

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-161

RAY SANDY

APPELLANT

VS. FINAL ORDER
SUSTAINING HEARING OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER ON REMAND

JUSTICE AND PUBLIC SAFETY CABINET
DEPARTMENT OF CORRECTIONS
J. MICHAEL BROWN, APPOINTING AUTHORITY

APPELLEE

** **

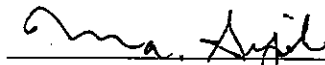
The Board at its regular June 2013 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 3, 2013, and being duly advised,

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 19th day of June, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Wesley Duke
Ray Sandy
Stephanie Appel

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-161

RAY SANDY

APPELLANT

V. 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 an evidentiary hearing at 9:30 a.m., ET, on February 21, 2013, at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Boyce A. Crocker, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Ray Sandy, was present at the evidentiary hearing and was not represented by legal counsel. Appellee Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Wesley Duke. Appearing with Mr. Duke was his paralegal, Ms. Ann Smith, and also as agency representative, Warden Don Bottom. **(Hearing Officer Note: Mr. Bottom had been Warden of the Blackburn Correctional Complex at the time this disciplinary action was taken against Appellant, but is now Warden at the Northpoint Training Center.)**

Prior to the Appellee putting on its case, as the Appellee bore the burden of proof for this disciplinary action, Appellant had some points of order he raised regarding discovery and the alleged failure of the Appellee to provide discovery, either at all or in a timely manner. After discussion, it was agreed that the discovery issues would not prevent this evidentiary hearing from going forward.

As noted, Appellee proceeded first in the presentation of evidence, as it bore the burden of proof on the suspension taken against Appellant.

The Hearing Officer notes this appeal was filed on July 23, 2012. Appellant had been suspended without pay for three days from his position at the Blackburn Correctional Complex (BCC) for alleged poor work performance and alleged insubordination.

BACKGROUND

1. For its first witness, Appellee called **Stephanie Hughes**. Prior to Ms. Hughes taking the oath, Appellant informed the Hearing Officer he had not had a chance to review her statement, as well as the statement of another potential witness. Appellant was provided the statements and given as much time as he needed to review same. Subsequent to that, with parties' consent, Ms. Hughes was sworn and offered the following testimony.

2. Ms. Hughes stated she is Assistant Unit Administrator (UA I) at BCC. She testified that on May 4, 2012, she was informed that Appellant and Officer Aseltine took two truckloads to the storage shed near the tool room. The two truckloads were of supplies. Specifically, these were cleaning supplies. Ms. Hughes stated that Ms. Pitcock was the employee at BCC in charge of ensuring supplies for the dorms. Ms. Hughes testified the dorms did not have to request chemicals; those were automatically supplied, but pretty much any other supply had to be requested through Ms. Pitcock. Ms. Hughes also testified there was a specific area in each dorm (supply closet) where these supplies were kept.

3. Ms. Hughes testified the only places where cleaning supplies should be is either in the dorms (in the supply closets) or in central storage. She did state that yellow gloves were more closely held than that, due to not wanting inmates to get a hold of them as possible contraband.

4. Ms. Hughes testified that Deputy Warden Harm wanted all of the dorms to have and use Appellant's inventory sheet, because she liked how that was done.

5. The next witness called to testify by the Appellee was **Linda Pitcock**. Ms. Pitcock was properly sworn, and testified that she is currently employed at BCC as a Human Resource Specialist.

6. During the events in question in May 2012, Ms. Pitcock was employed as a Property Officer II. As a Property Officer, Ms. Pitcock was responsible for oversight of the supply warehouse and also for filling requisitions from the dorms for cleaning supplies. Ms. Pitcock stated there was nothing out of line with Mr. Sandy's supply requisitions. She also stated she would, for some of the dorms, actually go in there and inspect the supplies. In Ms. Pitcock's experience, she did not believe there was any reason to have supplies anywhere other than either the Unit Administrator's office for certain supply items, or for the bulk of the supplies to be stored in the supply closet in the dorm.

