

CERTIFICATION OF PERSONNEL BOARD RECORDS

I certify that the attached is a true and correct copy of the Findings of Fact, Conclusions of Law, Recommended Order and Final Order in the case of **ERICK STEINBERGEN VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2014-183)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 20th day of May, 2015.



MARK A. SIPEK, SECRETARY
KENTUCKY PERSONNEL BOARD

Copy to Secretary, Personnel Cabinet

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-183

ERICK STEINBERGEN

APPELLANT

FINAL ORDER
SUSTAINING HEARING OFFICER'S
VS. 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 May 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 2, 2015, Appellee's exceptions, oral arguments, 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 20th day of May, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Edward Baylous
Erick Steinbergen
Bobbie Underwood

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-183**

ERICK STEINBERGEN

APPELLANT

VS.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER**

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

APPELLEE

** ** *

This matter came on for an evidentiary hearing on January 23, 2015, 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, Erick Steinbergen, was present and not represented by legal counsel. Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Edward Baylous. Also present as Agency representative was Aaron Smith, Warden of the Kentucky State Reformatory.

The issue concerns the disciplinary action taken against the Appellant, that is, the ten-day suspension from duty and pay, beginning August 10, 2014, and continuing through August 21, 2014, for alleged poor work performance. The burden was on the Appellee to prove by a preponderance of the evidence that the disciplinary action was taken with just cause and was neither excessive nor erroneous.

BACKGROUND

1. The first witness for the Appellee was the Appellant, **Erick Steinbergen**. Mr. Steinbergen is employed as a Lieutenant at the Kentucky State Reformatory (KSR). He gave a brief description of his duties.

2. On June 27, 2014, Appellant was assigned the task of supervising the transportation of approximately eleven inmates in two vans. When six or more inmates are transported, policy requires a supervisor and two correctional officers participate in that transport.

3. Every vehicle has a state-issued cell phone assigned to it. Lt. Steinbergen discovered that one of the assigned cell phones was inoperable. He did not advise the transport personnel of that malfunction. Instead, he retrieved his personal cell phone and took it with him during the transport.

4. These inmates were transported from the Roederer Correctional Complex processing facility to the Blackburn Correctional Complex in Lexington and Northpoint Training Center in Danville. Prior to reaching the first destination, Appellant instructed the drivers to pull into the Love's Truck Stop in Waddy, Kentucky.

5. Transportation of inmates requires that the transport occur as quickly as possible to minimize exposure to the public. The rules against contraband and restriction of inmate access to telephones are part of the security procedures. Appellant conceded he should not have taken his personal cell phone and that some form of discipline is appropriate. He believes a written reprimand or three-day suspension would be the most appropriate discipline.

6. When the vehicles stopped at the Love's Truck Stop, Appellant left the van to enter the restroom. His personal cell phone remained in his pocket. The two correctional officers stayed together in the vans with the inmates. The Correctional Officers had one working state-issued cell phone between them.

7. Appellant presented a series of photographs he took showing various aspects of the Love's Truck Stop:

Appellant's Exhibit 1A shows the outside configuration of the connected facilities of McDonald's, Subway and Love's;

Appellant's Exhibit 1B shows a closer view of the three-store setup;

Appellant's Exhibit 1C shows the area where the vans were parked off to the side of the complex away from customers at the main entrance;

Appellant's Exhibit 1D shows the entrance to the McDonald's through which Appellant passed;

Appellant's Exhibit 1E shows the interior of the McDonald's;

Appellant's Exhibit 1F shows the interior of the McDonald's looking through the Subway to the Love's Truck Stop store;

Appellant's Exhibit 1G shows the interior of the Subway and into the Love's Truck Stop store; and

Appellant's Exhibit 1H shows the location of the restroom in the Love's Truck Stop. Appellant testified he took the most direct route from the van to the restroom.

8. On his way out from the restroom, Appellant's cell phone rang. This particular day had previously been his day off. However, he worked overtime this day to perform the transport. When he viewed his cell phone he was reminded he had forgotten to cancel a doctor's appointment. He answered the call from the doctor's office. While he was on the phone, he was approached within the facility by Commissioner LaDonna Thompson. Appellant's conversation on the cell phone lasted less than ten minutes.

9. The Commissioner introduced herself, asked who Appellant was, where they had come from, and where they were going. This short conversation took about ten to 15 seconds. The Commissioner shook Appellant's hand and walked away. Appellant started heading back outside and concluded the phone call.

10. Appellant concedes being on his personal cell phone for a personal matter while on duty was wrong.

11. In almost ten years of employment with the Department, Appellant has had no prior disciplinary action. The Cabinet conceded Appellant has a good record and his performance is always satisfactory or above.

12. The next witness was **Aaron Smith**. Mr. Smith is employed by the Department of Corrections and, since May of 2014, has been the Warden at KSR.

13. Warden Smith described the first mission of the Department as public safety. A supervisor's presence is required for safety and security during a mass transport such as this. The transport of inmates outside the institution, in public, is considered the most dangerous thing they do. The transport supervisor is the individual in charge and who adds additional security and safety.

