

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2014-313

SANDRA MCKINNEY

APPELLANT

VS. FINAL ORDER  
SUSTAINING HEARING OFFICER'S  
FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND RECOMMENDED ORDER

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

APPELLEE

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The Board at its regular October 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated August 21, 2015; Appellant's motion to reconsider, Appellee's response to Appellant's motion to reconsider, oral arguments on the motion, Appellant's exceptions; Appellee's response to exceptions, and being duly advised,

**IT IS HEREBY ORDERED** that the Appellant's motion to reconsider is **DENIED**.

**IT IS FURTHER ORDERED** that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be, and they hereby are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **DISMISSED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

**SO ORDERED** this 14<sup>th</sup> day of October, 2015.

KENTUCKY PERSONNEL BOARD

  
MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Edward Baylous  
Hon. David O. Suetholz  
Hon. Devon Oser  
Bobbie Underwood

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DEPARTMENT OF CORRECTIONS,  
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**APPELLEE**

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This matter came on for an evidentiary hearing on June 18, 2015 at 9:30 a.m., at the office of the Personnel Board, 28 Fountain Place, Frankfort, Kentucky before the Hon. Darren L. Embry, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Sandra McKinney, was present at the evidentiary hearing and was represented by the Hon. David O. Suetholz and the Hon. Devon N.R. Oser. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Edward A. Baylous.

This matter involves whether Appellant's termination for the unauthorized administration of prescription drugs to a co-worker was excessive or erroneous. The parties provided several documents in support of their positions, which were introduced as Exhibits.

The burden of proof was placed upon Appellee to establish just cause for Appellant's dismissal and to show that the penalty was neither excessive nor erroneous.

**BACKGROUND**

1. Appellant, Sandra McKinney, was employed by the Appellee, Justice and Public Safety Cabinet, Department of Corrections, as a Nurse Service Administrator when she was terminated. The Appellee issued an intent to dismiss letter on October 24, 2014. A letter dated October 28, 2014 notified Appellant of her termination.

2. Appellant filed a timely appeal on December 1, 2014. Appellant admitted to giving a Nurse Practitioner a steroid shot. She indicated that the Nurse Practitioner possessed prescribing authority, and that she issued the shot at his direction. Appellant highlighted her otherwise excellent job performance, and lack of a disciplinary record. She argued that Appellee should have utilized progressive discipline in her case.

3. Prior to the hearing, Appellant filed a *Motion for Pre-Trial Conference and Request for Sanctions for Witness Tampering through Intimidation*. This Hearing Officer determined that the matter would be best addressed during testimony and that the hearing should proceed as planned. The Appellant withdrew the motion after questioning Warden Alan Brown on cross-examination.

4. Appellant requested that the parties stipulate that any witness in this proceeding be protected from retaliation for testifying. The Appellee acknowledged that the request is a correct iteration of the law. The Hearing Officer ruled that both parties should be aware of witness protection laws, but that no stipulation would be issued.

5. The Appellant, **Sandra McKinney**, was called as the first witness in the Appellee's case-in-chief. She administered Depo Medrol to Ernest Morris in July 2014. Mr. Morris was not an employee of the Department of Corrections. He worked for Correct Care Solutions, a contract company that works for the Commonwealth of Kentucky. Mr. Morris did not write an order for the injection. The medication belonged to the Kentucky Department of Corrections. She did not recall whether the medication had been inventoried. Appellant never told anyone about administering the injection when it occurred.

6. Both Mr. Morris and Susan Gee, another Correct Care employee, were terminated due to this incident.

7. The Appellant is licensed by the Kentucky Board of Nursing. She is under investigation by the Board of Nursing for administering an injection without a signed order. Appellant indicated that before meeting with the Board of Nursing on April 2, 2015, she did not know that physicians could not write their own prescriptions. She had seen physicians write orders for themselves in the past.

8. The Appellant is trained in state disciplinary procedures. She went to supervisor trainings that focused on progressive discipline. She indicated that except for situations which result in harm or a danger to individuals, progressive discipline should be employed. In her position, she would recommend discipline for employees. The recommendation then went to the Warden for approval. Appellant recalled recommending disciplinary action for a Nurse in her department that had given out a narcotic without an order for the prescription. Before termination, the Nurse had received verbal warnings, written warnings, and a suspension.

9. The Appellee called **Warden Alan Brown** as its next witness. Warden Brown started with the Department of Corrections in 1988 as a Correctional Officer. He served in numerous positions before being promoted to Warden.

