

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-003**

WALTER RAFFERTY

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 16, 2015, 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, Walter Rafferty, was present and was represented by the Hon. Michael Boylan. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and was represented by the Hon. Stafford Easterling.

The issue at the evidentiary hearing was whether or not there was just cause for the demotion of the Appellant from Correctional Sergeant to Correctional Officer and whether or not that penalty was excessive or erroneous. 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 by a preponderance of the evidence.

BACKGROUND

1. The Appellant, Walter Rafferty, was involuntarily demoted for cause from his position of Correctional Sergeant, grade 10, at the Kentucky State Reformatory (KSR) to Correctional Officer, grade 9, effective December 1, 2014.

2. The Appellant timely filed his appeal with the Personnel Board on January 7, 2015, appealing from his demotion from Correctional Sergeant, grade 10, to Correctional Officer, grade 9, at KSR.

3. The first to testify was the Appellant, **Walter Rafferty**. Prior to his demotion from Correctional Sergeant at KSR to Correctional Officer, Mr. Rafferty was what was known as a "relief officer" at KSR. On the day in question, the same being November 9, 2014, Mr. Rafferty was assigned to the Correctional Psychiatric Treatment Unit (CPTU), which is the mental health unit housing for the prisoners who are not allowed in the yard with the general population. These prisoners are locked in their cells the vast majority of the day, as they are dangerous to themselves and/or others. Some are known as "max assaultive," and cannot be around the general population and must be watched continuously. The CPTU is the most dangerous wing at KSR. Mr. Rafferty testified that he has worked at other posts at KSR, but in the CPTU there is a heightened sense of security.

4. Appellee's Exhibit 1 was introduced into the record and is a copy of the Kentucky Corrections Policies and Procedures, Policy Number 3.1, Code of Ethics. Appellee's Exhibit 2 was introduced into the record and is a copy of the KSR Policies and Procedures, Policy Number KSR 03-00-14, Prohibited Employee Conduct, Disciplinary Actions, and Appeal Process. Appellee's Exhibit 3 was introduced into the record and is a copy of KSR Post Order #75. According to the Appellant, it was incumbent upon him to review the Post Order marked as Appellee's Exhibit 3 and follow the same.

5. According to the Appellant, on the date in question, the same being November 9, 2014, he was assigned to the CPTU. He testified that within five minutes of arriving at CPTU, there was an inmate cutting himself, an inmate attempting to hang himself, and an inmate banging his head against a door. He also stated at that time only he and one other guard were in the wing. Mr. Rafferty testified that at the CPTU there are three wings, the same being "A," "B," and "C," with "C" being the most dangerous. So in essence, the Appellant had three things going on right off the bat and his help, Mark White, did not arrive on the Unit until about 4:10 p.m. (for a shift that started at 3:30 p.m.).

6. Appellee's Exhibit 4 was introduced into the record and is a copy of Mr. Rafferty's Incident Report prepared at 4:30 p.m. on November 9, 2014. Mr. Rafferty explained that an inmate watcher is an inmate brought in from the general population whose sole duty is to keep an eye on an assigned inmate in the CPTU. The purpose is to keep an extra eye on these dangerous inmates throughout the day.

7. Mr. Rafferty stated that Lt. Broughton ordered him to bring inmate Armour from an upstairs cell to a downstairs cell without a "bean flap," which is an opening in a door for purposes of sliding a meal tray in, so that he could be watched. Mr. Rafferty was working on what type of watch to put inmate Armour on when all the confusion was ensuing. Apparently someone hollered out that inmate Armour was attempting to hang himself, so Mr. Rafferty ran to the phone to find out what kind of watch to put him on. According to Mr. Rafferty, there are two types of watches. One is a 15-minute watch and the other is a one-on-one watch. The 15-minute watch is when the inmate is checked on every 15 minutes and the one-on-one watch is when an inmate is constantly watched. So, as testified to previously, the phone was ringing; an inmate was cutting himself; and an inmate was attempting hanging himself, all at one time and the Appellant chose to go to the phone to see what type of watch inmate Armour was to be on. According to Mr. Rafferty this all happened before Corrections Officer Maria White got to the Unit. With this being the case, Mr. Rafferty contradicted his earlier testimony and the alleged confusion actually occurred between 4:00 and 4:30 p.m. (and not within the first five minutes of the shift as he previously testified to). Once Officer White got to the Unit there was a full staff on hand with Mr. Rafferty being the supervisor over two Corrections Officers.

