

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2014-184

PHOEBE POWELL

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 September 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated July 30, 2015; 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 **SUSTAINED** to the extent therein.

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 16<sup>th</sup> day of September, 2015.

KENTUCKY PERSONNEL BOARD

  
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MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Angela Cordery  
Phoebe Powell  
Bobbie Underwood

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This matter came on for an evidentiary hearing on April 28 and 29, 2015, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Phoebe Powell, was present and was not represented by legal counsel. She was accompanied by her daughter, Robin Mashburn. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Angela Cordery. Also present as Agency representatives were Warden Aaron Smith on the first day and Ben Mitchell on the second day.

**BACKGROUND**

1. The Appellant, Phoebe Powell, a Correctional Officer at the Kentucky State Reformatory (KSR), filed this appeal with the Personnel Board on August 22, 2014. On her appeal form she indicated she was appealing from an "other penalization," specifically hostile work environment and age discrimination. In the narrative portion of her appeal Appellant stated:

False statements (verbal and written) by supervisors and staff that continue to slander and embarrass this employee – detrimental to my character, my health and well being. Harassing phone calls during work hours meant to hurt and harass this employee about personal matters concerning family members now deceased. This has also been discussed with inmates. The on-going problems of family-friends-supervisors and employees dating or living together and working the same shift-discussing personal and correctional business with fellow employees and inmates about fellow employees - if you follow post orders and P&P you are considered too tough for inmates – if you take offense to being called names and cursed it is stated you have a chip on your shoulder – after 117 months in corrections I cannot see this as right and should have a better work environment – non-hostile.

2. At the time of the first pre-hearing conference the issues were defined as the Appellant's claims she has been subjected to a hostile work environment, subjected to age discrimination, and was penalized when statements were placed in her evaluation file which were never discussed with her and which Appellant believes should not be in the evaluation file. The Appellant was assigned the burden of proof on all issues. The burdens of proof are by a preponderance of the evidence.

3. This appeal was the subject of three pre-hearing conferences. At the second and third pre-hearing conference there was considerable discussion regarding discovery and regarding witnesses to testify at the evidentiary hearing. The Appellee suggested that it may file a Motion to Dismiss, however, no such motion was filed. The parties attempted mediation but were unable to resolve this appeal.

4. **Robin Mashburn**, the Appellant's daughter, was called as the first witness. She is an Accountant III at Roederer Correctional Complex (RCC). She has worked for Corrections for a total of sixteen years between Kentucky State Reformatory and RCC. Ms. Mashburn testified that she is friends with Lisa Craigmyle who is an Accountant in the Business Office at KSR. While exchanging e-mails on other subjects on December 1, 2014, Craigmyle wrote to Mashburn, "Word around KSR is that momma is waiting for her BIG payout from her lawsuit and then she will retire." Mashburn testified that she responded to the e-mail saying that her mother had not filed a lawsuit but had only filed a grievance against a supervisor who had cursed her in front of staff and inmates. She was not asking for money she only wanted the offending supervisor to be punished. Ms. Mashburn said she did not expect anything to be done at the institutional level and that Frankfort would need to be involved. Mashburn was not sure if anything here would help her mother, but she thought it might help some other officers so that they would not have to put up with unprofessional treatment at KSR. The e-mail was introduced into evidence as Appellant's Exhibit 3.

5. Mashburn also testified she attended a meeting with Warden Aaron Smith and her mother. In the meeting, the parties discussed Ms. Powell's grievance concerning the events of June 22, 2014. This was the incident where the Appellant alleges she was cursed by Sergeant Christine Bishop. Appellant asked for a thorough investigation of this incident, training for new officers and that employees not be encouraged to write statements against each other. Appellant also requested that written statements not be placed in a person's evaluation file without the employee knowing about it. Ms. Mashburn testified that the Warden told them at the meeting that something would be done without going into specific detail.

6. **Lisa Craigmyle**, an Accountant at KSR, testified by telephone. She testified regarding the contents of the e-mail exchange with Robin Mashburn and her testimony was the same as Ms. Mashburn's. In addition to the gossip around KSR that Ms. Powell was waiting for a payout from her lawsuit, she specifically heard that Ms. Powell in a meeting with Warden Smith had given him a piece of paper telling a specific amount of money it would take to make

these issues go away. She heard this from Linda Gordon, another employee in the Business Office at KSR. She testified she viewed all of this as negative gossip regarding the Appellant.

7. **Captain Scott Stewart**, who is currently employed at the Luther Luckett Correctional Complex (LLCC), also testified by telephone. He previously worked at KSR and was the Shift Captain on the 4:00 to 12:00 shift from August 1, 2014, through February 28, 2015.

8. On November 2, 2014, Captain Stewart was assigned as the duty officer. He received a call from Lt. Heather Broughton who stated that because of a reported conflict with Sgt. Christine Bishop, Officer Powell was moved to a different post. Lt. Broughton reported that Sgt. Bishop said she had been sued by the Appellant and did not think it was a good idea for her to be assigned to her unit. Captain Stewart stated he made a notation of this in the duty officer's log. He stated that Lt. Broughton may have reported this to him as shift supervisor and not as duty officer. He stated that the move had already been made before he received the phone call.

9. The following day Appellant turned in a handwritten statement regarding this incident to Captain Stewart. This document was admitted into evidence as Appellant's Exhibit 4. He stated that he relayed this information on to the Warden.

10 Captain Stewart also testified about an incident that occurred on January 6, 2015, when the Appellant received a "W-Day" letter. On this date, Captain Stewart was there running the shift when he was informed by Sgt. Ramos that the Appellant would not work the post she was assigned to. Apparently she was assigned to the nursing care facility and had a one-on-one assignment with an inmate that had been transferred to KSR from Death Row. The Death Row inmate was involved with a lawsuit which also included the inmate who had killed the Appellant's sister. Captain Stewart believed that the Appellant was offered another one-on-one post assignment, possibly in Dorm 10. The Appellant did not want to work either of these posts and left the facility knowing that she would receive a "W-Day" for that date. Captain Stewart described a "W-Day" as a day without pay. He stated that this is pending a review by the Senior Captain who makes the final decision regarding this issue. Captain Stewart testified he was not told anything about the Appellant complaining of being claustrophobic when denying the second one-on-one post. In addition, Captain Stewart did not recall any mention of the Appellant having severe asthma attacks.

11. Captain Stewart also testified that he remembered being told one time by the Appellant about officers harassing her about her sister who was murdered by the Death Row inmate. Captain Stewart was not sure of the timeframe when he learned of this. He stated that he passed this information on to Warden Smith.

12. **Lieutenant James Rodney Tingle** is employed at KSR. He has been employed there for seventeen and a half years and is the Appellant's son-in-law.

13. Lt. Tingle testified that he overheard Lt. Christine Bishop discussing at Gate 1 that she had been served with a lawsuit on her birthday. He stated that she did not state, but "insinuated," that it was from the Appellant. He said that there were several staff members around.

