

5. The Board finds Appellant did not follow the inmates and curse them or provoke them, but rather only followed the inmates to ensure they left the gym and closed the door behind them. The Board specifically finds the Appellant's testimony more credible than that of Correctional Officer Kennedy.

- B. **Delete** Findings of Fact numbers 8 and 9 and substitute the following:

8. The Board finds there is no credible evidence that the Appellant engaged inmates in provocative conversation or unnecessarily agitated the inmates while following his orders and ordering the SAP inmates out of the gym at 5:30 p.m. The Board thus finds the Appellant did not engage in any activity that could have endangered the security of the staff, inmates or the NTC in violation of the NTC Policy No. 03-02-01, Prohibited Employee Conduct, Paragraph (7)(k).

- C. **Renumber** paragraphs 10 and 11 to paragraphs 9 and 10.

- D. **Delete** Findings of Fact number 12 and substitute the following:

11. The Board finds the evidence does not demonstrate the suspension of Appellant was for good cause.

- E. **Renumber** paragraph 13 to paragraph 12.

- F. **Delete** Conclusion of Law number 3 and substitute the following:

3. The Board concludes the Appellee did not show that a three-day suspension for Appellant was taken for good cause. The Board concludes Appellant followed his orders and in so doing was put in a difficult situation, but did not endanger inmates or staff or violate any policy in following orders from his superiors by adhering to the schedule for gym usage.

G. **Delete** the Recommended Order.

IT IS HEREBY ORDERED that the appeal of **RONALD C. NUNEMAKER VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2013-262)** is **SUSTAINED**, that the three-day suspension of Appellant be expunged from his record, the Appellant receive back pay for the three days suspension, and that he otherwise be made whole. The Board orders Appellee to reimburse Appellant for any leave time he used attending the evidentiary hearing, any pre-hearing conferences, and oral argument at the Board. **[KRS 18A.105, KRS 18A.095(25), 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**.

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 19th day of November, 2014.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day mailed to:

Hon. Angela Cordery
Ronald C. Nunemaker
Bobbie Underwood

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-262**

RONALD C. NUNEMAKER

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 June 19, 2014, 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, Ronald C. Nunemaker, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Amber Arnett.

At issue at the evidentiary hearing was the disciplinary action taken against Appellant, the same being a three-day suspension from duty and pay, and the Appellant's claim of retaliation. The burden of proof was upon the Appellee to demonstrate that the disciplinary action taken against the Appellant was neither excessive nor erroneous and was taken with just cause. The burden of proof was on the Appellant for his claim of retaliation. The burden of proof was by a preponderance of the evidence.

BACKGROUND

1. The Appellant, Ronald C. Nunemaker, was suspended from duty and pay for a period of three working days beginning at 12:00 p.m. Tuesday, November 5, 2013, and continuing through the end of the work day November 7, 2013, from his position as a Corrections Recreation Leader with the Department of Corrections, Northpoint Training Center (NTC).

2. The Appellant timely filed his appeal with the Personnel Board on November 6, 2013, appealing from his three-day suspension from duty and pay.

3. The first to testify at the evidentiary hearing was **James Kennedy**. At the time in question, the same being August 27 2013, Mr. Kennedy was a Correctional Officer at NTC and was working the second shift. Mr. Kennedy testified that prior to the subject incident, he had seen the Appellant but had never met him. Upon review of the documents marked collectively as Appellee's Exhibit 1, Mr. Kennedy testified that the information report found at p. 9 of the same was completed by himself at the request of Capt. Haynes.

4. Mr. Kennedy explained that he was working the chow hall just prior to going to the yard when a fight broke out. By the time the chow hall incident was cleared up, the inmates were late for their gym time (which was to be between 4:30 and 5:30 p.m.). As a result, by the time the inmates arrived at the gym, they only had ten minutes of gym time remaining. After approximately ten minutes of recreation time, the Appellant kicked the inmates out of the gym which caused them to get upset. This caused the inmates to complain, which in turn upset the Appellant. As the Appellant was instructing the inmates to leave the gym he was also pointing his finger and yelling. It was then that Mr. Kennedy heard the Appellant shout "on the streets mother-fucker." In addition he heard the word "nigger" stated by the Appellant.

5. Mr. Kennedy explained that while words were being exchanged, tension started to build. There were between 20 and 30 inmates involved at the time and Mr. Kennedy was trying to diffuse the situation by moving them away from the gym. Mr. Kennedy testified that he heard certain words, but was not sure who said what. He reiterated that he did (and does) not know the Appellant, but that he heard him say the words mentioned in his Information Report. Mr. Kennedy also stated that while he did not physically see the Appellant say anything, he was fairly certain it was the Appellant's voice he heard.