8. The inmate that was allegedly cutting himself had been moved downstairs into cell 8 and was being attended to by C/O Maria White. According to the Appellant, he took Officer White's key because she was having trouble turning the key to cell 8. The Appellant could not remember whether he took Officer White's keys or just helped her turn the keys while it was in the lock. Mr. Rafferty stated he then helped cuff the inmate while Officer White took the inmate over to receive medical attention. All the while the key to the cell was still dangling from the lock on the cell door. Mr. Rafferty testified he thought Officer White still had the keys or had taken the keys out of the lock. Once the inmate had been removed from the cell, Mr. Rafferty entered the cell briefly to determine what the inmate had used to cut himself. So, for a minute or two, the keys (which open all the cell doors in the unit) were left dangling in cell door 8 with the inmates on watch duty being within ten feet of the same. Eventually Lt. Broughton's clerk came down to collect the inmate count and informed the Appellant that the keys were still hanging from the cell door. Corrections Officer Williams immediately took control of the keys.

9. The next to testify was **Heather Broughton**. Ms. Broughton is employed at KSR as the Operations Lieutenant. She was the Operations Lieutenant on duty during the second shift on November 9, 2014. According to Ms. Broughton her clerk at the time, Correctional Officer Raines, went to the CPTU to get the inmate out-count (which is a count of the inmate watchers and janitors taken out of the general population to work in the CPTU). Officer Raines told the Appellant at the time that the keys were still hanging in the door of cell 8. Upon returning to the office, Officer Raines informed Ms. Broughton about the incident.

10. Appellee's Exhibit 6 was introduced into the record and is a copy of the video which captured the events at the CPTU during the time in question. The video indicates that Officer White handed her keys to the Appellant who then opened the door to cell number 8. Officer White took the inmate from cell 8 to the medical cart and the Appellant went directly into the cell. At all times, the keys were left hanging in the door lock. The video shows the Appellant just wandering around outside of the subject cell after having stuck his head in to the cell briefly. It also shows there were inmate watchers located approximately two to three feet from the cell door while the keys were left hanging in the lock. Ms. Broughton testified that the key in question opens every cell door in the unit. The video then shows Officer Raines arriving in the unit and Officer Williams turning around immediately thereafter and removing the keys from the door. All told, the keys were left hanging in the cell door for approximately one and a half to two minutes. Also, the video evidence does not correlate with the Appellant's previous testimony. Clearly, the Appellant was the last one with the keys. In addition, the video does not support the Appellant's testimony that there was mayhem going on while all this was occurring.

11. After this incident Lt. Broughton pulled the Appellant out of Unit C and placed him into Unit B. She testified that on this particular evening she did not order any inmates moved around from cell-to-cell as previously related by the Appellant. She also testified that there was no hanging incident during the time in question and, if there had been, there would have been an organized response. In direct contradiction to the Appellant's testimony, the video marked as Appellee's Exhibit 6 shows everyone being casual and walking around the unit leisurely during the incident in question.

12. Ms. Broughton testified that the Appellant's duty as the relief officer, or any supervisor for that matter, was to review and strictly adhere to the Post Order for the unit. [See Appellee's Exhibit 3.]

13. On cross-examination, Ms. Broughton was asked whether the Appellant violated Post Order #75 [Appellee's Exhibit 3] which states under (A)(5): "Keep keys in your possession at all times. Keys shall never be accessible to inmates." According to Ms. Broughton, once Officer White handed her keys to the Appellant, it was the Appellant's responsibility to maintain the security of the key. Ms. Broughton also testified that to her knowledge, Officer White was not disciplined for this incident. When asked if she believed Officer White did anything wrong when she handed her keys to the Appellant, Lt. Broughton stated that she did not and that a correctional officer should always be able to rely upon his or her supervisor in the event he or she were to hand his or her keys over to them.

14. The next to testify was **Kevin Mazza**, who is the Senior Captain at KSR, and is the head supervisor in uniform in charge of overseeing all the security at KSR. Mr. Mazza testified that the CPTU is a 150-bed mental health unit with the C Wing being the most volatile in the entire Kentucky Correctional system. According to Captain Mazza, the CPTU is even worse than being on Death Row.

15. When asked how he became involved with the subject incident, Sr. Captain Mazza testified that when he arrived at work on Monday morning, November 10, 2014, the Incident Reports regarding the same were in his mailbox. This prompted him to speak with Lt. Broughton and Officer Raines and review the video of the incident. He then reported the incident to Deputy Warden of Security James Coyne and Warden Smith, who instructed him to look into the matter a little bit more. As a result, he went on to question the Appellant, who by that time had not yet written his Incident Report.