7. Ms. Pitcock testified she had never found any supplies in any other location during her time as Property Officer.

8. Ms. Pitcock became aware, via Ms. Hughes, that Officer Aseltine had taken a couple of truckloads of supplies from Dorm One to what was called "the old tool room." Ms. Pitcock informed her supervisor, who informed Ms. Pitcock that she would check it out. Ms. Pitcock's supervisor did find those supplies, and told Ms. Pitcock to go inventory those supplies. Ultimately Ms. Pitcock and another employee found the remainder of the supplies in another

building. The items were taken back to the warehouse and re-inventoried. Counsel for the Appellee introduced exhibits to support this account.

9. Appellee's next witness was **Deputy Warden Brandy Harm**. Ms. Harm was Deputy Warden of Security at BCC at the time of the evidentiary hearing. In May 2012, Ms. Harm was Deputy Warden of Programs. Ms. Harm was directed by Warden Bottom to complete an investigation.

10. Ms. Harm stated she found from her investigation that Appellant had Officer Aseltine remove a large amount of cleaning supplies from his dorm and store them in an unauthorized area. The chemicals and supplies were not inventoried and there was no Material Safety Data Sheet (MSDS) with them. Ms. Harm testified that cleaning supplies are supposed to be stored in each dorm in a secure closet, and that each dorm in BCC has such.

11. Ms. Harm testified there was no reason for any cleaning supplies to be in the "old tool room." Ms. Harm stated that the supplies were stored in violation of Institutional Policy and Procedure (IPP) 08-06-01.

12. On cross-examination Appellant wanted to know why there was a delay between some statements being taken; Ms. Harm replied it could take sometimes a while for an investigation to be completed because of staff scheduling.

13. Ms. Harm stated that as for her taking a verbal statement from Appellant and then taking his written statement later, there was a delay in case there were any follow-up questions. When challenged, Ms. Harm responded to Appellant that she did complete an investigation to the fullest.

14. Ms. Harm denied ever making a statement to the effect, "Any UA would be an idiot not to hoard cleaning supplies." The witness also denied various other statements attributed to her by Appellant regarding hoarding cleaning supplies.

15. Ms. Harm did admit to storing wax in her office with a MSDS sheet and an inventory. Ms. Harm denied that when she collected the written statement from Appellant she asked him to back date it to the date she had submitted her investigation, May 11, 2012. Ms. Harm also agreed she had sent Appellant and some of his inmates to clean other areas at BCC due to Appellant's expertise. However, Ms. Harm denied it would have been common for Appellant to have ordered extra cleaning supplies to cover those areas outside his dorm, because he would have used the supplies ordered for those areas.

16. Ms. Harm did recall one occasion when wax had been removed from a building, and she had ordered Appellant to take it back. Ms. Harm also denied she ever gave permission for Appellant to have preferential treatment as far as ordering or retaining extra cleaning supplies.

17. On re-direct, Ms. Harm testified that to the best of her knowledge the supplies and chemicals found in the "old tool room" or the empty shed building on May 4, 2012, did not have a MSDS.

18. The next witness called by Appellee was the Appellant, **Ray Sandy**. Appellant was properly sworn and testified as follows.

19. Appellant stated he has worked at BCC for ten years, and before that worked at the Clark County Jail, and has been a Unit Administrator since 2010. Appellant agreed he had, on April 30, 2012, asked Officer Aseltine to move the majority of the supplies and chemicals which were found on May 4, 2012. Appellant stated those supplies, prior to being discovered on May 4, 2012, had been kept in his office or in CTO Jackson's office. Appellant testified he kept those extra supplies because he was sent to many areas of BCC (dorms, administration building, food area, medical building, etc.) to handle sanitation.

20. In response to a question from counsel for Appellee, Appellant admitted some of these places had their own supply closet, but not their own supplies. Appellant denied he told Officer Aseltine to move these supplies to any specific place, but did ask him to move the supplies to a secure location. When asked why he didn't return the excess supplies to central receiving, Appellant stated he might be asked at any time to go to a different location in the yard to handle sanitation.

21. Appellant also denied that supplies would be available to him from Central Receiving when directed to clean other areas. Appellant testified the record of supplies on the supplies' requisition list would match up to the supplies he had asked Officer Aseltine to move.

