

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-335

COLLEEN F. PAYTON

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

APPELLEE

*** **

The Board, at its regular October 2016 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated August 9, 2016, and being duly advised,

IT IS HEREBY 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 3rd day of November, 2016.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Catherine Stevens
Ms. Colleen F. Payton
Mr. Rodney E. Moore

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PERSONNEL BOARD
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**V. FINDINGS OF FACT, CONCLUSIONS OF LAW
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DEPARTMENT OF CORRECTIONS,**

APPELLEE

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This matter came on for an evidentiary hearing on June 13, 2016, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Colleen Beach, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Colleen F. Payton, 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. Catherine Stevens.

BACKGROUND

1. As Appellee bore the burden of proof, it went first in the presentation of evidence.
2. Appellee called its first witness. **Sergeant Pamela Griffith** is a Correctional Sergeant at Little Sandy Correctional Complex (LSCC), a position she was promoted into on September 1, 2015. Prior to her promotion, Griffith was a Correctional Officer at LSCC for nine years.
3. Griffith was asked to recall an incident that occurred with Appellant, Colleen Payton, on September 28, 2015. Griffith stated that she was assigned to work the yard that day. Her duties included walking through every dormitory. When she and her coworker, Sgt. Howard, came to Dorm G, an inmate approached them and asked if they would let him in his cell.
4. Griffith then contacted Appellant, who was the "dorm officer" that day. Appellant came down from Dorm F to let the inmate in. As Appellant was opening the door, Griffith heard Appellant yell at a group of inmates who were in the "core" (living area). Griffith testified that Appellant said to them: "You goddamn fuckers are getting on my fucking nerves."

5. Griffith estimated that there were 20 to 25 inmates in the core when Appellant made that comment. She described Appellant's tone of voice as "loud and aggressive."

6. Griffith estimated that she was approximately ten feet away from Appellant when Appellant opened the door.

7. After the incident, Griffith continued making rounds. Approximately one hour later, Captain Terry Wallace asked her to write an Occurrence Report regarding her observations of Appellant's behavior. Griffith testified that she remembered clearly what Appellant had said when she wrote her report.

8. **Sergeant Tim Howard** has worked for the Department of Corrections for ten years, and is currently a Correctional Sergeant at LSCC.

9. Howard was asked to recall the events of September 28, 2015. He stated that he and Sgt. Griffith were patrolling the dormitories, checking in on officers and inmates.

10. When they reached Dorm G, an inmate asked to be let into his cell. Sgt. Griffith called Appellant and asked her to let the inmate in. Howard continued walking through the dormitory, and heard Appellant say: "You goddamn fuckers are getting on my nerves." Howard estimated that he was 30 or 40 feet away from Appellant when she made that statement. He testified that he heard her clearly.

11. Howard stated that there were about 25 inmates present when Appellant made that comment.

12. Howard described Appellant's voice as "loud and unprofessional." He added, "The statement drew attention. The inmates looked up and wondered what was going on."

13. After the incident, Howard went to the yard office. He asked Sgt. Brent Gregory to join him as a witness. He called Appellant into the office. When she arrived, she told Howard: "I know I messed up." Howard told her: "This is not paperwork. This is counseling." Howard then admonished Appellant to "be more professional."

14. During this meeting, Appellant shared with Howard that she was having problems at home. Howard then offered her a Kentucky Employee Assistance Program (KEAP) referral.

15. Howard testified that it was LSCC policy that if a KEAP referral is made, an Occurrence Report must be done. He forwarded his report to his shift supervisor.

16. Howard stated that he was in error when he informed Appellant that their meeting was for counseling only. Howard admitted that as a Sergeant, he "does not have a say in disciplinary matters. Only the Warden has the authority to do that." Howard received a verbal reprimand for this mistake.

17. Howard was asked why it was not acceptable for staff to use vulgar language with inmates. Howard answered: "As a Sergeant, I have to see that my staff gets home safely every day. Use of profanity could trigger an inmate who is having a bad day. You don't know what's on their mind and how they are going to react to that tone of voice."

18. **Aaron Holbrook** is currently a Correctional Lieutenant and Supervisor of Internal Affairs at LSCC, a position he has held since September 16, 2015. He has been employed at LSCC since 2011.

19. Holbrook conducted an investigation into the incident that occurred with Appellant on September 28, 2015. The investigation was precipitated when Warden Meko received an Occurrence Report from the shift supervisor that day. Meko assigned the case to Holbrook.

20. Through Holbrook's testimony, the Internal Affairs Office Report he prepared on October 1, 2015, was introduced into the record as Appellee's Exhibit 1.