10. The Appellee introduced Appellee's Exhibit 1. The document consisted of a memorandum written by Warden Brown following an interview he did regarding the alleged injection incident. The memorandum was written on the day of the interviews and prepared in accordance with his duties.

11. Warden Brown testified regarding the approximate one-month delay from the date of the incident until the imposition of disciplinary proceedings. The afternoon before the interview, Warden Brown received a phone call from his immediate supervisor, Deputy Commissioner James Erwin, informing Warden Brown that he [Erwin] had received a report from Correct Care about the injection incident. Mr. Morris had reported the incident to Correct Care. Due to the serious nature of the allegations, Warden Brown handled the interview personally.

12. Warden Brown next turned to his discussions with Appellant regarding the incident. He indicated Appellant never stated to him that she administered the injection to help workforce productivity. Appellant stated to Warden Brown that it was to prevent Mr. Morris from having to travel to his hometown in order to receive the medication. Warden Brown indicated Appellant gave the injection to help Mr. Morris, as a friend.

13. The Appellee introduced Appellee's Exhibit 2, consisting of a pre-termination letter given to Appellant following the incident. This letter served as notice to Appellant of her impending termination. Upon receiving the letter, she requested a meeting with Warden Brown. According to Warden Brown, during the meeting, Appellant asked to have her termination postponed until she would be eligible for retirement benefits.

14. The Appellee introduced Appellee Exhibit 3. This document consists of the final notice provided to Appellant of her termination. The letter indicated Appellant would be terminated for poor work performance, specifically for administering a Depo Medrol injection to a fellow staff member. According to the letter, this violated the Department's Code of Ethics which prohibits using supplies of the Commonwealth for private purposes. Warden Brown testified that the letter was an accurate representation of his reasons for terminating Appellant. He felt termination was appropriate in this particular case due to the clear violation of the Code of Ethics. Warden Brown discussed his training regarding progressive discipline. He indicated an incident should be taken "as is," or based on the particular circumstances. Given this standard, Warden Brown maintained this particular incident required a severe punishment due to its nature.

15. On cross-examination, Warden Brown testified regarding his conversations with Ruth Rust. He went to Rust in private, to let her know that she could travel with him to the hearing, and that the hearing would be on company time rather than requiring Rust to use personal leave from work. Warden Brown indicated that he did not attempt to intimidate the witness and that Rust would not be subject to reprisal for testifying.

16. Warden Brown testified that he was aware Mr. Morris had the authority to write orders for prescription injections to another person. The Medical Department is able to give Tylenol to the medical staff.

17. In considering what punishment to impose, Warden Brown discussed the Appellant's work history with her immediate supervisor. He found that Appellant had no prior disciplinary history. When making a decision, he considered both the disciplinary history and the severity of the incident. Warden Brown did not examine her previous performance

evaluations. Prior to this incident, he found Appellant to be a cordial and knowledgeable employee who went by the rules.

18. Warden Brown testified as to why he believed Appellant's administering the shot to be a self-serving act. Mr. Morris' absence would have caused a hardship in the department. Warden Brown had observed Mr. Morris and Appellant behaving as friends. Appellant never expressed to him that she administered the shot for the greater good of the institution for which she was employed. The fact that she supposedly gave the shot for this reason would not have changed the fact that Appellant violated the Code of Ethics by using state property for an unauthorized purpose. Warden Brown stated that his decision would not have changed had Appellant actually given the injection for the greater good of the institution.

19. Appellant called her first witness, **Ruth Rust**. Ms. Rust is a nurse that worked with Appellant for approximately 15 years. Appellant acted as Ms. Rust's supervisor for some time. Ms. Rust did not recall any incidents of Appellant being unethical. She would trust Appellant to work with patients again were she reinstated.

20. On cross examination, Ms. Rust testified that she did not know whether doctors or nurse practitioners could write prescriptions for themselves.

21. Appellant next called **Dr. Jean Hinkebein** to testify. Dr. Hinkebein has been a psychologist for approximately 20 years. She worked very closely with Appellant in the medical department at Green River for eight years. Dr. Hinkebein described Appellant as an outstanding nurse who knew her regulations and ethics.

22. Dr. Hinkebein left the Department of Corrections after an investigation by the Department. Despite the investigation, she resigned from the department in good standing. Dr. Hinkebein indicated that her personal conflicts with her former employer did not color her testimony.

23. **Appellant** retook the stand to testify. She testified regarding her duties as a Nurse Services Administrator. This included overseeing the department and making sure they followed American Correctional Association (ACA) guidelines and policies set out by the state. She again emphasized her training in progressive discipline.