6. Mr. Kennedy stated that although the inmates were getting more agitated he did not feel threatened and that although the situation was never dangerous, he admitted it could have been. According to Mr. Kennedy, he did not believe the Appellant handled the situation correctly. If it were him, he would have tried to diffuse the situation, especially when there were only one or two Correctional Officers around to keep the peace.

7. The next to testify at the hearing was **Pam Coffman** who is the Human Resource Administrator at NTC. Ms. Coffman has been in personnel since 2008 and with the state for over sixteen years. Ms. Coffman is also the caretaker of all NTC employee personnel files and is responsible for keeping them up-to-date and accurate. Appellee's Exhibit 2 was introduced into the record through the witness and demonstrates the Appellant was trained and oriented on the code of ethics and should have known that his duty, among other things, was to protect the rights of the inmates, and to familiarize himself with policies and procedures of the correctional facility.

8. The next to testify was **James Bailey**. Mr. Bailey was taken out of order via telephone and testified on behalf of the Appellant. Mr. Bailey is currently an inmate at NTC and was present on August 27, 2013, when the subject incident occurred. According to Mr. Bailey, 30-40 inmates were kicked out of the gym resulting in words being exchanged with the Appellant. He testified that he never heard the Appellant say anything. He noted that since he is black, had the Appellant said something racially offensive, he would have known. Mr. Bailey admitted he was convicted for trafficking and stated he has six years to go on an eight-year sentence.

9. The next witness to testify at the hearing was **Brandon Wright**, who was also taken out of order, via telephone. Brandon Wright is also currently an inmate at NTC and was present on August 27, 2013, when the subject incident occurred. Mr. Wright recalled that during the incident words were exchanged but the inmates were doing all the provoking. According to Mr. Wright, the Appellant was only trying to do his job. Mr. Wright also stated he never heard the Appellant cuss at the inmates. Finally, Mr. Wright testified he has five years left on his sentence for receiving stolen property and that he was working as a desk clerk at the gym at the time of the incident. As such, the Appellant was one of his supervisors.

10. The next witness to testify for the Appellee was **Gary Prestigiacom** who is the Deputy Warden at NTC. Mr. Prestigiacom was assigned to investigate the incident by the Warden. At the time of his investigation, he did not know the Appellant.

11. Appellee's Exhibit 1 was introduced into the record through the witness and consists mainly of the results of Mr. Prestigiacom's investigation. According to Mr. Prestigiacom, the Appellant denied using any slurs or cussing at the inmates. However, Officer Kennedy told him he was positive he heard the Appellant's voice even though his back was turned to him. Mr. Prestigiacom discounted most of the inmate testimony. To him, it was quite evident an argument had ensued. He also noted that some of the Appellant's witnesses stated that the Appellant had cursed. Mr. Prestigiacom admitted there was no certainty the Appellant uttered the word "nigger." However, his overriding thought was that the situation should never have occurred and that there were other, better ways to handle the situation.

12. Appellee's Exhibit 3 was introduced into the record and is a copy of Kentucky Corrections Policy and Procedure, Number 3.1, Code of Ethics. According to Mr. Prestigiacom the Appellant violated Policy and Procedures, II.A.(5) because he thought the Appellant had lied to him during his investigation about his cursing to the inmates.

13. Appellee's Exhibit 4 was introduced into the record and is a copy of Northpoint Training Center, Policy Number 03-02-01, Prohibited Employee Conduct. According to Mr. Prestigiaco, the Appellant violated paragraph 5(d) because he used abusive, vulgar or profane language toward the inmates. He was also of the opinion that the Appellant violated paragraph 7(k) by engaging in other activity that might endanger the security of the staff, inmates or the institution. According to Mr. Prestigiaco pursuing an argument with the inmates and then simply returning to the gym thereby leaving Officer Kennedy with up to 40 irate inmates was unwise and could have led to security problems.

14. On cross-examination, Mr. Prestigiaco admitted that Capt. Haynes should have informed the Appellant of why the inmates were late to the gym, but noted that the Appellant could have called the Captain to get clarification or direction. Mr. Prestigiaco also was asked to review Appellee's Exhibit 1, p. 16, that documented who was present at the gym during the day in question. Said sign-in sheet indicated inmates Rice and Ross were not present on the day in question, yet their interviews were somewhat relied upon in the making of his recommendation to suspend the Appellant. In response, Mr. Prestigiaco noted that inmates violate the rules all the time.