22. The final witness called by Appellee Department of Corrections in its case-in-chief was **Warden Don Bottom**. Warden Bottom was properly sworn and testified he is currently the Warden at the Northpoint Training Center, but at the time of the events in question, in May 2012, he was Warden at BCC.

23. Warden Bottom gave testimony as to when he became aware of supplies being moved out of Dorm One to another area, and that he had ordered those supplies be moved to Central Receiving. Warden Bottom discussed the letter of suspension in both of the allegations. The first allegation, that of poor performance, Warden Bottom attributed the charge to a lack of proper inventory and proper storage for those excess supplies which had been in Dorm One and under the control of the Appellant. The insubordination charge, as Warden Bottom described it, stemmed from his becoming aware there were excess cleaning supplies which were not returned to Central Receiving despite the Warden's order.

24. Warden Bottom stated Appellant had requested a meeting subsequent to receiving the Intent to Suspend letter. Warden Bottom stated Appellant expressed remorse at the meeting, that he had gotten Officer Aseltine involved, and that he would work hard to regain trust. Warden Bottom testified it was important to ensure that such supplies were accounted for and properly inventoried, because such supplies, including mops and brooms, could create a "dangerous situation" in an institution such as BCC.

25. Warden Bottom testified the supplies which were found and returned to Central Receiving did not have a log or inventory associated with them.

26. Warden Bottom testified that even though these items were under lock and key when they were found, they presented a hazard due to items such as brooms and mop heads were not inventoried or accounted for. Warden Bottom agreed that almost anything could be turned into a weapon, and that of some of the extra cleaning supplies which were discovered, the most obvious one which could be turned into a weapon was a broom handle.

27. Warden Bottom testified he believed three days without pay was the appropriate punishment due to the blatant disregard for process on how to store items and that they were not returned to Central Receiving, and there was also an attempt to hide the items.

28. It was clarified on cross-examination that Warden Bottom believed that Officer Aseltine had been asked by Appellant to move the items from the dorm, and they were originally taken to the "old tool room." When Warden Bottom became aware of this, he asked Officer Aseltine to move the items to Central Receiving. Only some of the items were so moved, and a good portion of these items were moved to the HVAC room.

29. On questioning by the Hearing Officer, Warden Bottom stated it was not part of his decision-making that he imposed punishment based upon any belief that Appellant had ordered Officer Aseltine to move the supplies from the "old tool room" (the first place) to the HVAC room (the second place).

30. Appellant questioned Warden Bottom as to whether there were steel pipes near the welding shop and bricks near the masonry shop, and the Warden agreed. Warden Bottom also stated there was steel weight-lifting equipment. Warden Bottom stated he had authorized an electric power-washer for Appellant when he was in Dorm One for the canine program.

31. After completion of Warden Bottom's testimony, Appellee concluded its case.

32. Appellant called **Mr. Kyle Harless** as his first witness. Mr. Harless was properly sworn. Mr. Harless testified he has been with the Department of Corrections for 18 years, with BCC for three years, and as Appellant's supervisor for over two years.

33. Mr. Harless testified he had taken no disciplinary or corrective actions against Appellant, had given him excellent or outstanding evaluations except for the last one, where he gave him a "good" because of the suspension, and there were no time or attendance issues with Appellant.

34. Mr. Harless testified he did "not currently" have any extra cleaning supplies. Mr. Harless testified it was the "norm" at BCC to have extra cleaning supplies in your office, as they were only allowed to order from Central Receiving once per week. Mr. Harless also testified these extra supplies wouldn't necessarily be something kept on the log or the inventory. He testified it was common practice among Unit Administrators.

35. Mr. Harless testified he had previously been at the Kentucky State Reformatory (KSR). It was also the norm there to keep some extra supplies, in case you had to immediately replace items which were broken.

36. Mr. Harless testified that a meeting was held on May 17, 2012, to sign a document. This was admitted as Appellant's Exhibit 7. Mr. Harless also testified that Deputy Warden Harm informed Appellant not to change anything he was doing in regards to sanitation. The Hearing Officer believes from testimony that this took place prior to May 4, 2012.

37. Mr. Harless testified that Deputy Warden Harm had asked Appellant to go clean other areas, and he listed some of those areas. He further testified Appellant kept his extra cleaning supplies in his bathroom. Mr. Harless could only "assume" that Deputy Warden Harm was aware of these extra cleaning supplies.

