

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOS. 2017-006 AND 2017-057**

RAY SANDY

APPELLANT

**V. FINDINGS OF FACT, CONCLUSION OF LAW
AND RECOMMENDED ORDER**

**JUSTICE AND PUBLIC SAFETY CABINET
DEPARTMENT OF CORRECTIONS**

APPELLEE

This matter came on for evidentiary hearing on August 24, 2017, at 9:30 a.m. (ET), at 28 Fountain Place, Frankfort, Kentucky, before Brenda D. Allen, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Ray Sandy, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, Justice & Public Safety Cabinet, Department of Corrections, was present and was represented by the Honorable Oran S. McFarlan, III. Also present were Warden Tiffany Ratliff, Agency Representative, and Deanna Smith, Paralegal.

The issues before the Hearing Officer were whether the Appellant was performing the duties of a Unit Administrator II without compensation or if he is entitled to be reclassified to a Unit Administrator II. An additional issue was whether the Appellant was retaliated against and harassed for filing a grievance regarding this matter. The Appellant had the burden of proof by a preponderance of evidence.

BACKGROUND

1. Ray Sandy filed Appeal No. 2017-006 with the Personnel Board on January 11, 2017, alleging that he was being penalized by being required to perform duties outside his classification without compensation and was also being penalized with retaliation because he had filed a grievance. He was requesting a reclassification and back pay. On March 7, 2017, the Appellant filed a second appeal, Appeal No. 2017-057, alleging that he was being retaliated against for filing a grievance. At a prehearing conference held April 24, 2017, the parties agreed to consolidate both appeals and the Appellant submitted a discovery request. The Appellee was to provide responses to discovery within 30 days and did so.

2. On the day of the hearing, the Appellee made an opening statement and the Appellant waived opening.

3. The first witness to testify on behalf of the Appellant was **Jim Erwin**, Deputy Commissioner of Adult Institutions, who is also serving as the Interim Commissioner of the Department of Corrections. Mr. Erwin testified, as if on cross-examination, that he responded to Mr. Sandy's grievance regarding his request for a reclassification of his position. The response, dated December 15, 2016, was entered into the record as Appellant's Exhibit 1 and a copy of KRS 18A.005 was entered as Appellant's Exhibit 2. Mr. Erwin testified regarding both exhibits in responding to the Appellant's grievance. He determined that Mr. Sandy's performance of duties of re-entry (or pre-release) services at Blackburn, along with his oversight of the operation of Dorm 3, were both duties within the Job Class Specifications of a Unit Administrator I (also referred to as a UA I) and, accordingly, reclassification was not appropriate. Appellant's Exhibit 3, 4 and 5 were identified and entered into the record without objection.

4. The next witness to testify on behalf of the Appellant was **Warden Tiffany Ratliff**. She testified, as if on cross-examination, that she had been employed at the Blackburn Correctional Complex in the position of Warden for one year. Warden Ratliff reviewed her December 6, 2017 response to Mr. Sandy's grievance. Through his grievance, Mr. Sandy contended that an email from Deputy Warden McIntire, in which she responded to his question about work and advised Mr. Sandy that he would continue to perform the duties of a Unit Administrator I and re-entry, just as Allison had, constituted a directive that permanently changed his job duties and warranted reclassification to Unit Administrator II (also referred to as a UA II). Warden Ratliff testified that through the grievance response she advised Mr. Sandy that he was not entitled to additional compensation or reclassification. She further testified that, in her experience at other institutions, re-entry duties have only ever been performed by an individual serving in the position of Unit Administrator I. She testified that frequently, assignments and duties are adjusted if there are shortages due to illness or vacancy. She testified that the work must be done regardless of staff shortages, so duties are temporarily assigned to others. She testified that Mr. Sandy did perform the re-entry responsibilities for nearly a year due to a staff shortage, but once the position was filled by promotion by Eric Sizemore, another Unit Administrator I, the re-entry duties were taken from Mr. Sandy. She testified that Mr. Sandy was provided overtime or compensation time for any overtime worked as a result. Appellee's Exhibits 1 and 2 and Appellant's Exhibits 6 and 7 were identified by Warden Ratliff and admitted into the record.

