

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2012-132**

**TERRY SHELLEY  
APPELLANT**

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

**CABINET FOR HEALTH AND FAMILY SERVICES  
J. P. HAMM, APPOINTING AUTHORITY  
APPELLEE**

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The Board at its regular March 2013 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated January 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 **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 \_\_\_\_\_ day of March, 2013.

**BOARD** **KENTUCKY PERSONNEL**

\_\_\_\_\_  
**MARK A. SIPEK, SECRETARY**

A copy hereof this day sent to:

Hon. Tim Salansky  
Terry Shelley

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This matter was brought for an evidentiary hearing before E. Patrick Moores, Hearing Officer for the Personnel Board of the Commonwealth of Kentucky on November 2, 2012, at its offices located at 28 Fountain Place, Frankfort, Kentucky, and pursuant to KRS 18A was recorded by audio-video equipment.

The Appellant, Terry Shelley appeared and was not represented by legal counsel. The Appellee, Cabinet for Health and Family Services, was represented by Hon. Tim Salansky of the Cabinet's Office of Legal Services

At issue was whether the Appellant, Terry Shelley, was improperly suspended for two days without pay, and without just cause. The Appellant also sought to have the suspension expunged from his record and have his two days pay reinstated to him.

**I. STATEMENT OF THE CASE**

1. This matter concerns Terry Shelley's appeal of a two-day suspension without pay issued on April 23, 2012, by Howard J. Klein, Appointing Authority for the Office of Human Resource Management of the Cabinet for Health and Family Services, for Unsatisfactory Performance of Duties. The charge resulted from a pattern of conduct consisting of inappropriate and unprofessional comments, arising from an anonymous complaint of sexual harassment of employees under Shelley's direct line of supervision. An investigation was undertaken by the EEO/Civil Rights Compliance Branch of the Cabinet's Office of Human Resource Management.

2. The EEO/Civil Rights Compliance Branch's investigation revealed that the Appellant demonstrated inappropriate and unprofessional conduct, given his position of authority as a member of the management team, and recommended the matter be referred to the Employee Relations Branch for possible disciplinary action. A review of the allegations and the

Compliance Branch's investigation by the Appointing Authority resulted in a determination that Shelley's conduct violated the KCPC Code of Ethics and Employee Conduct, and that pursuant to 101 KAR 1:345, Section 1, a two-day suspension with loss of pay was merited.

3. An appeal was filed by Shelley. At a pre-hearing conference, an issue was raised as to whether the Cabinet could impose a two-day suspension and loss of pay of a managerial employee. Counsel for the Appellee investigated the issue, and submitted a reference to 803 KAR 1:070, Section 10, which provided that an exempt employee could be docked for unpaid disciplinary suspensions on a daily basis. The language of the administrative regulation was found to be virtually identical to the Federal Wage and Hour Regulations at 29 C.F.R. §541.602. The Personnel Board's Hearing Officer determined that the suspension of pay was not improper, and the matter was scheduled for a second Pre-Hearing Conference.

4. At the second Pre-Hearing Conference, conducted on August 2, 2012, the Hearing Officer of the Personnel Board framed the issue for an evidentiary hearing and placed the burden of proof on the Appellee. The parties were also instructed about discovery procedures, submitting witness and document lists, and subpoenaing witnesses.