14. Sometime before the incident that occurred in Dorm 4, Lt. Tingle overheard officers Gary True and Catherine Goff stating that they had heard about the Appellant being harassed in Unit B. Lt. Tingle reported this to Internal Affairs Capt. Williams. He stated that he asked Officer Drew and Officer Goff for written statements; however, they stated that all they had done was overhear statements so they did not want to put anything in writing.

15. Lt. Tingle testified that he picked up the Appellant after the incident in Dorm 4 on June 22, 2014.

16. **Lieutenant James Bernardi** testified that he has been employed at KSR for three and a half years. He was the Appellant's evaluating supervisor. On June 16, 2014, he recalled an incident when Officer Amanda Holbert was bringing an inmate to the treatment room because of a medical problem. Officer Holbert stayed with the inmate claiming that she could not leave him with the Appellant because the Appellant had a conflict with the inmate. Lt. Bernardi checked with the inmate and the Appellant and discovered there was no conflict. He reported this information to Captain Ben Mitchell and Lt. Julie Thomas. Lt. Bernardi recalled that Lt. Thomas stated that Ms. Powell was being melodramatic and that she was "on her cross" again. Lt. Bernardi testified that Officer Mary Heilman was interested in getting the Appellant out of Dorm 5 and that Amanda Holbert had joined in this effort.

17. The following day on June 17, 2014, Amanda Holbert found a shank in the cell of an inmate. The inmate was locked up and Officer Holbert received a commendation. A couple of days later after further investigation, it was determined that Officer Holbert had brought the shank to the inmate. The inmate was released from lock-up and Officer Holbert was seen in an orange jumpsuit leaving the facility.

18. Lt. Bernardi testified that the Appellant told him that she had received harassing phone calls regarding her sister. Lt. Bernardi reported these to Capt. Mitchell. Capt. Mitchell stated at roll call that telephones were for business purposes and that spreading rumors and other activities needed to stop.

19. **Ben Mitchell** testified that he was a Shift Captain on the 3:30 to 11:30 shift during many of these events. He has been promoted to Correctional Unit Administrator I for the last eight months.

20. Mr. Mitchell recalled an incident where Lt. Bernardi and the Appellant came to the Captain's office regarding Amanda Holbert. Officer Holbert had stated that the Appellant had a conflict with an inmate. Mitchell stated that when he looked into the matter there was no conflict.

21. Mr. Mitchell did not recall a discussion with the Appellant and Bernardi about harassment by five Correctional Officers on that occasion. He does recall having a discussion with the Appellant either in person or over the phone when she was upset about receiving phone calls at work regarding a family member. Mitchell described the Appellant's demeanor as crying and upset as she was telling him about this. He stated he could not identify the officer making the phone calls. He did not know what else to do to investigate this matter. He reported that soon after he addressed this issue at roll call without mentioning the Appellant's name. He stated that the phones were to be used for business purposes and inappropriate use of the phone would not be tolerated.

22. Mr. Mitchell was not working the day the confrontation in Dorm 4 between the Appellant and Lt. Bishop. (Christine Bishop is Sr. Captain Mazza's sister-in-law.) He stated that when he arrived the next day all the reports had been turned into Sr. Captain Mazza's office. When the Appellant filed a grievance regarding this matter, Mitchell reviewed the reports and took a telephone statement from Correctional Officer Jason Preston. Preston was in Dorm 4 working with Ms. Powell on the date in question.

23. Mr. Mitchell stated that after reading Lt. Bishop's statement, he did not believe that sounded like the Appellant. He acknowledged that he was not there and did not know what happened. He did say that he has seen the Appellant get emotional and upset, but has not heard her cuss anyone out.

24. Mr. Mitchell described the Appellant as a good employee who came to work and did her job. He did state he had some issues with Appellant and Correctional Officer Mary Heilman where they could not work together in Dorm 5.

25. **Lt. Christine Bishop** testified she has worked at KSR since 2012. She has been a Lieutenant for seven or eight months and was a Sergeant during many of the events involved in this appeal. During her testimony about the incident of June 22, 2014, Lt. Bishop referred to her Incident Report from that date. (See Appellant's Exhibit 1). Bishop stated there was a dispute over whether an inmate owned a pair of shoes or not. She retrieved a receipt and was taking it to Dorm 4 to meet with Lt. Noonan. When she arrived at the Dorm, Lt. Noonan was speaking with two inmates who are sitting at the stairs. She stated that she stood at the door waiting when she saw the Appellant walking towards the door and heard the Appellant say, "These f\*\*\*ing liars. They're going to make us out to be the bad guys and give their sh\*t back." Bishop also quoted the Appellant stating, "They're gonna say I'm f\*\*\*ing harassing them again." Bishop stated these comments were loud enough for inmates around the door to hear. Bishop asked Officer Powell to sit down. She stated that the Appellant responded, "Where do you want me to go f\*\*\*ing sit." Bishop states she directed Powell to go in the office and not escalate things with the inmate.

26. Bishop reported that Sgt. Buckler arrived in Dorm 4 and Lt. Noonan and he continued to speak with the two inmates in the office. They were then going to speak with Officer Preston and the Appellant. The Appellant jumped out of her chair and stated, "I'm going outside." She asked Bishop if it was okay with her. Bishop responded, "Are you getting smart with me?" The Appellant asked again if it was okay if she went outside. Bishop stated that she responded, "I don't give a sh\*t where you go!" Powell then responded, "You're not my supervisor, he is." She was referring to Sgt. Buckler and asked him. She stated the Appellant stormed past her and went outside. After a few minutes, Bishop stated she went outside and attempted to talk to the Appellant. She stated the Appellant stated, "I won't deal with you. Ask your brother-in-law, Kevin. I'm going to Frankfort tomorrow. I'm not your f\*\*\*ing nothing." Bishop stated that Powell yelled this in front of inmates who were around the office foyer.

27. Bishop denied that she ever carried a box of shoes during this incident. She stated that Correctional Officer Raines came in at some point, but she is not sure when. In response to a question from the Appellant, she stated that the Appellant has referred to Sr. Captain Mazza as "Kevin" on many, many occasions. She stated that she has never heard the Appellant talk like that before. At the Appellant's request, Bishop read the Department of Corrections' Mission Statement. She stated that she tried to help and teach the Appellant by giving her a chance to correct her behavior and calm down.

28. Bishop admits that she used a curse word, which was unprofessional and for which she received a verbal reprimand.

29. Bishop stated she was sued on her birthday by an inmate. She was served in the foyer on July 24, 2014. She stated that she spoke about it that day. She stated she heard others say that the Appellant had sued her. She is not sure of who said this.

30. On November 2, 2014, Bishop asked Lt. Heather Broughton who was running the shift to move the Appellant from her unit. She was told that the Appellant was suing her and thought it was unfair to have to tiptoe around the Appellant while doing rounds.