21. Holbrook testified that during the course of his investigation, he recorded the statements of the following witnesses: Sgt. Tim Howard, Sgt. Pam Griffith, Sgt. Brent Gregory, and Appellant. In his report, Holbrook summarized the statements of the witnesses and Appellant. He also went through Department of Corrections' Policies and Procedures to determine what policies had been violated, if any. He determined that the allegation against Appellant—that she had used profanity toward inmates—was substantiated.

22. On cross-examination, Holbrook stated that on October 5, 2015, Appellant and Officer Linda Adams told him that Sgt. Tim Howard "had cussed an inmate" that morning. Holbrook testified that he did ask Howard about the claim, but Howard denied it.

23. **Joseph Meko** is Warden of LSCC, a position he has held since 2007. Warden Meko stated that he is solely responsible for making all decisions regarding employee discipline.

24. Warden Meko was asked to address the incident that occurred with Appellant on September 28, 2015. He responded that he received an Occurrence Report from Sgt. Griffith and Sgt. Howard, which he referred to Internal Affairs for investigation.

25. Warden Meko received the completed Internal Affairs Office Report on October 1, 2015, which he reviewed.

26. In Warden Meko's opinion, the language Appellant used in front of inmates "could have been disruptive or dangerous to the institution." Meko added that it is also against policy to yell at inmates. "You talk to inmates in a firm manner, but you don't lose your temper in front of them," Meko stated.

27. Warden Meko was asked to address Appellant's prior disciplinary actions. He answered that Appellant had received a verbal reprimand on January 11, 2012, for "inappropriate and indecent language" toward a staff member (Appellee's Exhibit 11); a written reprimand on July 22, 2013, for inappropriate behavior (showing staff members a tattoo on her left hip) (Appellee's Exhibit 10); and a three-day suspension on August 7, 2014, for a policy violation (allowing an inmate to bend and zip her boots and allowing another inmate to put mineral oil on her boots) (Appellee's Exhibit 9).

28. Through Warden Meko's testimony, a video recording of the delivery of the Intent to Suspend letter to Appellant on October 30, 2015, was introduced into the record as Appellee's Exhibit 2. The recording, played at the evidentiary hearing, documented Captain Paul Crouch reading the letter to Appellant. After the letter was read, Appellant displayed a markedly angry demeanor. She said a curse word, and shoved a chair. She also refused to sign the letter that day. (Appellant signed the letter the next day).

29. Warden Meko was asked why he chose to suspend Appellant for five days. He replied that he had considered terminating her, but he took into account the fact that she was having personal problems at the time of the incident, and that she had later apologized for her behavior. Looking at her prior disciplinary record, and her behavior the day the Intent to Suspend letter was delivered, Meko determined that a five-day suspension was the appropriate discipline.

30. At the end of Warden Meko's testimony, the Appellee rested its case.

31. **Appellant, Colleen Payton**, testified on her own behalf. Appellant stated that when the incident occurred on September 28, 2015, she had five inmates in the area around her, and each one wanted something different. She told them "Goddamn it, you are getting on my fucking nerves." She denied that she had called them "fuckers." She denied that she had screamed at them.

32. Appellant stated that no inmate filed a grievance against her regarding her statement that day.

33. Appellant addressed the subject of the January 11, 2012 verbal reprimand. She explained that the "inappropriate and indecent behavior" complained of was actually her statement to a pregnant coworker that she was "getting big."

34. At the end of her testimony, the Appellant rested her case.

35. KRS 18A.095(1) reads:

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

36. 101 KAR 1:345, Section 1, reads:

Section 1. General Provision.

Appointing authorities may discipline employees for lack of good behavior or the unsatisfactory performance of duties.

37. 101 KAR 1:345, Section 4, reads:

Section 4. Suspension.

- (1) A suspension shall not exceed thirty (30) working days.
- (2) An employee without status may also be suspended for a period not to exceed thirty (30) days and shall be entitled to the same provisions of notice contained in KRS 18A.095(8) with the exception of the right of appeal.
- (3) When the employee is notified, copies of the notice of suspension shall be forwarded to the Commissioner of Personnel on the same date notice is delivered to the employee.

FINDINGS OF FACT

1. Appellant, Colleen Payton, is a Correctional Officer with the Department of Corrections, Little Sandy Correctional Complex ("LSCC"). She was suspended for five days, effective Monday, December 5, 2015, for unprofessional behavior.