15. Also on cross-examination, Mr. Prestigiaco admitted the Appellant had filed a grievance against him. Mr. Prestigiaco denied that this caused a conflict of interest and countered by noting he had been assigned to the investigation prior to the Appellant filing his grievance.

16. Finally, Mr. Prestigiaco stated that every employee's priority at the NTC is security. The evidence overall indicated that the Appellant cleared the gym of the inmates then continued to pursue them outside of the gym. If nothing else, the Appellant should have just left it at clearing the gym.

17. The next to testify was **Don Bottom**, Warden at the NTC. Warden Bottom is also the Appointing Authority for the facility. Mr. Bottom testified that the Appellant is a Recreations Supervisor at the NTC whose duties are to provide recreational activities for the inmates and to monitor the same.

18. Appellee's Exhibit 5 was introduced collectively into the record and consists of a copy of the intent to suspend letter, the Appellant's response to the same, and the actual suspension letter. It should be noted that while the Appellant tried to call into question whether inmates Ross and Rice were actually present during the subject incident (because they failed to sign-in at the gym on the day in question) during his cross examination of Mr. Prestigiaco, he clearly states in his response to the intent to suspend letter that inmates Ross and Rice had threatened to "whip his ass." Thus, it is clear the Appellant's attempt to discredit the reports of inmates Rice and Ross was disingenuous.

19. When asked why he chose to suspend the Appellant for three days, Mr. Bottom stated he was following the Appellee's progressive disciplinary policy and given the Appellant had received a written reprimand on August 30, 2013, for poor work performance, this was the next logical step. Mr. Bottom noted that when he met with the Appellant regarding this incident, the Appellant spent most of his time claiming he was being harassed rather than speaking to the facts. Mr. Bottom testified that he considered both the written memorandum of Mr. Prestigiacomo and his oral communication with the Appellant before he made his decision. At the end of the day, Mr. Bottom was not persuaded the incident had not occurred. He also was of the opinion that the Appellant did in fact curse the inmates. In addition, there was a safety issue generated by the Appellant when he followed the inmates out of the gym, thus allowing a confrontation to ensue, and a possible safety issue because the Appellant failed to call for assistance.

20. Warden Bottom testified he asked Mr. Prestigiacomo to investigate the incident because the Internal Affairs Officer who would ordinarily investigate the matter was unavailable at the time. He stated the Deputy Warden had no conflict of interest because he did not supervise the Recreation Department.

21. The testimony of Warden Bottom represented the end of the Appellee's case in chief.

22. The last to testify was the Appellant, **Ronald C. Nunemaker**. He testified that he is one of four Recreational Leaders at NTC.

23. He further testified that the Substance Abuse Program (SAP) inmates have one hour of gym time each day. The Appellant's direct supervisor, Lt. Helton, always had the gym scheduled for the SAP inmates between 4:30 p.m. and 5:30 p.m. On the day in question, the inmates arrived at approximately 5:15. According to Mr. Nunemaker, he told the inmates to leave the gym at 5:30 because he had a schedule to go by that he was never instructed to deviate from. When Correctional Officer Kennedy asked him why the inmates had been instructed to leave the gym after only 10 minutes, the Appellant told him he had to go by the schedule he was given, and that if he wanted to get a hold of Capt. Haynes, the Shift Supervisor, regarding the same, he could.

24. Mr. Nunemaker stated that when he went to close the gym door behind the inmates, inmates Rice and Ross started mouthing off. As a result, the Appellant went back to the gym to prepare an incident report against them. Shortly thereafter Sgt. Wilson approached the Appellant and stated inmate Rice told him he had called him a "nigger." The Appellant denied the same and continued to deny the same throughout the whole investigative process.

25. Mr. Nunemaker testified that approximately one month after the incident, inmate Rice came up to him and apologized for lying about him calling him a "nigger." He explained that he had to lie to insure he wouldn't be kicked out of SAP for being written up. Mr. Nunemaker noted that if an inmate completes SAP it helps him with parole so it is important for them to stay in and complete the program.

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

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

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

FINDINGS OF FACT

1. The Appellant, Ronald C. Nunemaker, was suspended from duty and pay from his position as a Corrections Recreation Leader with the Department of Corrections, Northpoint Training Center (NTC), for three working days, effective between November 5 and November 7, 2013. According to the intent to suspend letter and the suspension letter, found in Appellee's Exhibit 5, the Appellant was suspended for misconduct as a result of the incident referred to herein that occurred at the NTC on August 27, 2013. In essence, the Appellant was disciplined for providing false information during the investigation of the incident, using vulgar or profane language towards an inmate, and engaging in an activity that might endanger the security of the staff, inmates or the institution.