31. Lt. Bishop stated she has had no other issues with the Appellant.

32. **Lt. Julie Thomas** was the next witness. Lt. Thomas has worked at KSR for eighteen years. She is currently the Transportation Supervisor. During 2014 she was the second shift Operations Lieutenant. Lt. Thomas was running the shift the evening of July 22, 2014, the night with the incident in Dorm 4 involving the Appellant and Sgt. Bishop. Lt. Thomas is aware that there are reports from that night, however, she is not sure if they were collected that night. She does not know why a statement was not obtained from Officer Jason Preston. She stated that she heard from Lt. Noonan that the Appellant wished to leave and might have been having some health issues. She asked for the Appellant to be brought to the Captain's office.

33. Lt. Thomas responded to the Appellant's grievance, which is a part of Appellant's Exhibit 1. In her response, Lt. Thomas stated, "All employees are advised by counseling session if a statement, written reprimand, etc., is being placed in their personnel file." "If a statement is written against an employee, the employee has a chance to explain their actions leading up to the statement being written unless it is deemed to be detrimental to the safety and security of the institution." She testified that employees should be aware of what's being placed in their file and have an opportunity to respond.

34. Lt. Thomas denied that she ever said the Appellant was "on her cross" and did not know what that meant. Lt. Thomas stated that the Appellant came to work and did her job. She has never heard her cuss anyone.

35. By agreement of the parties, the Appellee called **Warden Aaron Smith** to testify out of order as Appellee's first witness. He testified he has worked for the Commonwealth of Kentucky since 1988 and has been with the Department of Corrections since 1993.

36. He testified that in August of 2014 he met with the Appellant and her daughter regarding her claims that she had been mistreated by staff and supervisors at KSR. She took her concerns to Captain Mitchell and did not believe they had been adequately addressed. The Appellant reported that the stress was taking a toll on her and that she was trying to retire December 1, but she did not have enough time to do that. At the time of the meeting the Appellant was off work and the Warden said he offered her other possibilities when she came back to work. These included working on another shift and possibly taking another job so that she would be out of uniform. The meeting took place when the Appellant's grievance reached the Warden's level.

37. Warden Smith followed up with Deputy Warden of Security James Coyne and Sr. Captain Mazza. The Warden stated that Sr. Captain Mazza reported that he was aware of the incident involving the Appellant and Sgt. Bishop and it did not rise to the level of disciplinary action. Sr. Captain Mazza reported that he had interviewed all the parties involved. Mazza stated that he counseled Bishop regarding the incident. He had written statements from most of the personnel involved. The Warden instructed him to get statements from all of them.

38. The Warden also described being aware of issues where people could not get along on the shift and that there were rumors spread. He stated that there are actions which you can take to minimize rumors, but you cannot completely stop them.

39. When it comes to disciplining employees for cursing, the Warden testified that this is not a black and white issue and that it depends on the context.

40. Warden Smith claims that he never heard the Appellant complain of age discrimination. He noticed that the Appellant was in her early 70s and had worked at KSR for eleven years. He was aware of other correctional officers in their 60s. He stated that reports of discrimination could be given to an employee's supervisor or the Sr. Captain or Deputy Warden.

41. The Warden has not had any performance issues with the Appellant. At one point she asked to move to first shift and he granted her request. After a brief period of time, she moved back to second shift. The institution is currently on a two twelve-hour shift schedule.

42. At one point, because of issues on second shift, Warden Smith assigned Capt. Stewart to provide stability on the shift and to assist Capt. Mitchell. He felt that Capt. Stewart would be able to assist with better organization on the shift and possibly help to stop some of the rumors being reported.

43. Warden Smith testified that employees have personnel files with one maintained in Frankfort and one maintained at the institution. In addition, supervisors maintain their own file which may be referred to as the "supervisor's file" or an "evaluation file." These normally contain information which is helpful in preparing an employee's evaluation. He stated that these files may include Occurrence Reports, notes, conferences, or Incident Reports. He stated that it was his expectation that a supervisor should meet with an employee and discuss something if it is being placed in the evaluation file. He stated he believed this was the case whether the information was good or bad.

44. The Warden stated that in his opinion there was a misunderstanding regarding Sgt. Bishop being sued by the Appellant. He stated that employees overheard Sgt. Bishop discussing being served with a lawsuit on her birthday and were aware that the Appellant and Bishop were having difficulty. This somehow got turned into a rumor that the Appellant had sued Sgt. Bishop.

45. On cross-examination, Warden Smith stated that Deputy Warden Coyne should not have told the Appellant she would have to file an open records request to get copies of reports that had been written about her and placed in her personnel or evaluation file. Warden Smith reviewed Incident Reports from February 2015 and introduced into evidence as Appellant's Exhibits 15, 16, 17 and 19. He stated that it would be appropriate to place these in the Appellant's evaluation file; however, they should be removed from her personnel file.

46. With regard to the incident involving Sgt. Bishop and the Appellant, the Warden stated that he was not there and does not know for sure what happened. He stated that the allegations of language used by the Appellant were out of character. He could not decide what happened. He stated that he did not take formal disciplinary action against either employee because they had conflicting reports against each other and no one else corroborated their statements except for the one statement made by Sgt. Bishop which led to her verbal reprimand.

47. The Warden testified that he felt it was appropriate for Sr. Captain Mazza to investigate this matter even though Bishop was Mazza's sister-in-law. He stated that there are a lot of family relationships within Corrections and it is important that supervisors do their job and that they should not be accommodated for these type of family relationships.

48. Warden Smith testified that it was unusual to get a verbal reprimand followed quickly by a promotion within the same month. He stated that as far as he knows the members of the interview panel were aware of the verbal reprimand. He believes that Sr. Captain Mazza was on the committee that recommended Bishop for promotion from Sergeant to Lieutenant.

49. Warden Smith testified that Officer Amanda Holbert was dismissed when it was discovered that she had smuggled a shank in to the institution and that there were also criminal charges brought against her. He remembered that Holbert was one of the officers that the Appellant could not get along with. Warden Smith said he first learned about the phone calls to the Appellant when the Appellant told him. He asked the Internal Affairs Captain, Senior Captain and Captain Mitchell to look in to this; however, they could not verify who was making the calls.

50. The Appellant called **Sgt. Bruce Sams** as her next witness. Sgt. Sams wrote a report introduced in to evidence as Appellant's Exhibit 17, dated February 8, 2015. In his statement, he states that on February 8, 2015, which he refers to as Wednesday in his statement, he reported to work at 5:00 a.m. for a transportation trip. He met the Appellant at Gate 1, at which point she told him that he should watch himself and watch the company he keeps. He stated that the Appellant told him you were judged by the company you keep at KSR. She told him specifically he was too friendly with Lt. Christine Bishop. She stated that Sr. Captain Mazza lets Lt. Bishop do what she wants because they are related. Sgt. Sams stated that it was this last part of the conversation which related to Sr. Captain Mazza which caused him to write the statement.