24. Appellant received strong performance evaluations, and promotions due to her work record, evidenced by her personnel files presented in Appellant's Exhibits 1-6. Appellant became certified as an Auditor for the ACA in 2014. She went to prisons in Kentucky to help facilitate compliance for audits.

25. Testimony turned to the department's policies on giving medication to employees. According to Appellant, the Warden condoned giving over the counter medications to staff. This policy allowed all able bodies to remain on post. Appellant administered the injection because Mr. Morris had indicated he would need two days off work to go to his doctor and receive the medication, and she wanted to prevent this. The department had become behind in physicals, so she wanted to keep inmate care up and running and prevent further delay. She gave Mr. Morris

the injection without knowing of any specific authority by the department that would allow her to do so.

26. Appellant testified regarding the shot she administered. The injection she administered, a Depo Medrol shot, is a fast-acting steroid that does not provide any "high." It is used to decrease muscle inflammation. The retail value for 80 milligrams of Depo Medrol is \$30.99.

27. Appellant attended training held by the state for new supervisors. She received training in the factors one should consider in arriving at a disciplinary recommendation. The training did not include that a discipline decision should be consistent for similar infractions.

28. Prior to the incident involved in this case, Appellant's supervisor had previously come to her and asked her to prescribe antibiotics. Appellant did not provide the antibiotics and reported the incident to the Warden.

29. Appellee recalled **Warden Brown**. He testified regarding his training on disciplinary determinations. The training did not provide that performance evaluations should be considered in administering discipline. He indicated training should be consistent for similar types of infractions. This ensures everyone is treated fairly.

#### **FINDINGS OF FACT**

1. The Appellant, Sandra McKinney, appeals from a termination rendered due to her administration of a Depo Medrol injection to a fellow staff member without a medical order or prescription.

2. The Appellant admitted to administering a prescription medication without authority to do so on July 24, 2014. Appellant had refused to administer prescription medication at the request of fellow staff member without an order in the past, and reported that incident to the appropriate authority.

3. The Appellee has established by a preponderance of the evidence that the termination of Appellant was neither excessive nor erroneous. The record shows Appellant committed a serious offense by administering a prescription medication without an order. While Appellant testified that she had previously been unaware a Nurse Practitioner could not self prescribe medications, her ignorance of the rules does not excuse her infraction. Medical personnel are responsible for being aware of the laws and codes of conduct that regulate their profession.

4. While the record does not establish that Appellant administered the injection for her own personal gain, Appellant nonetheless has violated CPP 3.1, Code of Ethics, II. A. 3. This section reads as follows: "The use of time, facilities, equipment or supplies of the Commonwealth by an employee for his private purposes shall constitute a violation of the standards of ethical conduct set forth in this policy and may result in appropriate disciplinary action as prescribed by the appointing authority for an employee, or other appropriate action

including reimbursement of costs or restriction from department of Corrections or offices.” Appellant’s actions were not at the behest of the department, or taken under any authority given to her by the department. Appellant used supplies of the Commonwealth for something non-worked related, and thus, a private purpose.

5. Appellee has established that progressive discipline was not required in this case. Appellant argues that in all situations where there is no result of harm or a danger to individuals, progressive discipline should apply. Even assuming this to be an accurate depiction of the appropriate discipline tactics provided to the department, Appellant’s actions still do not justify progressive discipline. Prescription medications are controlled by strict regulations to prevent possible danger to individuals that might occur were the medications available otherwise. Appellant either knowingly or through her own ignorance of medical law, circumscribed these regulations and made a choice to administer the medication. These actions could have resulted in an injury to her co-worker. The Department of Corrections’ decision to terminate Appellant based on this reckless behavior is neither excessive nor erroneous. Even without the potential for risk of harm, Appellant committed a very serious offense. Termination of the Appellant is appropriate considering the degree of her misconduct. While consistent disciplinary procedures should be employed, Appellant asks the Appellee to now adopt a practice that would allow employees to essentially get a “free shot” at taking prescription medications from the state’s supplies before they can be terminated.

#### **CONCLUSION OF LAW**

The Appellee has demonstrated by a preponderance of the evidence that the decision to terminate Appellant was neither excessive nor erroneous.

#### **RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **SANDRA MCKINNEY V. JUSTICE & PUBLIC SAFETY CABINET DEPARTMENT OF CORRECTIONS** (Appeal No. 2014-313) 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 part 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 Darren L. Embry** this 21<sup>st</sup> day of August, 2015.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. David O. Suetholz  
Hon. Devon N.R. Oser  
Hon. Edward A. Baylous