

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-081

WALTER RAFFERTY

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

** ** *

The Board at its regular October 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated September 10, 2014, and being duly advised,

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

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

SO ORDERED this 15th day of October, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Angela Cordery
Walter Rafferty
Bobbie Underwood

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This matter came on for an evidentiary hearing on July 24, 2014, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and authorized by virtue of KRS Chapter 18A.

Appellant, Walter Rafferty, was present and was not represented by legal counsel. Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Angela Cordery. Ms. Cordery was accompanied by Ms. Elisha Mahoney, Paralegal, as well as Deputy Warden James Coyne, the Agency representative.

Mr. Rafferty appeals the three-day suspension from his position as Correctional Sergeant with the Department of Corrections, Kentucky State Reformatory, beginning February 14, 2013, and continuing through February 16, 2013. The burden of proof was on the Appellee to show by a preponderance of the evidence, that there was just cause for this discipline and that the three-day suspension was neither excessive nor erroneous.

The rule separating witnesses was invoked and employed throughout the course of the proceedings. The Appellee presented its opening statement. Appellant waived presentation of an opening statement.

BACKGROUND

1. **Amy Ganschow** was the first witness for the Appellee. For the past two years, Ms. Ganschow has held the position of Human Resources Administrator at the Kentucky State Reformatory. She handles all personnel and disciplinary actions and maintains personnel and medical files. When the Warden determines discipline is required and establishes the level of discipline, Ms. Ganschow processes the request by sending it to Central Office. Central Office, after review, advises whether the discipline is approved. Once approved, a letter of discipline is then drafted and sent to the employee.

2. She identified Appellee's Exhibit 1 as the Personnel Cabinet Form, No. P-1, showing the Appellant, Walter Rafferty, was appointed to the position of Correctional Officer within the Department of Corrections on May 1, 2003.

3. She identified Appellee's Exhibit 2, as the Personnel Cabinet Form, No. P-1, showing that on February 16, 2009, Appellant had been promoted to the position of Correctional Sergeant.

4. On January 28, 2013, an intent to suspend letter was drafted and delivered to the Appellant, signed by Warden Clark Taylor (Appellee's Exhibit 3).

5. Appellant responded to the letter in writing and met with Warden Taylor to discuss his position. Following that meeting, the Warden signed and issued a suspension letter dated January 15, 2013 (Appellee's Exhibit 4). Appellant was suspended from duty and pay for a period of three working days beginning February 14, 2013, and continuing through February 16, 2013, for specified misconduct. The letter alleged Appellant's acts were in violation of Kentucky State Reformatory's (KSR) Policy and Procedure, KSR 17-00-07, Inmate Personal Property, Policy and Procedure, III. Placement of the Inmate in the Special Management Unit (SMU), Correctional Psychiatric Treatment Unit (CPTU), or Dorm 12, B; and KSR Policy and Procedures, KSR 03-00-14, Prohibited Employee Conduct, Disciplinary Actions, and Appeal Process, Policy and Procedure, II. Prohibited Activities and Conduct, U.

6. The Department of Corrections employs progressive disciplinary procedures. The Appellant's prior disciplinary history included a written reprimand in 2010; a written reprimand September 3, 2009; a three-day suspension May 8, 2006; a written reprimand November 3, 2005; and a written reprimand April 11, 2005. The witness identified Appellee's Exhibit 5 as an example of the written reprimand as issued to Appellant on January 21, 2010.

7. **Carlos Schantz**, who for the past two and a half years has been employed as Corrections Unit Administrator I at Kentucky State Reformatory (KSR), offered his testimony. Mr. Schantz oversees programs and assists in the supervision of security staff and in management of a KSR living unit. He also assists in investigations and conducted the investigation involving the Appellant.

8. Mr. Schantz received a letter from an inmate. That letter explained an incident involving a separate inmate who had been placed in the Special Management Unit (SMU). It was alleged Appellant had permitted two other inmates to assist in packing up the segregated inmate's property and thereafter allowed the inmates to keep possession of some of that property. He identified Appellee's Exhibit 6 as a copy of the letter, which had been authored by Inmate Barney Mitchell.¹

9. During the investigation, Mr. Schantz reviewed camera footage pertinent to the dormitory where the segregated inmate's cell was located. He observed on the footage that Sgt. Rafferty and two inmates were in and about the segregated inmate's cell, packing that inmate's property. He also observed how items had been removed from that cell and placed in the cell of one of the inmate's who assisted in packing the property.