5. The evidentiary hearing before the Board began on November 2, 2012. Approximately one hour into the hearing, the Appellant announced that due to the death of a neighbor's family member in a Carroll County bus accident, whose funeral was on this date of the hearing, he was going to have to leave to help care for his neighbor's livestock while the family attended the funeral. The Appellant was asked (at 10:31 through 10:40 of the recorded transcript of the hearing) if he was requesting a continuance, to which he responded he was not, and that he was not giving up his appeal, adding the only thing he had to present as evidence was the information set forth in his written statement dated April 30, 2012 (in which the second and third pages have a typed date of March 19, 2012). The Appellant was instructed that his right to cross-examine each witness would be waived if he left the hearing, and he responded he understood that such right would be waived, adding "I don't want to cross-examine any witness." The Appellant further stated, "I have retired . . . I have left that snake-pit. I figure the worst thing that can happen to me is that you [the Hearing Officer] will sustain the decision and let it stand." The Appellant was instructed that he would have to at least stay long enough to allow Appellee's counsel cross-examine him on his written statement, to which the Cabinet's legal counsel, Tim Salansky, stated he had no objections to the filing of Shelley's written statement and that he waived cross-examining Shelley on said statement. Thereafter, following Shelley's admission on the record that he understood the rights he was waiving, he was granted permission to leave the hearing.

## **II. STATEMENT OF FACTS**

1. The first witness called by the Cabinet was **Marjorie Payne**, the EEO and Civil Rights Compliance investigator for the Cabinet, where she has been employed for the past five years. She described the investigation which began in November 2011, following the

assignment being assigned to her to investigate an anonymous complaint being received in the Office of the Governor of allegations of reported sexual harassment against Terry Shelley, the Director of Security at the Kentucky Correctional Psychiatric Center (KCPC).

2. Her report summarizing her interviews of witnesses was directed on three allegations. The first allegation was that Appellant Shelley made three attempts to kiss Correctional Officer Michelle Perkins in his office in 2009, and that Perkins had observed Shelley and training director Rhonda Harmon “acting like a couple” although she never observed any inappropriate sexual conduct between them. When asked why she never reported this to anyone, Perkins explained she was afraid of losing her job. She further said that Perkins alleged no requests from Shelley for sexual favors.

3. Payne also reported an allegation from Correctional Officer Rebecca Watts, that Shelley’s remarks about her being attractive and asking for hugs from her made her feel very uncomfortable around him and that she would always try to maintain distance from him, although Watts admitted that Shelley never made any sexual advances toward her. Payne also reported that Correctional Officer Rose Staples gave her a statement in which she alleged that Shelley told her how pretty she was and that he wanted to protect her from the male workers in the facility.

4. Payne interviewed Shelley, and in his statement he denied the allegations against him. Shelley said he never tried to kiss Perkins. He admitted that he may have told the women that they were attractive, and that if he ever touched any of the women it would be during their training and with permission. Shelley admitted that he warned several women about becoming involved with some of the aggressive men at the facility.

5. Payne stated that her investigation produced insufficient evidence to confirm or disprove the allegations of sexual harassment against Shelley. She testified that all the females she interviewed that were associated with Shelly had the perception that he tried to use his authority to influence his relationship with them, which caused them to fear for their jobs. She further testified that there was no concrete evidence of a hostile work environment or that the female employees were promised any rewards pertaining to their job if they granted any sexual favors to him, nor were any threats made.

6. Payne also testified about her investigations into alleged retaliation by Shelley, but that none of the officers could recall any specific retaliatory conduct, and that her investigation disclosed that all disciplinary actions were well documented and the result of consistent application of facility policy, and occurred for legitimate, non-retaliatory reasons.

7. The last allegation that Payne investigated was an allegation by Correction Officer Denise Fleming of being discriminated against by Shelley and others after she was promoted to lieutenant, thereby creating a hostile work environment because she was a female. Payne testified that she found no evidence to substantiate the allegation.

8. **Michelle Renae Perkins** appeared with her personal attorney, the Hon. Vanessa Cantelly of Louisville. Perkins said that she had previously been employed at the Luther Lockett

Correctional Complex since April 12, 2012, but that she was previously employed at the KCPC since October 2008. She testified that she started at the KCPC as a contract employee from the Crown Agency, and became a permanent state employee in early 2009. She testified that Shelley was her boss and that in addition to being his secretary, in which she would also gather the mail, prepare reports, ran errands for Shelley and Rhonda Harmon, Director of Training, and would assist Harmon in the training. She said her office was next door to the office of Shelley. She testified that after she had been on her job for about six months, and she refused one of his advances, Shelley told her that due to staff shortages she would be reassigned to work as a correctional officer on the floor of the facility. Perkins claimed she thought the reason she was being transferred was because she refused Shelley's advances and attempts to hug and kiss her, but she said she was relieved to be transferred.