51. Sgt. Sams testified regarding another incident where the Appellant, Sgt. Sams and others were involved with finding "hooch" and "pills" in inmate possession. Sgt. Sams stated that he was not aware that he had been mentioned in "heroes among us" in the KSR newsletter for these events. He stated that if anyone had asked him he would have stated that the Appellant, as well as all others involved should have all received the same credit.

52. The Appellant called **Correctional Officer Mary Heilman** as her next witness. She has been employed at KSR for approximately two years. She was not aware that she has written any report regarding the Appellant. She stated that although she likes the Appellant, the Appellant has screamed at her on a couple of occasions.

53. Officer Heilman stated that she did not get along with Correctional Officer Amanda Holbert. Officer Heilman stated that she did not know anything about phone calls being made to the Appellant. She thought the Appellant was a good officer and that she knew her job well.

54. The Appellant called **Sgt. Betty Ramos** as her next witness. Sgt. Ramos has worked at KSR for about one year after transferring from LLCC. She offered testimony regarding a January 6, 2015, W-Day letter received by the Appellant. During her testimony, Appellant's Exhibit 20 was admitted in to evidence. This exhibit includes Sgt. Ramos' statement regarding that occurrence as well as Capt. Stewart's W-Day letter and other documents.

55. The Appellant was assigned to work one-on-one in the Nursing Care Facility with a Death Row inmate on January 6, 2015. Early on in the shift when Sgt. Ramos was making her rounds with the Unit Administrator, she noticed that the Appellant was crying and upset. Officer Powell told Sgt. Ramos that she had been taken out of Dorm 3 because of a report she had written at Sgt. Ramos request two days earlier. The Appellant was upset that she was assigned to work a one-on-one regarding a Death Row inmate because the Appellant's sister had been kidnapped and killed. The Appellant also reported to Sgt. Ramos that staff had called her on the phone and said things like, "I heard your sister can't handle rough sex." After conferring with the Captain's office, Sgt. Ramos offered the Appellant a one-on-one with another Nursing Care Facility inmate. The Appellant was upset and did not want this post either. Sgt. Ramos was also able to offer her a regular position in the Nursing Care Facility that did not involve one-on-one with an inmate. The Appellant refused this post as well and was informed she would get a pending W-Day. According to Sgt. Ramos, the Appellant gathered her things and in front of the inmate grumbled about getting the W-Day. Sgt. Ramos informed her that it was inappropriate to talk like that in front of an inmate. She stated that the Appellant ignored her and stormed off towards the Administration Building.

56. Sgt. Ramos testified that the Appellant did not tell her anything about being claustrophobic on that occasion.

57. The Appellant called **Correctional Officer Christie King** as a witness. She has worked at KSR for two and a half years. Officer King wrote a statement on June 16, 2014, that Officer Holbert had brought an inmate to the treatment room and stated, "Don't let Officer Powell near the inmate because of a conflict." Officer King stated that she called the Captain's Office and was informed there was no conflict. She testified that Officer Holbert was no longer working at KSR.

58. Officer King testified she has worked with the Appellant and that she has not had any problems. She had heard a rumor that the Appellant was walked out of KSR in handcuffs. She has also heard a rumor that the Appellant was suing Lt. Bishop.

59. The Appellant called **David Buchanan**, a Correctional Officer at KSR as her next witness. He testified regarding Appellant's Exhibit 18 which was a report he prepared on February 5, 2015, at the request of Lt. Bishop. On that date, as Buchanan and the Appellant were walking to their post, the Appellant started talking to him about her Personnel Board appeal and coming to Frankfort to testify. She also talked about subpoenaing employees from KSR and stated that she had problems with Lt. Bishop. Officer Buchanan stated he was talking about this matter when Lt. Bishop told him that he would have to write a report regarding this matter.

60. Officer Buchanan stated that he is friends with Sgt. Sams. Buchanan stated that Appellant helped him when he first started working at KSR. He thinks that the Appellant tries to help new officers.

61. The Appellant called **Lt. Heather Broughton** who has worked at KSR for six years as her next witness.

62. Lt. Broughton was the Operations Lieutenant on second shift and was running the Captain's office the evening of November 2, 2014. Lt. Broughton assigned the Appellant to work Dorm 7 that evening. After the Appellant had been in Dorm 7, she was moved to another dorm after Lt. Bishop called Lt. Broughton and told her that she had heard that there was a grievance or a complaint filed by the Appellant against Bishop and they should not be working together.

63. Lt. Broughton did not recall discussing this matter with Capt. Stewart. She did not write a report regarding this incident. She stated that this occurred on a Sunday night and as she was leaving Sr. Captain Mazza came in for Monday morning and she told him what had happened.

64. Lt. Broughton stated that she only separated Lt. Bishop and the Appellant to avoid any potential problems. She did not take this action based on any discrimination, retaliation or attempt to harass the Appellant. Lt. Broughton stated she had a good working relationship with the Appellant who she described as a very good employee.

65. The Appellant called **Shannon Raines**, an Administrative Assistant at KSR, as a witness. Ms. Raines was a Correctional Officer until February 1, 2015. In August of 2014 she wrote a statement regarding the June 22, 2014 incident. Ms. Raines testified that she was assigned to the yard that date and was sent to hand some keys to Lt. Noonan. When she arrived in Dorm 4 she saw the Appellant was frantic and upset and the dorm was chaotic. Ms. Raines stated that she did not know exactly what was going on in the dorm. Ms. Raines stated that she was asked to write a statement regarding this incident sometime in August after she heard something had been filed regarding this incident.

66. Ms. Raines stated that she is not aware of any harassing phone calls being made to the Appellant. She specifically denied that she had ever made any phone calls of a harassing nature to the Appellant.

67. The Appellant called **Sergeant John Buckler** who has worked at KSR for seventeen years. On June 22, 2014, Sgt. Buckler was the Appellant's supervisor. Sgt. Buckler referred to his report from that incident during his testimony (See Appellant's Exhibit 1). Sgt. Buckler testified that at approximately 7:20 p.m. on that evening, Officer Jason Preston asked him to respond to Dorm 4 due to an unruly inmate. When Sgt. Buckler arrived, Lt. Noonan was questioning two inmates who were sitting on the stairs. After listening to the inmates for a few

minutes, Lt. Noonan and Sgt. Buckler entered the office where Sgt. Bishop was standing in the doorway. Lt. Noonan explained to the staff that it was a simple matter and there was just a magazine involved. The concern was that inmates were trading property. According to Sgt. Buckler the Appellant asked Sgt. Bishop if she could go outside and get some air. Sgt. Bishop asked the Appellant if she was getting smart with her. The Appellant stated she was asking Sgt. Buckler if she could go outside. Sgt. Bishop responded, "I don't give a sh\*t what you do." The Appellant stood up and stated that she did not deserve to be treated like this. The Appellant went outside the dorm, Sgt. Bishop followed her. Sgt. Buckler testified that he was not sure happened outside of the dorm in the foyer. The Appellant returned a few minutes later and stated that she wanted to go home. Sgt. Buckler informed Lt. Thomas of the situation and Officer Powell went home.