10. He identified Appellee's Exhibit 7 as a DVD containing the video footage of the security camera he had examined. The pertinent portion of the DVD was played in the hearing, observed by the parties, the witness, and the Hearing Officer. During the playing of the DVD, the witness testified this was security footage showing the lower floor of Dormitory 7 in C-Wing. The segregated inmate's cell was shown by the open door on the left of the area near the stairwell. This footage was shot on December 20, 2012, at approximately 7:27 p.m. Mr. Schantz described seeing the two inmates packing and carrying off property, in the presence of the Appellant.

11. Mr. Schantz described that the open cell door appearing to the right of the footage was the cell of inmate Mitchell. Property was taken from segregated inmate Miller's cell to the cell of inmate Mitchell. The property taken to Mitchell's cell consisted primarily of perishables, as well as a laundry basket. Perishables, that is food items, cannot be stored, so are required to be thrown out. One of the inmates had itemized a number of such items on notebook paper.²

12. Mr. Schantz and the Unit Director, Travis St. Clair, interviewed Appellant and asked for his written statement about the incident. They also reviewed the property inventory forms and had spoken to the two inmates who assisted Sgt. Rafferty.

13. He identified Appellee's Exhibit 8 as KSR Inmate's Personal Property Form, which listed several non-food items inventoried from inmate Miller's possessions.

14. He identified Appellee's Exhibit 9 as KSR Inmate Canteen Property Form, which listed mostly edible items belonging to inmate Miller.

¹ Appellee's Exhibit 6 was admitted for the limited purpose of showing how the institution learned of the incident and, thereafter, began its investigation.

² By agreement of the parties, Appellee's Exhibit 7, containing security footage at KSR, was ordered sealed in the record.

15. He identified Appellee's Exhibit 10 as the notebook paper inventory written up by one of the inmates. This list shows all food items from Miller's cell that had been distributed to the inmates. Appellee's Exhibits 8, 9 and 10 had been retrieved from the institution's property room.

16. He identified Appellee's Exhibit 11 as the January 4, 2013 KSR Incident Report that had been written by the Appellant. Appellant had been requested to submit such report after Schantz and St. Clair had spoken to him about the incident.

17. He identified Appellee's Exhibit 12 as the January 10, 2013 KSR Incident Report also written by Sgt. Rafferty. This Incident Report had been written by the Appellant after a subsequent request to do so by Deputy Warden Coyne.

18. Inmate Miller eventually was returned to his cell from the SMU. Thereafter, he came to Schantz's office to report that Sgt. Rafferty had asked him to write a statement about the property incident. At that time, Miller advised he felt a little bit intimidated by Sgt. Rafferty having asked him to write such a statement. He inquired what he should do. Schantz and St. Clair advised Miller to write the statement, but to turn it over to them, and they would pass it on. Mr. Schantz identified Appellee's Exhibit 13 as the statement written by Louis E. Miller.

19. Once Schantz and St. Clair received all the documentation they passed it to the immediate supervisor, Deputy Warden James Coyne.

20. **James Coyne** has been the Deputy Warden of Programs at KSR for the past three years. He offered his testimony and described his duties as the direct supervisor of the unit staff, supervisor of security issues and security staff.

21. He had been notified of the incident. He directed Mr. Schantz and Mr. St. Clair to complete their investigation and forward their documentation. When he received the documentation, he reviewed it, interviewed the Appellant and requested Sgt. Rafferty write an Incident Report. He thereafter discussed the matter with Warden Clark who decided what type of discipline to issue. Mr. Coyne then wrote up the disciplinary letter.

22. After Appellant and Mr. Coyne met, Appellant, of his own volition, went to inmate Miller's cell to request he write a statement pertaining to the property incident. Miller wrote that statement (Appellee's Exhibit 13). Deputy Warden Coyne viewed this request by the Appellant to have been an interference with the investigatory process. Inmates fear retaliation if they do not do what officers request. Security video confirmed that the Appellant had indeed gone to Miller's cell at that time.

23. Deputy Warden Coyne asked Appellant to meet with him and Senior Captain Jordan. Appellant was asked if he approached inmate Miller and directed him to write a statement. At first the Appellant denied having done so. He was then told there was video footage showing that he entered the inmate's cell at that time. Appellant then admitted he had made this request of inmate Miller.