5. As it pertains to Mr. Sandy's claim of retaliation through counseling sessions, Warden Ratliff testified that a counseling session is not disciplinary in nature, but is intended to be a mutual conversation to advise the employee of concerns so the employee can address them. Warden Ratliff testified that she had advised Deputy Warden McIntyre to counsel Mr. Sandy when Ms. McIntire came to her with concerns about Mr. Sandy's work performance. She testified that she told the Deputy Warden to document the counseling session and to have another Deputy Warden present, and she did as directed.

6. The witness identified Appellee's Exhibit 3, a collective set of documents regarding Mr. Sandy's grievance resulting from his December 20, 2016 counseling session. The exhibits included both Warden Ratliff and Commissioner Irwin's responses to that grievance. The witness testified that the grievance alleged that the counseling session was conducted in retaliation for Appellant's filing of a December 6, 2016 grievance. The response from Warden Ratliff and Deputy Commissioner Irwin found no retaliation. As it pertains to Mr. Sandy's claim that retaliation was supported by Deputy Warden Bloyd's behavior during the meeting, specifically, that she grabbed a document from Mr. Sandy and ripped and threw it in the garbage, Ms. Ratliff testified that if that happened it would not be the norm.

7. The next witness to testify was **Eric Sizemore**. He testified that he is a Unit Administrator I. He was hired to perform the re-entry duties formerly performed by Mr. Sandy. He advised that all he does is re-entry and he has no oversight of the dorm.

8. The next witness to testify on behalf of the Appellant was **Tiffany Taylor**, Human Resource Administrator for Blackburn. She testified that she has been in the position for seven (7) years. She testified that she was present during a counseling session involving Mr. Sandy in December 2016, at Mr. Sandy's request. During the meeting, Deputy Warden Bloyd raised her voice and grabbed a document from Mr. Sandy's hand, ripped it up and said it was garbage.

9. Ms. Taylor identified Appellee's Exhibit 4, the Job Class Specification for a Unit Administrator II. She testified that it does not include pre-release or re-entry duties, and a Unit Administrator I Job Class Specification does. She testified that the individuals who performed re-entry duties before and after Mr. Sandy were classified as a Unit Administrator I and only performed the duties of re-entry.

10. Appellant, **Ray Sandy**, was the final witness in the Appellant's case in chief. He testified in the narrative, and upon questioning from the Hearing Officer, that he was assigned the duties of re-entry, in addition to his normal duties of responsibility for the dorm, which constituted a permanent change in duties and entitled him to a reclassification. However, he admitted he performed the re-entry duties only for a period of about ten months and stated that

he deemed ten (10) months to be permanent. He testified that an email from his supervisor, Deputy Warden McIntire, advising that with regard to dorm oversight and re-entry duties “you will have to do both just like Allison has been doing” constituted a formal reclassification in accordance with KRS 18A.005(30) by the Appointing Authority. On cross-examination, however, Mr. Sandy admitted that Deputy Warden McIntire was his first-line supervisor and that the Warden is actually the Appointing Authority, but contended that the Deputy Warden’s email to him was nonetheless an email from the Appointing Authority.

11. As it pertains to his counseling sessions in December 2016, the Appellant identified Appellant’s Exhibit 8, a document outlining the issues discussed during the counseling session. The Appellant testified that although he requested it during the meeting, this was the document Deputy Warden Bloyd ripped from his hands and put in the trash. He testified that a copy of the document was provided to him several weeks later.

12. Mr. Sandy reviewed the Job Class Specification for a Unit Administrator I and testified that the use of the conjunction “or” in the class specification meant that he could only be legitimately assigned to do either of the two types of job, but not both. Specifically, the document provided that the UA I “assists a Correctional Unit Administrator II in the overall administrative operation and control of a unit . . . OR directs and coordinates pre-release services with institution and field offices for inmates ready to be paroled.” He testified that having to conduct both duties for ten (10) months elevated his work to that of a UA II and, further, that it constituted a permanent change in duties. The Appellant asserted that the Personnel Board’s case of *Bradshaw v. Education and Workforce Development Cabinet*, 2014-327 and 2015-013, supported his contention. On cross-examination, the Appellant identified Appellee’s Exhibit 5, his performance evaluation from May 2016 to December 2016, completed by Deputy Warden McIntire. He admitted that he was rated “Highly Effective” by his supervisor in this evaluation, but still contended his evaluator was retaliating against him by performing counseling sessions.