68. Sgt. Buckler testified that Lt. Noonan had spoken with Lt. Thomas about possibly moving the Appellant to Dorm 9. The Appellant became upset when they were using the word "escort" in reference to moving her out of the dorm. Sgt. Buckler denied Officer Raines' statement that the dorm was chaotic on that evening. Sgt. Buckler wrote his report and turned it in to the Captain's office. He has not been interviewed about these events.

69. Sgt. Buckler also testified that during 2014 he was the Appellant's evaluating supervisor effective April 15 of that year. He performed her first interim review. After he had initially prepared a draft that was favorable to the Appellant on "communication" and "teamwork," at the request of Lt. Julie Thomas, Sgt. Buckler changed the "communication" and "teamwork," to read, "Officer Powell needs to work on her communication skills with her fellow employees which will lead to better teamwork." Sgt. Buckler testified that Lt. Thomas insisted on this language due to an incident in Dorm 5 and other problems the Appellant had communicating with staff. Sgt. Buckler testified that the Appellant would not sign the evaluation, although he encouraged her to, telling her that signing did not indicate that she agreed with the evaluation only that she had received it.

70. Sgt. Buckler testified that Officer Powell was an excellent officer and they have worked together for eleven years. He had no trouble with her at work.

71. Appellant called **Capt. Thomas Noonan** as her next witness. Capt. Noonan has worked at KSR since 2009. He was promoted to Captain in September of 2014. During many of the events associated with this appeal he served as a Lieutenant.

72. Capt. Noonan referred to his report from June 22, 2014, in order to discuss the events of that evening. At approximately 7:28 p.m., Lt. Noonan and Sgt. Bishop responded to Dorm 4 in response to Officer Preston's request. Capt. Noonan was trying to defuse the situation involving two inmates who were becoming belligerent about possibly being written-up over a magazine. While Noonan was talking with the two inmates outside the Dorm 4 office, the Appellant asked Sgt. Buckler if she could step outside the dorm for a few minutes. As Noonan entered the office, Sgt. Bishop stated to the Appellant, "What are you getting smart with me? I don't give a sh\*t what you do, but you're not going to talk rude to me." Capt. Noonan stated that

the Appellant stepped outside of the dorm with Sgt. Bishop. Noonan called the Captain's office and spoke with Lt. Thomas. In order to diffuse the situation, Lt. Thomas stated that the Appellant should switch with the Dorm 9 officer.

73. When Noonan told the Appellant that she was being moved to Dorm 9, the Appellant stated that she was just going to go home. Noonan told Sgt. Buckler that he would escort the Appellant up to the Captain's office. Capt. Noonan testified this was a poor choice of words and use of the word "escort" got the Appellant more upset. Capt. Noonan stated that his intention was to walk with the Appellant because she was upset and he was concerned for her safety walking across the yard with the number of inmates involved. While walking with the Appellant, he stated she had to stop at the fence behind Dorm 1 due to being exhausted and out of breath. She had to use her inhaler. Noonan offered the Appellant a chair to sit down on, offered to carry her bags, and take her on a route through one of the dorms to get out of the heat. The Appellant refused all help. Once they arrived at the Captain's office, Capt. Noonan obtained phone numbers to call for a member of Appellant's family to pick her up.

74. Capt. Noonan testified he did not hear what transpired outside the dorm between Sgt. Bishop and Appellant. He did note that the Appellant was visibly upset throughout the events. He has never heard the Appellant cuss out another employee. Capt. Noonan wrote a report about the events of June 22, 2014, but has not been interviewed by anyone about these events.

75. Capt. Noonan testified about an occasion in February 2015 when he took the Appellant to Deputy Warden Coyne's office. He did this because the Appellant who was working at Gate 1 was alleged to have made unprofessional comments to various staff members as they entered the facility. The comments were directed towards the administration at KSR. Capt. Noonan testified that he was there during the meeting with Deputy Warden Coyne and that the Deputy Warden referred to some written reports.

76. The Appellant also questioned Capt. Noonan about Appellant's Exhibit 13 and 15. Part of this exhibit concerned the Appellant being written-up when she refused to work mandatory overtime. The Appellant indicated she had medical testing and was not available to work overtime. Noonan did not dispute the Appellant's excuse. His testimony was that at his level he needed to generate paperwork that the Appellant had refused to work mandatory overtime. He stated that the Appellant would then have the opportunity to present her documentation, which if it showed a valid medical justification the Senior Captain would make the decision as to whether or not there would be any consequence for refusing to work overtime. Capt. Noonan testified he did not have the discretion to not generate paperwork at his level regardless of how valid he thought the excuse for not working was. Capt. Noonan stated that the Appellant was treated the same as all other officers with regard to these issues.

77. The Appellant called **Christopher Cross** as her next witness. Cross has been a Correctional Officer at KSR for a little over a year. He testified he gets along well with the Appellant and that she is a good employee. Officer Cross reported that he had heard rumors that the Appellant had sued Lt. Bishop. He had also heard rumors that the Appellant was harassed by Officer Heilman.

78. Officer Cross described an occasion when Sr. Captain Mazza pulled the Appellant aside at roll call and whispered to her. This resulted in a conversation in the hall where the Appellant was informed that the inmate who had murdered her sister might be coming to KSR. Cross described the Appellant as being very emotional and upset regarding this news.

79. The Appellant, **Phoebe Powell**, testified that she is employed at KSR as a Correctional Officer. She has been employed there for eleven years. Ms. Powell is 72 years old.

80. The Appellant testified she grew up in a construction family and was not offended by cursing; however, she did not want to be cursed at. She had several conversations with Senior Capt. Mazza about this fact. She told him that if she were cursed at again she would take some action.

81. The Appellant testified that on June 22, 2014, she was assigned to Dorm 4. She testified that she had some problems with the inmates due to the fact that she had recently been assigned there and was stricter when enforcing the rules. The inmates did not like that she enforced the rules and also blamed her for getting rid of Correctional Officer Amanda Holbert. (See Appellant's Exhibit 1.)

82. The Appellant worked this dorm with Correctional Officer Preston. She and Officer Preston were involved with two inmates over a magazine. The Officers dealt with two inmates, both of whom claimed that the magazine was theirs. Officer Preston called Sgt. Buckler who was supervisor over this area. Before Sgt. Buckler could arrive, Lt. Noonan, who was the yard lieutenant on that date, arrived and started talking to the two inmates. Sgt. Christine Bishop came with Lt. Noonan and found Officer Powell standing in the dormitory office. Bishop stated to the Appellant, "You need to set your damn ass in that f\*\*\*ing chair." The Appellant asked if she were referring to her, at which Sgt. Bishop repeated the comment. Sgt. Buckler entered the office and the Appellant asked if she could go outside the dorm. The Appellant alleged that Sgt. Bishop responded, "What the sh\*t is wrong with you." The Appellant again asked Sgt. Buckler if she could go outside. Sergeant Bishop responded, "I don't give a f\*\*\*ing sh\*t what you do."