9. Perkins testified that she was contacted during an investigation in October 2011 by Martin Anderson, who gave her a statement to sign about Shelley. She refused to sign, stating those were not her words, the statement was not about what happened to her, and that she was reluctant to sign because she wanted to keep her job. She took a break to go to the bathroom and on her way back she ran into Mr. Haddix, the Assistant Director of Security, and after explaining to him why she appeared to be upset, Haddix told her to just tell the truth. She returned to Mr. Anderson and gave him a statement about instances that Shelley would bring her into his office, close the door and ask her for hugs and kisses, describing that these instances became more frequent, occurring once to three times per day. She said that his advances made her tense up, and that when he tried to pull her to him she would push him away. She said this ended her employment working with Shelley, as she was transferred the next day.

10. Perkins denied that she made an anonymous complaint to the Office of the Governor. She said she was recalled to Ms. Payne's office in which she discussed her situation with Shelley. Thereafter, she felt she was being watched by Shelley, recalling one incident where she had to go to the Captain's Office and that while she was there Shelley came and stood in the doorway, forcing her to have to brush by him when she left the office. She eventually was transferred to the Luther Luckett facility.

11. **Rebecca Lee Watts**, was employed at KCPC early July 2012, having worked there for approximately one year. On July 30, 2012, she went to work for the Roederer Correctional Facility in LaGrange for the Department of Corrections. She started working at KCPC as a contract employee through the Crown Agency. Previously she worked as a mental health care worker, working with patients undergoing pretrial testing. She was initially assigned at KCPC as a contract corrections officer, and about a month later, while she was still a temporary employee, was approached by Shelley who one month later made her into a fire safety officer. She was given the responsibility of a lieutenant, to re-create policies and guidelines and she recognized that the regular employees didn't like that. She testified that she felt it was Shelley's attempt to put her in his "inner circle" and that he was "grooming" her. She testified that Shelley told her that she would only report to him.

12. Watts testified that eventually during their meetings he would shut the door, which made her feel uncomfortable, and that a couple of days later he asked her for a hug. She said she didn't know how to deal with this approach by him, as she was concerned about keeping

her job, as she was still a temporary contract worker. She testified that she tried to shrug it off, and keep professional. She said Shelley never asked for sexual favors, but that on one occasion he patted her on the back. She testified that Shelley told her that she was extremely attractive and that she could “go far.” She added that Shelley made it very clear on multiple occasions that he could get anything he wanted, and that he could promote people within his inner circle.

13. Watts testified that after the investigation started against Shelley, she began to experience a changed attitude toward her by the staff, and that she got no help from anyone. Suddenly, fire drills that normally took 5-7 minutes would take up to 15 minutes, it appeared she was out of the circle of trust, and not getting the assistance she needed. After she had been off for two days and returned to the facility, she was directed to the office of Laura Hall, Human Resources Director, who walked her out of the facility telling her that she was being sent back to Crown. Watts asked why and she said Hall told her, “I don’t have to give you a reason,” but subsequently told her that “you’re not a good fit.” She could not understand how after twelve months she was no longer a good fit. She testified that she believed the reason she was terminated from KCPC was because she was the last female still there that was under the control of Shelley, as all the others involved in the investigation had left, including Perkins and Staples.

14. **Rose Staples** is now employed as a Probation and Parole Officer with the Department of Corrections in Louisville since July 16, 2012. She started at KCPC in August 2010 as a corrections officer. She was a contract employee for one year, then became a state employee. She said that as the Director of Security, Shelley was at the top of the chain of command she was under.