2. The Appellant, a classified employee with status, timely filed his appeal with the Personnel Board on November 6, 2013, appealing from his three-day suspension from duty and pay.

3. On August 27, 2013, while acting in his capacity as a Recreation Leader (R-3) at the NTC, the Appellant received custody of approximately forty SAP inmates at 5:15 p.m. The inmates presented themselves at the gymnasium at the NTC 45 minutes late due to a disturbance which occurred just prior thereto at the chow hall. The SAP inmates are typically scheduled to utilize the gym between 4:30 p.m. and 5:30 p.m.

4. Rather than call his supervisor for clarification, the Appellant decided to strictly adhere to the typical gym schedule and after approximately ten to fifteen minutes of gym time, ordered the inmates out of the gym at 5:30 p.m. This upset some of the inmates because they were not allowed their usual one-hour of recreational activity and some of them began

mouthings off.

5. Rather than simply ordering the inmates out of the gym at 5:30 p.m. per the usual schedule, the Appellant, having been provoked by certain inmates, chose to follow the inmates out into the yard while engaging them in heated conversation. As a result, tensions were allowed to build at a time when only the Appellant and one Correctional Officer were present to keep the peace. Although in sight of a nearby guard tower, Correctional Officer Kennedy and Appellant were the only training center employees in the yard along with roughly 40 agitated inmates. Fortunately, Officer Kennedy shepherded the inmates away from the gym and the situation never became dangerous.

6. There is no persuasive proof the Appellant used the word "nigger" or actually cursed at the inmates during the subject incident. The Appellant has at all times denied that he cursed at the inmates during the incident in question. Further, other than the testimony of Officer Kennedy, who admitted he had not even met the Appellant prior to the subject incident, there is only hearsay evidence which serves to contradict the Appellant's continued denial.

7. The preponderance of evidence of record demonstrates the Appellant did not provide false information to Deputy Warden Prestigiacomo during the course of an investigation. As such, the Appellant did not act in violation of Kentucky Corrections Policy and Procedure, No. 3.1, Code of Ethics.

8. While there was clearly some jawing back and forth between the Appellant and the inmates during the subject incident, the preponderance of the evidence demonstrates the Appellant did not direct abusive, vulgar, or profane language towards an inmate. Thus, the Appellant did not violate NTC Policy No. 03-02-01, Prohibited Employee Conduct, Paragraph (5)(d).

9. The preponderance of the evidence indicates the Appellant's decision to engage the inmates in provocative conversation while following them out of the gym and into the yard, served to unnecessarily agitate the inmates, who clearly outnumbered the NTC staff assigned to provide security at the time. Thus, the Appellant engaged in an activity that could have endangered the security of the staff, inmates or the NTC in violation of NTC Policy No. 03-02-01, Prohibited Employee Conduct, Paragraph (7)(k).

10. A review of the Appellant's personnel file revealed that he had received a written reprimand on August 30, 2013, for poor work performance for failing to notify a shift supervisor.

11. After reviewing the memorandum of Deputy Warden Prestigiacomo and interviewing the Appellant, Warden Don Bottom determined that the violations set forth in the

intent to suspend and actual suspension letter did in fact occur and chose to apply the Appellee's progressive disciplinary policy by suspending the Appellant for three working days.

12. The preponderance of the evidence demonstrates that the suspension of the Appellant for three working days was neither excessive nor erroneous under the circumstances and was done for good cause.

13. There is no credible or persuasive evidence of record to support the Appellant's claim that he was retaliated against for filing a grievance against Mr. Prestigiaco.

CONCLUSIONS OF LAW

1. The Appellant timely filed his appeal with the Personnel Board appealing from his three-day suspension from duty and pay as a Corrections Recreation Leader at the NTC on November 6, 2013.

2. The Appellant has failed to demonstrate that the Appellee retaliated against him when suspending him from duty and pay for three days.

3. The Appellee has demonstrated by a preponderance of the evidence that the disciplinary action taken against the Appellant, the same being a three-day suspension from duty and pay, was neither excessive nor erroneous and was done for good cause.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **RONALD NUNEMAKER VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORECTIONS (APPEAL NO. 2013-262)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

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

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

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

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

ISSUED at the direction of **Hearing Officer Geoffrey B. Greenawalt** this 16th day of September, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Amber Arnett
Ronald C. Nunemaker