13. The first witness to testify on behalf of the Appellee was **Deputy Warden Abigail McIntire**. She testified that she has been employed in the Department of Corrections since October 1998 and is now the Deputy Director of Programs. She advised that she was formerly the first-line supervisor for Appellant when he was performing re-entry duties, but is now his second-line supervisor. She advised that she had counseled the Appellant on two occasions and that neither was retaliatory, but that each counseling session was conducted to advise Mr. Sandy of concerns and to get his feedback.

14. The witness reviewed Appellee's Exhibit 4, and testified regarding the duties of a Unit Administrator II. She stated that of all of the duties listed (approximately nine) Mr. Sandy would only perform one of them, and then only in the absence of the Unit Administrator II. She then went through all of the duties of a Unit Administrator I, as outlined on Appellant's Exhibit 5, and stated that the duties of this classification are consistent with the work Mr. Sandy actually performed.

15. Deputy Warden McIntire testified that the email she sent to Appellant regarding his performance of re-entry duties was a directive, but the Appointing Authority remains the Warden. The witness testified that from the time of her hiring at Blackburn, the duties of Unit Administrator I and re-entry were both performed by Allison Medley, and when Allison left, she assigned those duties to Mr. Sandy, who performed both re-entry and dorm oversight duties, just as Allison had. However, the witness testified that there had been a shift in the focus of re-entry, which occurs from time to time with programs when there is a change in administration. She testified that there was a decision to have re-entry staff perform only re-entry duties. Once Mr. Sizemore was hired, the re-entry duties were taken away from Mr. Sandy and assigned to Mr. Sizemore.

16. The final witness to testify on behalf of the Appellee was **Deputy Warden Alicia Bloyd**. She testified that she was present for one of the counseling sessions involving Mr. Sandy and that Mr. Sandy became agitated and was unable to focus on the issues about which Deputy Warden McIntire was counseling him. She stated that she took one copy of the piece of paper outlining the issues, and put it in the trash in an attempt to re-direct Mr. Sandy who became fixated on it. She advised that the counseling session was merely a conversation and was not retaliatory. Consistent with it being a conversation, Deputy Warden McIntire had made notes on the document as to Mr. Sandy's response to each concern Deputy Warden McIntire raised. She identified Appellee's Exhibit 6 as an additional copy of the document created by Deputy Warden McIntire and used in the counseling session. She testified that there was no retaliation against Mr. Sandy and that she had no idea that Mr. Sandy had filed a grievance prior to the counseling session. Appellee's Exhibit 7 was entered into the record without objection.

17. The Appellee rested.

18. Each party made a closing statement. The Appellee made a motion to leave the record open to allow post-hearing briefs regarding the applicability of *Bradshaw v. Education and Workforce Development Cabinet*, the Personnel Board case the Appellant contended was relevant to his claim. The Motion was **SUSTAINED** without objection and a post-hearing order was prepared providing the Appellee time to file a post-hearing brief and for the Appellant to file a response. The Appellee timely filed a post-hearing brief and the Appellant submitted nothing

in response. The administrative record was closed. The Hearing Officer considered the entire record.

FINDINGS OF FACT

1. The Appellant, Ray Sandy, was employed in the classified position of Corrections Unit Administrator I with the Justice and Public Safety Cabinet, Department of Corrections, and was assigned to the Blackburn Correctional Complex. (Testimony of Appellant.)

2. The Job Class Specification of a Unit Administrator I (Appellant's Exhibit 5) provides "Characteristics of the Job" as follows:

Assists a Correctional Unit Administrator II in the overall administrative operation and control of a unit within a correctional facility and assumes the duties of the Correctional Unit Administrator II when absent to assure adequate supervision on a seven day, twenty four hour basis at the institution OR directs and coordinates pre-release services with institution and field offices for inmates ready to be paroled; and performs other duties as required.