16. According to Sr. Captain Mazza, Officer Maria White was having a problem getting the door to Cell 8 open. At some point, the Appellant had his hand on the key until Officer White got the inmate out of the cell, then the Appellant took his hand off the key and entered the cell. Sr. Captain Mazza testified that there are eight people who work in the CPTU and only four keys, so it is common to pass the keys to each other. When asked if Officer White violated Post Order #75 [Appellee's Exhibit 3], Mr. Mazza testified that there was no violation because she handed off the key to a trusted employee.

17. During his discussion with the Appellant, the Appellant informed Captain Mazza there was an inmate hanging himself at the same time the phone was ringing. However, video and the information received from other staff did not support this version of the events. If such an event had occurred, according to Sr. Captain Mazza, the Appellant should have taken the keys, attended to the inmate hanging himself, and then gone to the phone.

18. According to Sr. Captain Mazza, the Appellant is a relief supervisor and is not assigned to any particular unit. In other words, he is a "floater" between the five units at KSR. If it were the Appellant's first time in the CPTU, they would usually have kept someone with him until he was familiar with the unit. In any event, the first thing all supervisors must do is read the Post Orders. [See Appellee's Exhibit 3.] Sr. Captain Mazza did not think it was the Appellant's first time in the CPTU since he had been promoted to Relief Officer as far back as 2008 or 2009, but he did not know that for a fact.

19. According to Sr. Captain Mazza, the Appellant did not fulfill his duty per policy when he left the key in the door with inmates milling around nearby. Especially given that key opens every door in the CPTU along with all the handcuffs utilized in the unit.

20. The next to testify was **Warden Aaron Smith**, who has been the Warden at KSR since May 1, 2014. According to Warden Smith, Senior Captain Mazza brought this particular incident to his attention. After discussing the same and reviewing the Appellant's personnel file, it was his decision to demote the Appellant. Appellee's Exhibit 7 was introduced into the record and is a copy of the amended letter of demotion dated December 17, 2014. Appellee's Exhibit 8 was entered into the record and is a copy of the original demotion letter. This letter was amended because the salary indicated thereon was off by two cents. Appellee's Exhibit 9, was entered into the record and is a copy of the Appellant's disciplinary history dating back to 2009 only. According to Warden Smith, he was only interested in the Appellant's disciplinary history from the point of his promotion to Sergeant forward. According Warden Smith, the Appellant's disciplinary history was critical to his decision to demote him. It was his opinion that there was a pattern developing that exhibited the Appellant's failure as a Sergeant. Given that he had already had a suspension, he did not want to put him into a position where eventually he would be terminated. In Warden Smith's opinion, he felt that if the Appellant stayed on the same path he was heading as a Sergeant, the next disciplinary action taken could have been an intent to dismiss and he did not want to head down that road. According to Warden Smith, the truth was, they were having issues and problems with the Appellant in his role as a Sergeant but he felt he could still be an effective corrections officer.

21. Warden Smith testified that in his opinion there is no question that the facts contained on Appellee's Exhibit 7, the demotion letter, were correct. The keys were left hanging in the cell door which created a huge security risk in the most volatile wing in the state. This caused it to be an extremely dangerous environment with the possibility of death, injury, and escape. There were all kinds of potential problems and one of the worst things that can happen is to lose the Folger-Adams keys, which are large and dangerous enough to also be used as a weapon. According to Warden Smith, it is a supervisor's responsibility to secure the key. All indications were the Appellant instructed Officer White to get the volatile inmate handled while he handled the key situation. That course of action made sense. However, once he took control of the keys the Appellant needed to be responsible for them from that point forward and leaving the keys hanging in the door jeopardized everyone's safety, which is the number one priority at KSR.

22. Warden Smith testified he did not terminate the Appellant for lying to him regarding the events that occurred or for his error in securing the key. He stated it is not his goal to fire people and when looking into the Appellant's history, he simply did not feel he was performing well as a Sergeant. However, he believed he could succeed as a Correctional Officer. Finally, Warden Smith testified that Officer White was not disciplined for this incident because she did not violate any policy. It was clear that her supervisor instructed her to give up the keys and that is all she did. From that point forward, it was the Appellant's duty to secure the keys.

23. 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.