38. Mr. Harless testified that Appellant did not hoard these supplies, but would give them freely to other UAs or Officers who needed them and asked.

39. Mr. Harless was asked by Appellant whether Deputy Warden Harm had stated, "Show me a UA who doesn't cheat or hoard supplies, and I'll show you a UA with a nasty dorm like UA Hockensmith." Mr. Harless agreed with that statement.

40. Mr. Harless testified he had extra mop packs and received no disciplinary corrective action, but was told by Warden Bottom, "I expected better from you." Mr. Harless testified he had never been told by Warden Bottom or Deputy Warden Harm not to have extra cleaning supplies. Mr. Harless also testified that whatever extra supplies he had when he moved from Dorm Two to Dorm Four, he took with him.

41. On cross-examination, the witness reiterated that in his experience most UAs kept extra cleaning supplies. Mr. Harless testified that extra supplies which he would keep in his office would not show up on the daily inventory of supplies. Mr. Harless stated directly that, "Every UA I have ever worked with or have ever known has kept cleaning supplies in their office." Mr. Harless stated he would want such supplies under his direct access, and that prior to an audit, he would either send these extra supplies back to Central Receiving or account for them on the inventory.

42. On re-direct, Mr. Harless stated "to the best of my knowledge" supplies would be hidden or moved around before an ACA audit.

43. Appellant's next witness was **Correctional Officer Nathan Aseltine**. Officer Aseltine was properly sworn and testified as follows.

44. Officer Aseltine stated he had been a Correctional Officer at BCC for approximately five years, and had worked approximately two years in Appellant's dorm.

45. Officer Aseltine testified Deputy Warden Harm came into Dorm One at least once per week. The witness commented that any extra cleaning supplies were kept in either Appellant's office or CTO Jackson's office. Officer Aseltine agreed with Appellant that Deputy Warden Harm had knowledge of the extra supplies Appellant kept. Officer Aseltine agreed with Appellant on direct examination that he had helped Appellant move the supplies during the first shift when the yard was open, in broad daylight.

46. Officer Aseltine stated he received a written reprimand for having helped Appellant move the supplies.

47. On cross-examination, Officer Aseltine stated the reason he did not carry all of the items from the "old tool room" to Central Receiving when ordered by Warden Bottom was because someone else (not an inmate) apparently had access to the tool room and had torn some of the black bags containing the supplies open, and it was too difficult to move the supplies all at once if they were not in the black bags. Officer Aseltine stated that is why he moved the other items out of the tool room to the HVAC area. Officer Aseltine stated there was no inventory performed on the items moved to the tool room. He stated there were several people who had the key which would have opened the tool room.

48. Upon the conclusion of Officer Aseltine's testimony, **Appellant Ray Sandy** called himself as his last witness. Appellant was sworn and testified as follows.

49. Though the unique device of asking himself questions, Appellant testified he did have extra cleaning supplies, that he never took any of those home, that he never tried to hide any of those cleaning supplies, and they were in his office in a secure location. Appellant stated he ordered the supplies from Central Receiving, used the supply order form, and stated he did not deliberately move these items to keep them a secret. Appellant stated he was taking these items from Dorm One to Dorm Three to clean it, to get it into as good shape as he had Dorm One in. **(Hearing Officer Note: Appellant was moving from Dorm One to Dorm Three.)** Appellant testified Deputy Warden Harm was aware he had these extra cleaning supplies and she did send him to other locations in BCC to "fix" their sanitation issues.

50. Appellant stated he did not intend to get Officer Aseltine in trouble, nor did he think he received any sort of disciplinary action.

51. When Appellant finished testifying, he rested. The parties then made closing statements.

FINDINGS OF FACT

1. During the relevant times, Appellant Ray Sandy was a classified employee with status, serving as a Unit Administrator at the Blackburn Correctional Complex (BCC).

2. The Hearing Officer finds that Appellant, by his own admission, had extra cleaning supplies in his possession which he kept in his office or in CTO Jackson's office while he was Unit Administrator in Dorm One.

