that by bringing the contraband items to a state government facility where he was employed, he had violated the Cabinet's policy on Discriminatory Harassment, Section V, as well as Section VI(a)(4).

12. Appellant stipulated he violated the Cabinet's policy on Discriminatory Harassment and misled officials from the Franklin County Regional Jail during the course of an investigation regarding the contraband found at his worksite.

13. The Cabinet employs a progressive disciplinary policy. Prior to this incident, Appellant had no disciplinary action. Mr. Mark White, Director of Human Resources for the Cabinet, considered Appellant's spotless employment record of service to the Cabinet, and compared this incident to similar prior incidents. While he noted that past possession of pornography by employees on the worksite has resulted in termination, due to Appellant's spotless record, he determined a three-day suspension without pay was appropriate.

14. On January 15, 2013, Mr. White authored and signed a letter which was delivered to the Appellant, notifying him he had been suspended from his position of Maintenance Superintendent I in the Division of Administrative Services, Facilities Management Branch, for a period of three work days, from Wednesday, January 16, 2013, through Friday, January 18, 2013 (Appellee's Exhibit 3).

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

CONCLUSIONS OF LAW

1. A classified employee with status shall not be suspended, except for cause. KRS 18A.095(1). Appointing Authorities may discipline employees for Lack of Good Behavior, or the Unsatisfactory Performance of Duties. 101 KAR 1:345, Section 1. A suspension shall not exceed 30 days. 101 KAR 1:345, Section 4(1).

2. The Cabinet issued Appellant a three-day suspension by letter of January 15, 2013 (Appellee's Exhibit 3). That suspension was based on two separate violations of the Cabinet's policy on Discriminatory Harassment (Appellee's Exhibit 4), the negative publicity received by the Cabinet (Appellee's Exhibits 6 and 7), and the fact the Appellant had lied to authorities during the course of the investigation by having provided false answers to the Cabinet questionnaire (Appellee's Exhibit 2). Rather than termination for such an offense, Mark White considered Appellant's prior spotless employment record over the course of many years with this Cabinet, and concluded a three-day suspension was appropriate.

3. The Appellee has shown by a preponderance of the evidence that the three-day suspension of Appellant from January 16, 2013, through January 18, 2013, was neither excessive nor erroneous. Such disciplinary action in the nature of a three-day suspension was proper.

RECOMMENDED ORDER

The Hearing Officer hereby recommends to the Personnel Board that the appeal of **RICHARD A. LYONS V. EDUCATION AND WORKFORCE DEVELOPMENT CABINET**, (APPEAL NO. 2013-021) be **DENIED** and **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the

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


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

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

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

ISSUED at the direction of **Hearing Officer Roland Merkel** this 3rd day of October, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Rosemary Holbrook
Mr. Richard Lyons