24. Deputy Warden Coyne obtained Appellant's prior disciplinary history from Ms. Ganschow. The most important part of the disciplinary history, to him, had been the written reprimand Appellant received in 2010 for poor work performance, as that was the most recent action. He thereafter determined which policies had been violated, and discussed the matter with Warden Taylor. It was decided the next step in progressive discipline was issuance of a three-day suspension. Deputy Warden Coyne thereafter drafted the disciplinary letters.

25. He identified Appellee's Exhibit 14 as Policy Number KSR 17-00-07, Inmate Personal Property, effective February 21, 2012. Having reviewed this policy, he determined the Appellant had violated III.A., 2., and B., 1, 3, and 4. If the subject inmate is present when the property is to be inventoried, then only one officer is required to inventory with that inmate. However, if the inmate is not present, it is required that two officers conduct the inventory and pack those items.

26. Inmate property is a large issue in the institution. The institution must account to the inmate for his property particularly when an inmate is transferred to the SMU. Allowing an inmate to take the property of another could lead to the state's liability to replace the property if missing, stolen, or damaged. The institution is charged with safeguarding such property. Inmates also use personal property as currency. They trade it and use it to pay off "debts" with other inmates. Giving away such property could result in physical altercations and become a security issue.

27. III., A., 2., directs that all perishables and opened items shall be disposed of and documented on the inventory form. Perishables are to be thrown away and cannot be stored. Such perishables are to be inventoried on the appropriate form, that is, Appellee's Exhibit 8, and entered below the boxes and identified as items that had been disposed of. The list shown by Appellee's Exhibit 10 was not the proper way to conduct such inventory.

28. He identified Appellee's Exhibit 15 as Policy Number KSR 03-00-14, Prohibited Employee Conduct, Disciplinary Actions, and Appeal Process, effective January 16, 2007. The Deputy Warden identified II., U., as having been violated by the Appellant's action in approaching inmate Miller and directing he write a statement about the property incident. Such action was an attempt to affect the outcome of the then on-going investigation.

29. No further witnesses were called by the Appellee. Appellant stated he did not desire to offer any witnesses or testimony on his own behalf.

FINDINGS OF FACTS

1. The Appellant, Walter Rafferty, is a classified employee with status. He is employed as a Correctional Sergeant by the Justice and Public Safety Cabinet, Department of Corrections, at the Kentucky State Reformatory (KSR) (Appellee's Exhibit 2).

2. Inmate Barney Mitchell sent a letter dated January 2, 2013, to Corrections Unit Administrator I, Carlos Schantz (Appellee's Exhibit 6). The letter alleged that Appellant had permitted two other inmates to pack up and keep some of the property of inmate Lewis Miller who had been placed in the SMU.

3. Mr. Schantz conducted an investigation. He reviewed relevant security camera footage for December 20, 2012 (Appellee's Exhibit 7). He observed on the video that inmates Barney Mitchell and William Osborne, in the presence of Sgt. Rafferty, had packed inmate Miller's property. Some of the property was taken to Mitchell's cell. Most of that property consisted of perishables.

4. All property, including perishables, was to be properly inventoried by appropriate staff. Perishables were then to be thrown away; the remainder of the property to be placed in storage for safekeeping.

5. Mr. Schantz and Unit Director Travis St. Clair interviewed the Appellant and requested he provide a written statement. They reviewed the Property Inventory Forms (Appellee's Exhibits 8, 9, and 10) and interviewed inmates Mitchell and Osborne.

6. Appellant completed and on January 4, 2013, submitted an Incident Report (Appellee's Exhibit 11). In the report, Appellant admitted he and inmates Mitchell and Osborne had packed up inmate Miller's property; that Mitchell took Miller's laundry basket.

7. At the request of Deputy Warden Coyne, Appellant completed and submitted another Incident Report on January 10, 2013 (Appellee's Exhibit 12). In that report Appellant stated that he had been directed by Sgt. Morris to pack up inmate Miller's belongings; as a second officer was not available, Appellant enlisted the assistance of two inmates.

8. Inmate Miller was later returned to his cell from SMU. He was then asked by Sgt. Rafferty to write a statement about the status of his property. Miller thereafter approached Schantz and St. Clair, expressed his feeling of intimidation by such request, and asked what he should do. He was told to write the statement and turn it over to Schantz and St. Clair. Miller wrote and tendered his statement (Appellee's Exhibit 13).

9. When the investigation was complete, Schantz and St. Clair sent all their information to Deputy Warden James Coyne.

10. Coyne and Senior Captain Jordan met with Appellant. At first, Appellant denied he had directed inmate Miller to write a statement. When confronted with the fact that Appellant's meeting with Miller was on video, Appellant admitted he had made that request.