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

FINDINGS OF FACT

1. The Appellant, Walter Rafferty, was demoted from his position of Correctional Sergeant, grade 10, at the Kentucky State Reformatory (KSR) to Correctional Officer, grade 9, at KSR, effective December 1, 2014. According to the amended demotion letter dated December 17, 2014, marked as Appellee's Exhibit 7, the Appellant was demoted for failing to comply with KSR Policy No. 03-00-14 (I) (I), "Failure to properly discharge the duties of his position to include, but not limited to, making every reasonable effort to prevent the escape of an inmate" [See Appellee's Exhibit 2]; and KSR Post Order #75(B)(5), failure to "monitor and supervise subordinates adhering to all policies and procedures, and post orders." In essence, the Appellant was demoted for failing to secure the Folger-Adams keys which could open all the cells in Unit C of the CPTU, which happens to be the most dangerous unit in the entire Kentucky corrections system. In addition, the keys left unsecured could also unlock all handcuffs utilized in the unit. The failure to properly secure these keys endangered the security and safety of the staff, inmates and the institution.

2. The Appellant, a classified employee with status, timely filed his appeal with the Personnel Board on January 7, 2015, appealing from his demotion from Correctional Sergeant, grade 10, to Correctional Officer, grade 9, at KSR, effective December 1, 2014.

3. On November 9, 2014, while acting in his capacity as a relief supervisor, the Appellant was assigned to the Correctional Psychiatric Treatment Unit (CPTU), C-Wing, which houses mentally ill inmates who are dangerous not only to themselves but to others, and include max-assaultive inmates who are not allowed to mingle with the general inmate population. Many of these inmates need to be watched around the clock and/or every fifteen minutes. The testimony of Lt. Heather Broughton and the videotape of the incident marked as Appellee's Exhibit 6 demonstrate conclusively that the Appellant was assisting Correctional Officer Maria White open the Cell 8 door and order that she could secure the inmate therein. It appeared Officer White was having difficulty opening the door, so the Appellant took it upon himself to control the key to the cell and open the door. The videotape then shows Officer White securing the inmate and leading him out of the cell. Thereafter, the Appellant is seen going into the cell briefly and then exiting the same. There did not seem to be any distractions, and the Appellant simply walked away from the cell leaving the Folger-Adams keys dangling in the lock of the cell. The testimony of Lt. Broughton indicated that her clerk, Correctional Officer Raines, informed a Correctional Officer at Unit C that the keys were still in the lock and immediately thereafter that Correctional Officer removed the keys. The videotape demonstrates that the keys were left dangling in the lock for approximately two minutes. The videotape also demonstrates that there were inmate watchers within two or three feet of the cell door and the Folger-Adams keys.

4. The testimony of Lt. Broughton, the Appellant, Sr. Captain Kevin Mazza and Warden Aaron Smith all indicate that any supervisor must first read and be familiar with the Post Orders then in effect for the particular unit they are supervising. Appellee's Exhibit 3 is the Post Order in effect for the CPTU on the day in question. The order clearly states that keys are to be kept in staff possession at all times and shall never be accessible to inmates. Further, under (B)(5) the Appellant, as supervisor, was to monitor and supervise his subordinates and ensure that all policies and post orders were being followed.

5. The videotape, marked as Appellee's Exhibit 6, demonstrates clearly that Correctional Officer Maria White relinquished control of the subject Folger-Adams key to the Appellant. From that point forward, it was the Appellant's responsibility to keep the key in his possession and not allow it to be accessible to inmates.

6. Allowing the subject Folger-Adams key to remain in the cell door lock, dangling within two to three feet of other inmates for approximately two minutes, constitutes a breach of KSR Post Order #75 [See Appellee's Exhibit 3] and clearly jeopardized the safety of the staff and inmates at KSR.

7. Appellee's Exhibit 9 demonstrates that since being promoted to Sergeant, the Appellant has had a three-day suspension reduced to a written reprimand and received a three-day suspension from duty and pay.

8. Warden Smith testified that the Appellant's disciplinary history was a critical factor in his decision to demote the Appellant. It appeared to him that the Appellant was failing as a Sergeant but still had the wherewithal to be a good Correctional Officer. Instead of suspending the Appellant again for poor work performance and sending him down the path to the possible termination, he decided it would be best to put him in a position where he could succeed rather than to jeopardize his career.

CONCLUSIONS OF LAW

1. The Appellant timely filed his appeal with the Personnel Board on January 7, 2015, appealing from his demotion from his position of Correctional Sergeant, grade 10, to Correctional Officer, grade 9, at the Kentucky State Reformatory, effective December 1, 2014.

2. The Appellee has demonstrated by a preponderance of the evidence that the disciplinary action taken against the Appellant, the same being his demotion from his position of Correctional Sergeant, grade 10, to a Correctional Officer, grade 9, at KSR, effective December 1, 2014, 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 **WALTER RAFFERTY VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORECTIONS (APPEAL NO. 2015-003)** 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 22nd day of September, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Stafford Easterling
Hon. Michael Boylan