83. At this point, Lt. Noonan informed the Appellant that she was going to be escorted to the Captain's office. The Appellant looked at Sgt. Buckler and said, "This is embarrassing and isn't right." The Appellant stated that she became more upset, walked through the yard with inmates and officers watching and Sgt. Bishop following her. Appellant stated she was having trouble breathing due to the heat and health problems. Appellant stated she had her family come and get her as she was not able to drive home. She testified she told Lt. Thomas what had happened when she arrived to the Captain's office.

84. The Appellant went to the doctor the following morning and found out she had suffered a stroke. She stayed off work for a considerable period of time. The following morning the Appellant also prepared a written statement of the events of the previous day and turned it in to Amy Ganschow, the personnel representative, for distribution to the appropriate staff. The Appellant's statement is a part of Appellant's Exhibit 1 and was attached to her Grievance.

85. The Appellant denied the statements that Lt. Bishop states she made on June 22, 2014. The Appellant stated that if she made the statements attributed to her by Lt. Bishop, she (the Appellant) should be fired. She offered to take a lie detector test regarding these statements.

86. While she was off work, the Appellant filed a grievance regarding this incident which she turned in on June 17, 2014. When the grievance reached Warden Smith's level he scheduled a meeting with Appellant and her daughter, Robin Mashburn, on August 19, 2014.

87. Appellant remained off work until October 13, 2014. While she was off work, she thought about not coming back to work at KSR at all.

88. Appellant testified that while an Officer at KSR she received harassing phone calls when she worked in various dormitories. These calls were anonymous and many involved rude comments about her sister who was murdered. She said on some evenings she would receive as many as four or five calls in a particular night. She reported these phone calls to Lt. Bernardi, Sgt. Buckler and also discussed them with the Captain's office. She told her supervisors that she suspected four female Correctional Officers and a fifth was a maybe. She was informed that they did not have enough information to prove who was making the phone calls. She agreed that Capt. Mitchell made a general statement at roll call regarding phone calls. The Appellant stated that after she returned to work in October, the rude phone calls have stopped. She occasionally gets a hang-up phone call which is more of an annoyance than the harassing phone calls she used to get.

89. Ms. Powell stated that a number of things are placed in her personnel or evaluation file that she has no knowledge of. She specifically referred to a KEAP referral that she had never seen that was reportedly placed there by Lt. Deckard. The Appellant also mentioned the statement that Lt. Thomas told Sgt. Buckler to put in her interim evaluation about poor communication skills. She stated that this was allegedly the result of complaints from officers. Ms. Powell stated that many of the young officers complained that she was too old to work at KSR. They would ask why she did not retire. She also stated they would say they did not want to work with the old woman. She also heard, "Why are you still here?" Despite these statements, the Appellant was assigned to work the largest dorm at KSR.

90. With regard to the November 2, 2014 incident, Appellant stated that she understood Captain Stewart to say there was documentation regarding this occurrence. She stated that she has requested and has not been able to obtain it. According to Ms. Powell, when she asked Lt. Broughton why she was walked across the yard to a different post on this occasion, Lt. Broughton stated that Lt. Bishop stated, "You are suing her and you served her on her birthday." Appellant stated she has worked with Lt. Bishop on twelve occasions and there have been no problems.

91. With respect to the day she was written up for refusing a mandatory overtime, the Appellant stated she was being asked to work her third sixteen-hour day in a row. The Appellant had a valid medical appointment and claimed she was #48 on the mandatory list, having worked the night before. She did not believe she should have been written-up.

92. The Appellant testified regarding statements which were placed in her evaluation file without her knowledge. These items were introduced in to evidence as Appellant's Exhibits 15, 16, 17 and 19. These write-ups were also discussed with Deputy Warden Coyne. The Appellant states that he did not show her these statements and told her that she would have to make an open records request in order to obtain copies of the statements. Appellant stated that she finally obtained copies of them through discovery with respect to this appeal on April 22, 2015. The Appellant has prepared responses to these incident reports and asked that her responses be placed in her file along with the reports. She stated that this is consistent with the Warden's testimony regarding this matter.

93. With respect to age discrimination, the Appellant stated she thinks that she and other older officers do not get assigned to a permanent post in the dormitories. She currently works as a relief officer. She stated that she is aware that young female officers refuse to work one-on-one assignments and are given another assignment. She stated that she was not allowed to do this when a similar incident occurred with her.

94. On cross-examination, the Appellant stated that she did not place anything in writing regarding the harassing phone calls. In addition, she did not file any type of written age discrimination complaint. Appellant stated that placing reports in her file, such as the reports placed there in February 2015 are a form of harassment.

95. The Appellee called **Senior Captain Kevin Mazza**. He has been employed at KSR for eleven years and has been the Sr. Captain since July 1, 2013. He stated that he has worked with Powell for quite some time. They started as Correctional Officers together and the Appellant has worked for him since 2007 when he was Captain. He described the Appellant as a fair, firm employee who does the job in the dorms that she is supposed to do and follows policy. Sr. Captain Mazza described himself as a sounding board for the Appellant.

96. Mazza stated that the Appellant has never complained to him of age discrimination. She did talk to him last year about the incident in Dorm 4 with Sgt. Bishop. Mazza said that he heard about this incident the following day when he talked to the Appellant. Mazza stated that the Incident Reports from the various staff involved with this incident do not match. He said Sgt. Bishop admits that she said, "I don't give a sh\*t what you do." Mazza stated that the Appellant told him that she said, "I'm not going to be anyone's bitch!" The others involved did not hear anything. Mazza stated that he read the reports and questioned everyone involved except for Officer Preston. He reported this matter to the Warden who made the decision. No disciplinary action was taken except for a verbal counseling of Sgt. Bishop. Mazza stated that he does not know what took place that day, but he believes that the report written by Sgt. Bishop uses language that would be out of character for the Appellant.

97. Mazza stated that Sgt. Bishop is his sister-in-law. He is not sure if he sat on the interview panel when she was promoted to Lieutenant; however, he does not feel he should have been excluded as they are not family. Mazza stated that he is not that close with Bishop and actually is closer to the Appellant. Mazza stated that he is harder on Bishop than many others because of the perception that he might favor her because she is his sister-in-law.

98. Sr. Captain Mazza stated that he has talked with the Appellant about receiving harassing phone calls one time. He does not have anything in writing regarding this. He stated that there was nothing he could do to confirm who was making the call and they do not have that capability at KSR. Sr. Captain Mazza stated that he is aware of the Appellant's sister and the fact that she was murdered and her murderer is a Death Row inmate.