11. Deputy Warden Coyne reviewed Appellant's prior disciplinary history, which consisted of: An April 11, 2005 written reprimand; a November 3, 2005 written reprimand; a May 8, 2006 three-day suspension; a September 3, 2009 written reprimand; and a 2010 written reprimand. He also reviewed applicable policies.

12. At the time of these incidents, the Cabinet had in full force and effect the following policies:

- KSR Policy and Procedure 17-00-07, Inmate Personal Property (Appellee's Exhibit 14);
- KSR 03-00-14, Prohibited Employee Conduct, Disciplinary Actions, and Appeal Process (Appellee's Exhibit 15).

13. Coyne determined which policies had been violated by Appellant and discussed the matter with Warden Taylor. The Cabinet employs progressive disciplinary measures. It was decided Appellant would be issued a three-day suspension. Coyne then drafted the intent to suspend letter dated January 28, 2013 (Appellee's Exhibit 3).

14. Upon receipt of the intent to suspend, Sgt. Rafferty requested and participated in an interview with Warden Taylor, and presented him with a written response. They met on February 4, 2013.

15. Following the meeting, Warden Taylor issued Appellant a three-day suspension (Appellee's Exhibit 4). The suspension was based on allegations of misconduct, and violation of policies KSR 17-00-07 and KSR 03-00-14.

16. The Appellant timely filed his appeal with the Kentucky Personnel Board.

CONCLUSIONS OF LAW

1. A classified employee with status shall not be suspended except for cause. KRS 18A.095(1). Appointing Authorities may discipline employees for lack of good behavior or the unsatisfactory performance of duties. 101 KAR 1:345, Section 1. A suspension shall not exceed thirty days. 101 KAR 1:345, Section 4(1). William Rafferty, the Appellant, is a classified employee with status in his position as a Correctional Sergeant at the Kentucky State Reformatory (KSR).

2. The evidence shows that prior to this disciplinary action, Appellant's disciplinary history included:

- 4/11/05: written reprimand;
- 11/3/05: written reprimand;
- 5/8/06: three-day suspension;
- 9/3/09: written reprimand;
- 2010: written reprimand.

3. On December 20, 2012, Appellant enlisted two KSR inmates, Barney Mitchell and William Osborne, to enter the cell of inmate Louis Miller to inventory and pack up Miller's personal property. Miller was away from his cell, having been placed in the Special Management Unit (SMU).

4. Appellant allowed inmate Mitchell to take and keep some of Miller's property, specifically, a laundry basket and certain perishables. He also directed the two inmates to assist in conducting the inventory.

5. Following Miller's return to his cell from SMU, Appellant approached Miller and directed him to write a statement about the status of his property.

6. Appellee has shown by a preponderance of the evidence that disciplinary action against the Appellant was for just cause, that is, misconduct.

A. Sgt. Rafferty violated Kentucky State Reformatory Policies and Procedures, KSR 17-00-07, Inmate Personal Property (Appellee's Exhibit 14); III., A., 2. and B., 1, 3, and 4. He allowed the personal property of an inmate placed in SMU to have been inventoried by two inmates rather than the required two officers. Perishables were not disposed of, but were given to at least one other inmate. Inmate Miller's laundry basket was also given to one of the inmates. The inventory was not properly completed in its entirety on the required Personal Property Inventory Form, and had been conducted in part by one or both inmates.

B. Sgt. Rafferty violated Kentucky State Reformatory Policies and Procedures, KSR 03-00-14, Prohibited Employee Conduct, Disciplinary Actions, and Appeal Process, II., U. In addition to the acts described above, Sgt. Rafferty directed inmate Miller, in an intimidating manner, to write a statement that he was satisfied with the disposition of his personal property. Furthermore, when questioned about this act, Rafferty denied doing so before later admitting to have done this act.

7. Appellee has shown by a preponderance of the evidence that the disciplinary action taken against Appellant was neither excessive nor erroneous. Appellee employs disciplinary measures in a progressive manner. At the time of this discipline, Appellant had a prior disciplinary history that included four written reprimands and one three-day suspension. The nature of Appellant's acts and his prior disciplinary history were fully considered by Appellee when it issued the current three-day suspension.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Personnel Board that the appeal of **WALTER RAFFERTY VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2013-081)** 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).

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 Roland P. Merkel** this 10th day of
September, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Angela Cordery
Walter Rafferty