3. The Hearing Officer finds Appellant did ask Correctional Officer Nathan Aseltine to move the extra cleaning supplies in preparation of Appellant moving as Unit Administrator from Dorm One to Dorm Three. There is no dispute by the parties as to this. The Hearing Officer also finds that Appellant did not know Officer Aseltine was going to move the supplies to the "old tool room."

4. The Hearing Officer finds that Warden Bottom, when he became aware there were cleaning supplies without an inventory form stored in the tool room, ordered those supplies moved to Central Receiving. The Hearing Officer finds this was not immediately done; that some supplies were moved to Central Receiving, but that others were moved to another secure location.

5. The Hearing Officer finds Officer Aseltine's testimony persuasive in that it took him longer to move the supply items from the tool room to Central Receiving than he had expected, and that in the interim, others also moved supplies to Central Receiving from the tool room.

6. The Hearing Officer finds that Appellant was recognized as the Unit Administrator at BCC with the best reputation for sanitation, and this is evidenced by the administration repeatedly requiring Appellant to go to other areas to oversee sanitation efforts because he excelled at it.

7. The Hearing Officer finds that based upon un rebutted testimony of Appellant, Mr. Harless and Officer Aseltine, it was unlikely that administration was not aware that Unit Administrators, and Appellant in particular, would keep extra cleaning supplies in order to meet sanitation needs.

8. The Hearing Officer finds that Appellant, while apparently keeping more extra cleaning supplies than most Unit Administrators, likely did so because of the demands placed on him to clean other areas at the institution because of his excellence in doing so.

9. The Hearing Officer finds Appellant was not attempting to hide the extra supplies or evade responsibility for having these extra supplies, but merely wanted to ensure that he retained control over these supplies when he moved dorms. The Hearing Officer finds it persuasive that Appellant did not purchase these supplies with his own money, but ordered them in the normal course of business, even though no inventory sheet was found with the supplies in the tool room, or in the HVAC room.

10. The Hearing Officer finds Appellant should have informed his chain of command about his plan regarding these extra supplies, that is, that they would be stored in a non-traditional location. The Hearing Officer finds that had Appellant done this, either approval

could have been granted, or withheld. The Hearing Officer finds that the administration could have, at that point, required Appellant to return the extra supplies to Central Receiving.

11. However, the Hearing Officer also finds that due to the administration's likely knowledge that Appellant did have extra supplies, as did other Unit Administrators, that Appellant's failure to seek permission to store the supplies in another location prior to moving dorms was at worst a minor infraction, though it did cause some inconvenience to the institution, witness the investigation and the extra work caused to Ms. Pitcock and others.

12. The Hearing Officer finds the punishment imposed was excessive in light of the wrong committed.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law that Appellant did engage in poor work performance by not seeking permission to move the supplies to a temporary location pending his move from Dorm One to Dorm Three, and by involving Officer Aseltine.

2. The Hearing Officer concludes as a matter of law that Appellant was not insubordinate, though it is true that no inventory sheets or MSDS sheets were with these items, again, as the Hearing Officer found above, it was no secret that Appellant, like other Unit Administrators, kept extra cleaning supplies.

3. The Hearing Officer concludes, however, that the punishment imposed for Appellant's poor work performance was excessive. The Hearing Officer believes that though this incident did cause quite the stir at BCC, wasted the administration's and other employees' time, which could have been avoided with some forethought by Appellant, a corrective action such as a written reprimand, would be the more appropriate remedy.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **RAY SANDY V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS, (APPEAL NO. 2012-161)** be **SUSTAINED TO THE EXTENT** that the suspension be vacated, that Appellant be restored any back pay to which he would be due, and the suspension be expunged from his personnel record. The Hearing Officer further recommends to the Personnel Board that it order Blackburn Correctional Complex to impose the corrective, non-disciplinary action of a written reprimand. Because the Appellant prevailed, the Hearing Officer recommends to the Personnel Board order Appellant receive any leave time he may have spent at pre-hearing conferences or the evidentiary hearing, and that he otherwise be made whole. **KRS 18A.105, KRS 18A.095(25) and 200 KAR 12:030.**

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 Boyce A. Crocker** this 3rd day of May, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Wesley Duke
Mr. Ray Sandy