15. Staples was called into the investigation of Shelley due to the allegations of possible sexual harassment. She testified that when she started at KCPC she had been warned by some of the older workers to keep her distance from Shelley. She testified that she did not feel threatened or preyed upon by any of the other correctional officers, but Shelley would approach her with comments about how attractive she was, and other remarks that made her feel very uncomfortable. She described one instance when she was in training, he touched her, explaining that was “to use as an example.” She said she felt he singled her out because she was a young female. She also described occasions when he would stand in a doorway and not step back to allow her space to get around him without brushing by his body.

16. **Howard J. Klein** is the Appointing Authority for the Office of Human Resource Management of the Cabinet for Health and Family Services. Following the EEO Compliance Investigation, the matter was presented to the HR Office for determination of possible disciplinary action. Klein testified that he felt a two-day suspension, with loss of pay was appropriate due to Shelley’s high level of supervision. Klein said there was no direct evidence of sexual harassment, as the allegations involved more fear and pervasive conduct, and the discipline handed down was consistent with analogous circumstances. Klein said the level of discipline was initially recommended by Shelley’s branch manager, and that he agreed that the two-day suspension was appropriate.

17. Klein said he considered Shelley’s written response to the charges, and his request that the allegations would only merit, at best, a written reprimand. Klein disagreed, as Shelley’s

position, actions and comments to female subordinates, and Klein's reviewing cases over years, led him to consider the suspension with loss of pay was a major disciplinary action. Klein said that although actual sexual harassment was not found, it is because of these inappropriate actions by supervisors that cause the Cabinet to end up with time-consuming and costly EEO investigations.

18. Although **Terry Shelley** voluntarily chose not to appear in the evidentiary hearing, and was waiving his right to cross-examine witnesses, he stated on the record that he was not withdrawing his appeal, but instead was going to rely solely on his written statement dated April 30, 2012, to Mr. Klein, in which he suggests that the allegations against him by Officer Perkins was more in retaliation against him for failing to assist her in securing the newly opened administrative assistant position. Subsequently, she became upset when she was mandated to work overtime and refused to do so in order to attend her son's game. He reports that when he told her that she might receive some form of disciplinary action, as overtime was mandatory, that she made the choice to leave her employment with KCPC, and that approximately two weeks later her allegations of sexual harassment was filed against him. He denied the charge, noting that she worked directly for him for almost two-and-one-half years, and that the allegations were found unsubstantiated.

19. Shelley's written report also challenges the claims of Ms. Watts that he asked her for hugs, which he denied. He did acknowledge that he told her she was attractive, but stated that his comments to her concerning other male employees were merely warnings that they would try to manipulate her. He argued these statements may have been taken out of context. He states that he doesn't recall the incident alleged by Ms. Staples concerning how she should handle a traffic ticket. He concludes by stating that he has been a certified investigator for the department for the past six years, and that the evidence against him is short on facts and nothing more than unfounded hearsay. He concludes by stating he thought that under the Cabinet's progressive discipline policy, a written reprimand preceded a suspension.

### **III. CONCLUSIONS OF LAW**

1. The matter at hand involves the conduct of a supervisory employee of the Commonwealth of Kentucky whose conduct is incompatible with the privilege of his work position entrusted to him by his employer, and the compelling State interest of the people of the Commonwealth in his performing the job assigned to him as a Director of Security at the KCPC.

2. The evidence presented concerns the supervisory conduct and errors of judgment of a Supervisor of the Kentucky Correctional Psychiatric Center (KCPC) located in the Luther Luckett prison facility in LaGrange, Kentucky. The KCPC is operated by the Department for Behavioral Health, Developmental and Intellectual Disabilities within the Cabinet for Health and Family Services. The purpose of the institution is described in the facility's Mission Statement as follows: "As part of the Mental Health and Criminal Justice Systems of the Commonwealth of Kentucky, the Kentucky Correctional Psychiatric Center is responsible for the provision of professional objective and thorough forensic pretrial evaluations for the judicial system and quality inpatient psychiatric services of persons charged with or convicted of felony offenses."