99. Sr. Captain Mazza stated that he was aware in general that there were rumors circulating that Sgt. Bishop was telling people the Appellant had sued her. He stated that Bishop was sued by an inmate and served on her birthday and talked about this at the institution. He stated that once this story traveled around the institution he is sure that it changed into the Appellant was suing Bishop because people were aware of the incident in Dorm 4. He referred to KSR as "gossip central."

100. Sr. Captain Mazza was not aware of the specifics of the November 2, 2014 incident when the Appellant was moved because Bishop said she was suing her. This was handled by Lt. Broughton who was running the shift and Capt. Stewart who was the acting Sr. Captain while Mazza was gone.

101. On cross-examination, Mazza stated that he has heard the Appellant curse three times. The first time was when she told him about the incident involving Sgt. Bishop and stated she said she would not be treated like anyone's "bitch." The second time was when she referred to an officer as a "bitch." The third time was when the Appellant said "F\*\*k" while they were talking about her grievance.

102. Sr. Captain Mazza said that the Appellant has never referred to him as Kevin.

103. Sr. Captain Mazza said that the Appellant's name was clear as far as he was concerned.

### **FINDINGS OF FACT**

1. The Appellant, Phoebe Powell, is a Correctional Officer at the Kentucky State Reformatory (KSR). She filed an appeal with the Personnel Board on August 22, 2014, alleging that she had been penalized by being subjected to a hostile work environment and age discrimination. The Appellant also believed she was penalized when statements were placed in her evaluation file, which were never discussed with her, and which should not have been in her evaluation file. The Appellant was a merit employee with status throughout the events concerning this appeal. (Appellant's Exhibit 1.)

2. The Appellant was in her 60s when she was hired as a Correctional Officer at KSR and is now 72 years old. (Testimony of the Appellant.)

3. On June 22, 2014, the Appellant was assigned to work Dorm 4 at KSR with Officer Jason Preston. Sgt. John Buckler was the supervisor over that unit. The Appellant was not usually assigned to that dorm, having recently replaced Amanda Holbert who had been fired after being caught smuggling a shank in to the institution to give to an inmate. Officer Holbert was lenient with the inmates in Dorm 4. The inmates were unhappy the Appellant and Officer Preston were making them follow the rules on June 22, 2014. (Testimony of the Appellant and Appellant's Exhibit 1.)

4. The Appellant and Officer Preston were involved with two inmates who claimed to own the same magazine. The inmates became upset and Officer Preston called for a supervisor to help, specifically Sgt. Buckler. Before Sgt. Buckler could arrive, Lt. Noonan and Sgt. Bishop arrived in Dorm 4. While Lt. Noonan and later Sgt. Buckler dealt with the two inmates on the steps, Sgt. Bishop walked in to the dormitory office.

5. The Appellant had previously told Sr. Captain Mazza that she was tired of being cursed at by staff and inmates at KSR. She stated that she would take action the next time this happened to her. The Appellant alleges that Sgt. Bishop cursed at her extensively during the events of June 22, 2014. The Hearing Officer finds that the Appellant is credible and believes that her report is an accurate depiction of what occurred on that evening from the Appellant's perspective. (Testimony of the Appellant and Appellant's Exhibit 1.)

6. The Hearing Officer finds the testimony of the Appellant to be credible based on her demeanor and sincerity while testifying, her consistency over the months regarding these incidents, and the fact that she was genuinely upset over the events of June 22, 2014. Although they cannot corroborate all of the statements the Appellant alleges were directed at her, three other witnesses corroborate that Sgt. Bishop stated something like, "I don't give a sh\*t what you

do" when the Appellant asked to leave the office. (Testimony of the Appellant, Capt. Noonan, Sgt. Buckler, Lt. Bishop and Appellant's Exhibit 1.)

7. The Hearing Officer finds that the Appellant did not make the comments attributed to her in the report and testimony from Lt. Christine Bishop. The Hearing Officer so finds because these comments are contradicted by the credible report filed by the Appellant. In addition, they are not corroborated by the statements of Capt. Noonan, Sgt. Buckler, Correctional Officer Raines, or Correctional Officer Preston. In addition, the language attributed to the Appellant has been identified as out of character for her by Warden Smith, Sr. Captain Mazza, Capt. Mitchell and Capt. Noonan. (Testimony of the Appellant, Capt. Noonan, Sgt. Buckler, Correctional Officer Raines, Capt. Mitchell, Warden Smith, Sr. Capt. Mazza and Appellant's Exhibit 1.)

8. Although there was testimony that this matter was thoroughly investigated, the record does not back this up. The Appellant, Lt. Bishop, Capt. Noonan, and Sgt. Buckler all provided written statements within a day of these events. Sr. Captain Mazza states that he questioned all who were involved. Capt. Noonan and Sgt. Buckler state that no one interviewed them about these incidents and that they only provided written statements. (Testimony of Sr. Capt. Mazza, Capt. Noonan, Sgt. Buckler and Appellant.)

9. After the reports were filed, the Appellee chose not to take any formal disciplinary action against either Lt. Christine Bishop or the Appellant. Both Warden Smith and Sr. Captain Mazza identified this as a case without corroboration and with two conflicting versions of events. Lt. Bishop was given a verbal counseling or reprimand. No action was taken with respect to the Appellant regarding this incident. (Testimony of Warden Smith and Sr. Captain Mazza.)

10. On November 2, 2014, the Appellant was assigned to work Dorm 7. Dorm 7 was part of Unit C, which was supervised by Lt. Christine Bishop. At some point early in the shift, Lt. Bishop noticed that the Appellant was assigned to her unit and contacted Lt. Heather Broughton who was the Operations Lieutenant running the Captain's office that evening. Lt. Bishop asked that the Appellant be moved from her unit because the Appellant had filed a lawsuit against her. Lt. Bishop felt this constituted a conflict and it was not fair to her to have to work in a unit with an officer who was suing her. Lt. Broughton agreed this was the appropriate action to take and assigned the Appellant to Dorm 6 and assigned another officer to Dorm 7. (Testimony of Lt. Bishop and Lt. Broughton.)

11. The Appellant was upset about this move. She initially thought she was being moved out of Dorm 7 at the request of an inmate. After she arrived in Dorm 6 she called Lt. Broughton and was informed that she was moved because she had a conflict with Lt. Bishop because she was suing Lt. Bishop. The Appellant told Lt. Broughton that she was not suing Lt. Bishop and did not have a conflict. (Testimony of the Appellant and Appellant's Exhibit 4.)

12. After the move, Lt. Broughton contacted Capt. Scott Stewart, as either duty officer or shift supervisor, and informed him of this move and the conflict between Lt. Bishop and Appellant. The following day, the Appellant turned in a written statement to Capt. Stewart regarding this incident. (Testimony of the Appellant, Capt. Stewart and Appellant's Exhibit 4.)