3. On May 26, 2016, the Appellant emailed Deputy Warden McIntire inquiring about his work assignment. His question and her response are as follows:

Ray Sandy: When do you want me to move my things in the Re-Entry Office in the Administration Building?

Deputy Warden McIntire: Ray- you will be moving into Dorm 3. You will take over just as Allison has been doing. You will be CUA/Re-entry. You will have to do both just like Allison has been doing.

4. For a period of ten (10) months, Mr. Sandy performed the duties of re-entry in addition to his existing duties of dorm oversight. (Testimony of Sandy, McIntire.)

5. On December 6, 2016, the Appellant filed a grievance alleging that he was being penalized by performing Correctional Unit Administrator II duties without compensation since his May 26, 2016 directive from Deputy Warden McIntire. (Appellee's Exhibit 2.)

6. Warden Tiffany Ratliff responded, advising the Appellant that his grievance was untimely, but that the re-entry duties he performed were consistent with the Unit Administrator I position that he held and that they would continue due to a staff shortage.

7. On December 20, 2016, Deputy Warden McIntire counseled the Appellant regarding his performance of duties, outlining on a document eight (8) issues that she discussed with the Appellant during the counseling session. (Appellant's Exhibit 8; testimony of McIntire.)

8. On January 3, 2017, the Appellant filed a second grievance alleging that his December 20, 2016 counseling session was a retaliatory act in response to his December 6, 2016 grievance. (Appellee's Exhibit 3.)

9. In responding to the grievance, Warden Ratliff and Deputy Commissioner Irwin each found no evidence of retaliation. (Appellee's Exhibit 3)

10. KRS 18A.005(30) defines "Reclassification" as follows:

'Reclassification' shall mean the change in the classification of an employee when a material and permanent change in the duties or responsibilities of that employee has been assigned in writing by the appointing authority.

11. KRS 18A.005(24) defines a "Penalization" as follows:

'Penalization' means demotion, dismissal, suspension, fines and other disciplinary actions; involuntary transfers; salary adjustments; any action that increases or diminishes the level, rank, discretion, or responsibility of an employee without proper cause or authority, including a reclassification or reallocation to a lower grade or rate of pay; and the abridgment or denial of other rights granted to state employees.

12. The Hearing Officer finds that the duties of coordinating pre-release services or "re-entry" are specifically outlined in the Job Class Specification of a Corrections Unit Administrator I.

13. The Hearing Officer finds that on May 26, 2016, when Deputy Warden McIntire gave Appellant a directive to perform dorm oversight and re-entry, she directed him to perform the duties of a Unit Administrator I—the position to which he was already assigned. Moreover, the Hearing Officer finds that she clearly stated that the Appellant would be a "CUA I/Re-entry" which is a "Correctional Unit Administrator I/Re-entry."

14. The Hearing Officer finds that Appellant's contention that this email from the Deputy Warden (who is not the Appointing Authority) constitutes a Reclassification by the Appointing Authority is without merit.

15. The Hearing Officer finds that the Appellee's act of assigning the Appellant re-entry duties does not constitute a penalization under KRS 18A.005(24).

16. The Hearing Officer finds that the Appellant has put forth no evidence that the counseling session was a penalization or a retaliatory act.

17. The Hearing Officer finds that the case of *Bradshaw v. Workforce Development Cabinet* is not controlling in this matter because the Appellant in the instant case put forth no evidence that he was performing duties outside of his classification.

CONCLUSION OF LAW

The Appellant has failed to meet his burden of proof that he was penalized by performing duties outside of his classification without pay. He has likewise failed to meet his burden of proof to show that his counseling session was a retaliatory act in response to his filing of a grievance.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeals of **RAY SANDY V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS, (APPEAL NOS. 2017-006 AND 2017-057)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen 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 exception 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 the 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 Brenda D. Allen** this 28th day of November, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Ray Sandy
Hon. Orin S. McFarlan, III