2. Appellant filed her appeal of this suspension on December 21, 2015. In her statement of fact on the appeal form, Appellant alleged that she was "being punished twice for the same occurrence. I was counseled for this and also suspended for 5 days. I also did not get a response from the Warden within the five-day period after meeting with him." (Appeal Form, Appeal No. 2015-335).

3. On September 28, 2015, Sgt. Pamela Griffith and Sgt. Tim Howard were patrolling the dormitories. When they reached "G" Dorm, an inmate asked to be let in his cell. Sgt. Griffith called Appellant, who was the "dorm officer" that day, and instructed her to open the door, which Appellant did. As the door opened, Griffith heard Appellant yell to a group of inmates: "You goddamn fuckers are getting on my fucking nerves." Griffith estimated that she was ten feet away from Appellant at the time. She described Appellant's demeanor as "loud and aggressive."

4. Sgt. Howard testified that he heard Appellant yell: "You goddamn fuckers are getting on my nerves." He estimated that he was 30 or 40 feet away from Appellant at the time. He described Appellant's demeanor as "loud and unprofessional."

5. After the incident, he called Appellant into his office. Sgt. Brent Gregory was also present. When Appellant arrived, she told Howard: "I know I messed up." She shared with him that she was having personal problems at home. Howard's response was: "This is not paperwork. This is counseling." He then offered a Kentucky Employee Assistance Program (KEAP) referral.

6. Howard testified that because he made a KEAP referral for Appellant, LSCC policy required that an Occurrence Report be completed, which he did and submitted to his shift supervisor.

7. Howard was issued a verbal reprimand for his statement to Appellant that his meeting with her regarding the incident would only result in verbal counseling. "I do not have a say in disciplinary matters," Howard stated, "Only the Warden has authority to do that."

8. Warden Joseph Meko received the Occurrence Reports regarding the incident with Appellant and referred the matter to Internal Affairs for investigation.

9. Aaron Holbrook, Supervisor of Internal Affairs at LSCC, conducted the investigation into Appellant's behavior on September 28, 2015. He recorded the statements of Sgt. Tim Howard, Sgt. Pam Griffith, Sgt. Brent Gregory, and Appellant. He also reviewed Department of Corrections' Policies and Procedures. He determined that the allegation against Appellant—that she had used profanity toward inmates—was substantiated, and violated Kentucky Corrections Policies and Procedures (KCPP) 3.5, II (3), and LSCC Policy 03-01-01.

10. KCPP 3.5, II (3) states that "Corrections employees shall avoid offensive or inappropriate conduct or sexually harassing behavior at work...Prohibited Behavior...shall include: Vulgar or indecent gesture, language, or joke."

11. LSCC Policy 03-01-01, J(1) states that "All employees shall be expected to maintain a professional relationship with inmates. Each inmate shall be greeted and interacted with in a polite and professional manner unless the situation dictates otherwise."

12. At the evidentiary hearing, Appellant admitted that she did "cuss." She testified that she said to the inmates "Goddamn it, you are getting on my fucking nerves." She stated that at the time she made the comment, there were five inmates around her who were each asking for something different. She denied screaming at them or calling them "fuckers."

13. The Hearing Officer finds that even though Sgt. Howard determined that "counseling" was the appropriate action to take against Appellant for her misconduct, only Warden Meko is invested with the authority to decide disciplinary matters.

14. The prior disciplinary actions taken against the Appellant were a written reprimand on August 1, 2013, for inappropriate behavior, and a three-day suspension on August 7, 2014, for Policy Violation. (Appellee's Exhibit 3).

15. The Hearing Officer finds that Appellant spoke to a group of inmates using vulgar and indecent language in violation of KCPP 3.5, II (3).

16. The Hearing Officer accepts as credible the testimony of Sgt. Griffith and Sgt. Howard, and finds that Appellant made the inappropriate comment to the inmates in a loud and unprofessional tone in violation of LSCC Policy 03-01-01, J (1).

17. Based on Appellant's conduct, and considering the prior disciplinary actions taken against her, the Hearing Officer finds that the five-day suspension was neither excessive nor erroneous.

CONCLUSIONS OF LAW

1. Appellant's use of vulgar language in an unprofessional tone of voice satisfied the elements of poor work performance pursuant to 101 KAR 1:345.

2. The Cabinet was not arbitrary or excessive in its decision to suspend Appellant for 5 days.

3. Appellant's misconduct meets the just cause requirements of KRS 18A.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **COLLEEN F. PAYTON V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS, (APPEAL NO. 2015-335)** 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 Colleen Beach** this 9th day of August, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Catherine Stevens
Ms. Colleen F. Payton