13. The Appellant did not sue Lt. Christine Bishop. (Testimony of the Appellant, Lt. Bishop, Warden Smith, Sr. Capt. Mazza and Appellant's Exhibit 4.)

14. There were rumors that the Appellant had sued Lt. Bishop. These rumors may have spread as a result of Lt. Bishop being sued by an inmate and served at the institution on her birthday. Lt. Bishop talked about this incident near Gate 1 where other staff were present. From these basic facts eventually a rumor spread that the Appellant had sued Lt. Bishop. This rumor made its way back to Lt. Bishop, who on November 2, 2014, thought that she might be in the process of being sued by the Appellant. (Testimony of the Appellant, Robin Mashburn, Lisa Craigmyle, Lt. Tingle, Lt. Bishop, Warden Smith, Officer King, Officer Cross and Sr. Captain Mazza.)

15. The Appellant was embarrassed by both the June 22, 2014, and November 2, 2014 incidents. The Appellant thought it was embarrassing to be "escorted" across the yard by supervisory staff. She thought that this sent the message to any staff or inmates that saw her that she was in some sort of trouble and had to be moved by supervisors either off the yard or from one post to another. (Testimony of the Appellant and Appellant's Exhibits 1 and 4.) The Hearing Officer finds there was no intent to embarrass the Appellant on either occasion. Capt. Noonan was concerned for the Appellant's health and safety when he walked her to the Captain's office on June 22, 2014. He admitted use of the word "escort" was a poor word choice. He also made sure a family member was called to give the Appellant a ride home. Likewise, Lt. Broughton was trying to avoid an unnecessary problem when she moved the Appellant away from Lt. Bishop on November 3, 2014. In retrospect the move may have been unnecessary; however, the Hearing Officer finds no evidence of a bad motive on Lt. Broughton's part.

16. The Appellant's sister was murdered several years ago. Her murderer is an inmate assigned to Death Row. At some point around 2014, a number of officers at KSR were interested in this and spoke to the Appellant about it. At some point she started receiving harassing phone calls making reference to her sister. These included rude comments such as "I heard your sister liked rough sex." The Appellant reported these incidents to supervisors, including Lt. Bernardi, Sgt. Buckler, and Capt. Mitchell. The Appellant thought that she could identify the voices on these calls as four Correctional Officers she had difficulty with and possibly a fifth officer. The supervisors at KSR, mainly Capt. Mitchell and Sr. Captain Mazza, did not believe that they had sufficient proof of who was making the calls nor did they have the means to determine who was making the calls without severely disrupting operations. Capt. Mitchell made a general statement at roll call without referencing the Appellant. The statement informed officers that the telephones were for business use and misuse of the telephones would not be tolerated. The Appellant was off work from June 22, 2014, through October 13, 2014.

When she returned to work, these telephone calls stopped. Nothing was put in writing regarding these phone calls, there were no reports that listed the dates, times or posts where the Appellant was working when she received these phone calls. There was no testimony that the phone calls were from inside or outside the institution. (Testimony of the Appellant, Sgt. Buckler, Lt. Bernardi, Capt. Mitchell and Sr. Captain Mazza.)

17. A personnel file is kept on KSR employees at the institution. Supervisors also maintain an evaluation file for each employee. (Testimony of Warden Smith.)

18. In February of 2015, reports were placed in the Appellant's file without her knowledge or an opportunity for her to respond. These reports were discussed with the Appellant during a meeting with Deputy Warden Coyne and Capt. Noonan; however, the Appellant still did not get copies of them. She saw them during a mediation session with respect to this appeal, but did not actually receive copies of them until April 22, 2015. The Appellant prepared responses to these reports and introduced them into evidence during the evidentiary hearing in this case. (Testimony of Appellant, Capt. Noonan, Warden Smith and Appellant's Exhibits 15, 16, 17 and 19.)

19. According to Warden Smith's testimony, Incident Reports which do not result in formal disciplinary action do not belong in an employee's personnel file, although they may be proper for an evaluation file. If a report is placed in an employee's evaluation file, the report should be discussed and the report should be available to the employee. An employee has a right to respond to any such reports in writing. (Testimony of Warden Smith and Appellant's Exhibit 1.)

20. The Appellant did not present any evidence at the hearing that the events of June 22, 2014; November 2, 2014; the harassing phone calls or the reports placed in her file were the result of age discrimination. Likewise, she did not present any evidence that any of these actions constituted legally actionable harassment based on any protected class, such as race, sex, age, national origin, disability, religion, etc.

21. The Appellant offered testimony that post assignments may be a form of age discrimination; however, no details were presented regarding this issue and the Hearing Officer does not find that the Appellant has proven that post assignments are given out based on age at KSR.

### CONCLUSIONS OF LAW

1. State employees may appeal to the Personnel Board if they believe they have been discriminated against based on their age over forty (40). KRS 18A.095(12) and (14)(a) and KRS 18A.140(1). Based on the Findings of Fact in this case, the Appellant has failed to carry her burden of proof that any of the actions taken in this case were the result of age discrimination. Other than evidence of the Appellant's age and a few references to off-handed comments made by coworkers, there is no evidence in this case from which to conclude that any actions taken against the Appellant constitute age discrimination.

2. Based on the same statutory provisions, a state employee may appeal to the Personnel Board if they feel they have been harassed based on any of the protected classes, including age over 40. Based on the Findings of Fact the Appellant has failed to carry her burden of proof that any of the actions taken against the Appellant in this case constitute harassment based on the Appellant's age or constitute a hostile work environment based on the Appellant's age.

3. KRS 18A.020 governs employee access to personnel files. On written request, an employee shall have access to examine his personnel file and make comments in writing on any such item. Upon written request, a state employee may also inspect any record that relates to him and have the right to respond in writing. Incident Reports which do not result in disciplinary action are not appropriate for personnel files and should be placed in an evaluation file if they are maintained on any employee file. Based on the practices at Kentucky State Reformatory, employees should be notified when such reports are placed in their file and pursuant to KRS 18A.020 they should have the right to respond in writing.

### RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **PHOEBE POWELL VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2014-184)** be **DISMISSED** as the Appellant's claims of age discrimination and hostile work environment and **SUSTAINED to the extent** that Incident Reports which do not result in formal disciplinary action should be removed from the Appellant's personnel file, that she shall have notice of documents placed in her evaluation file, and that she should have the right to respond to these reports in writing pursuant to KRS 18A.020(3) and (4). **FURTHER**, Appellant shall be reimbursed for any leave time she used attending the hearing and any pre-hearing conferences at the Board, 18A.095(25).

**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.

**SO ORDERED** at the direction of **Hearing Officer Mark A. Sipek** this 30<sup>th</sup> day of July, 2015.

**KENTUCKY PERSONNEL BOARD**

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

A copy hereof this day mailed to:

Hon. Angela Cordery  
Phoebe Powell