3. The Cabinet's authority to impose the disciplinary action against Shelley is based on KRS 18A.095 and 101 KAR 1:345, Section 1. Pursuant to KRS 18A.095(1), a classified employee with status shall not be dismissed, demoted, or otherwise penalized except for cause. The burden of proof establishing "just cause" rests on the government agency. A person in the service of the government, who derives his position from a duly and legally authorized election or appointment, whose duties are continuous in their nature and defined by rules prescribed by government, and not by contract, consisting of the exercise of important public powers, trusts, or duties, as a part of the legal administration of the government, is an officer and holds a "public office" in the constitutional meaning of the term. *Alvey v. Brigham*, 150 S.W.2d 935, 286 Ky. 610 (Ky. App. 1940).

4. In this position of authority, Terry Shelley was entrusted with not only serving as a Director of Security at a facility charged with a duty of highly specialized service to patients having severe mental and emotional issues, but also supervising several employees, mostly young females. His position demanded a high level of compliance with the rules imposed on him and the employees serving under his authority and subjected to his conduct. While it is true that there was no direct evidence to substantiate the allegations raised against him, the evidence established to the satisfaction of the Appointing Authority, and to this Hearing Officer, a pervasive form of conduct and actions that suggested disciplinary action was necessary. Shelley's failure to stay through the hearing to confront and cross-examine his accusers, which is one of our most sacred Constitutional rights, raises suspicions of the failure by a person accused to exercise the most fundamental fairness required in the adversarial process. *Partin v. Commonwealth*, 168 S.W.3d 23 (Ky. 2005). Shelley not only chose to waive confronting his accusers, his failure to explain his actions in response and rebuttal to said testimony is troubling as it constitutes an attitude of lack of caring to protect his own position against the allegations made against him. This is detrimental to the public interest in fair evidentiary hearings and is an abuse of the taxpayers' trust in providing such avenues of appeal to disciplinary matters.

5. Shelley's refusal to remain for the hearing, or to seek an emergency continuance, was suddenly presented to the Board and this Hearing Officer an hour into the evidentiary hearing. At the very call of the matter on the docket, the parties were asked both off and on the record if they had any motions. The Appellate Shelley said he had none, although it is hard for this Hearing Officer to accept that Shelley did not know then that he had this issue that he claimed was an emergency. When he raised the fact that he wanted to leave, without requesting a continuance, he was asked at length if he understood the ramifications of what he was asking and the rights he was waiving, and based on Shelley's responses this Hearing Officer concludes that Shelley's waiver of his rights was made knowingly and intelligently.

6. The evidence presented, while failing to show any basis of sexual harassment or creation of a hostile work environment, the testimony consistently presented what the Appointing Authority described as conduct consisting of inappropriate and unprofessional comments, creating an atmosphere of fear and pervasive conduct, which Shelley's accusers found offensive. For a person holding the position of Director of Security, who holds a position of a certified investigator for the Department for six years, Shelley certainly understands the nature of such evidence, raising all the more a question into his failure to confront such evidence



when provided the opportunity. It is the conclusion of the Hearing Officer after considering all the evidence and the Appellant's leaving the hearing in the middle of the presentation of the evidence, renders the appeal without merit, and it should be dismissed.

#### **IV. RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **TERRY L. SHELLEY V. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2012-132)** be **DISMISSED**.

#### **NOTICE OF EXCEPTION AND APPEAL RIGHTS**

Pursuant to KRS 13.B.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 the **Hearing Officer E. Patrick Moores**, this \_\_\_\_ day of January, 2013.

#### **KENTUCKY PERSONNEL BOARD**

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**Mark A. Sipek**  
**Executive Director**

A copy hereof this day mailed to:

Hon. Tim Salansky  
Mr. Terry L. Shelley