14. When he worked at central office, one of Warden Smith's primary responsibilities was to review critical incidents. In every case, ". . . when people wavered around policy, the small procedures, always led to the big event." Major events resulted from deviations in minor policies.

15. He testified that Appellant stopping to use the restroom during a transport was fine. However, Appellant violated policy by taking his personal cell phone, which was contraband; he failed to report a non-working cell phone before the vehicle left the institution; he conducted personal business on the personal cell phone while on duty.

16. Inmates typically observe and study staff members and how they act. If inmates see that some policy is not being followed, they will take advantage of that.

17. Warden Smith believed the penalty needed to be as serious as that which had been issued here: a ten-day suspension. He had considered Appellant's prior record. Appellant "... has an excellent record. He is an excellent employee. I don't dispute any of that."

18. Prior to issuing the discipline, he met with the Appellant. They talked extensively. Warden Smith also spoke separately to Commissioner Thompson. He considered the nature of progressive discipline to be issued. He believed this act constituted a substantial risk to the public. The officers needed to get the inmates between points as quickly as possible.

19. He identified Appellee's Exhibit 2 as the July 16, 2014 letter he authored which advised Appellant of the intent to suspend him from duty and pay for ten working days.

20. He identified Appellee's Exhibit 1 as the July 30, 2014 letter of suspension he authored, issued to the Appellant.

21. The parties stipulated that Kentucky Corrections Policies and Procedures, Policy Number 9.6, Contraband, particularly with reference to cell phones as contraband, was in full force and effect at the time of the incident. (Appellee's Exhibit 3.) They also stipulated to the admission of this exhibit.

22. The Warden considered seriously the context in which the contraband violation occurred; that is, during the transport of inmates.

23. Appellee rested its case. Appellant presented no witnesses. Closing arguments were presented by both parties. The matter stood submitted to the Hearing Officer for his recommended order.

FINDINGS OF FACTS

1. Appellant, Erick Steinbergen, is a classified employee with status. At the time of the events which led to the disciplinary action, he was employed as a Lieutenant at the Kentucky State Reformatory (KSR).

2. On June 27, 2014, Lt. Steinbergen was assigned the task of supervising the transport of eleven inmates in two state vans. He was accompanied by two Correctional Officers. Some of the inmates were to be taken from the Roederer Correctional Complex processing facility to the Blackburn Correctional Complex in Lexington, while the remaining inmates were to be taken to the Northpoint Training Center in Danville.

3. When a state van is used for transporting inmates, it is to be assigned a working state-issued cell phone. Prior to commencement of the transport, Appellant realized they had only one operable cell phone. He did not report the matter to the proper authorities. Instead, he retrieved his personal cell phone from his personal vehicle, and took it with him during the transport.

4. Prior to reaching the first destination, Appellant directed they stop the vehicles at Love's Truck Stop in Waddy, Kentucky. The vehicles were parked away from the main (central) entrance, to minimize interaction with the public. Appellant left one of the vans and entered the McDonald's restaurant on his way to the truck stop store, to use the restroom. The two Correctional Officers and the inmates remained in the vans.

5. After using the restroom, Appellant walked back through the McDonald's when his personal cell phone rang. He noted the origin of the incoming call and was reminded he had missed a doctor's appointment that day. This particular day had originally been Appellant's day off, but he took this assignment and put in overtime hours.

6. Lt. Steinbergen answered the cell phone and spoke with a person from his doctor's office. At that time, Commissioner LaDonna Thompson, who happened to also be at that location, approached Appellant. After a short conversation between them, they shook hands and the Commissioner exited the building and returned to her vehicle. Appellant returned to the van. The Commissioner later reported the occurrence of this incident.

7. Kentucky Corrections Policy and Procedure, Policy #9.6, Contraband, was in full force and effect during all times relevant to matters in this appeal. (Appellee's Exhibit 3.) Included among the list of "dangerous contraband" is:

Any device capable of storing data for review to include personal messages, movies, correspondence concerning illegal activity, or other security risks (e.g. . . . cell phones . . .).

That policy further states:

Anyone who promotes contraband or dangerous contraband may be subject to the administrative disciplinary procedures outline in CPP 15.2 or may be prosecuted as provided in KRS 520.050 or 520.060.

8. Appellant admitted that using his personal cell phone for a personal matter, while on duty, was wrong. (Testimony of Lt. Erick Steinbergen.)

9. There was no violation of policy or procedure when Appellant directed the transport convoy to stop at the truck stop to allow him to use the restroom. (Testimony of Warden Aaron Smith of KSR.)

10. On July 16, 2014, Warden Aaron Smith issued, and had delivered to the Appellant, a letter notifying him of the intent to suspend him from duty and pay for ten working days. Such intent was based on an allegation of poor work performance. (Appellee's Exhibit 2.)

11. Appellant and Warden Smith met on July 17, 2014, to discuss the intent to suspend.

12. On July 30, 2014, Warden Smith issued and had delivered to the Appellant, a letter notifying him of suspension from duty and pay for ten working days beginning August 14 through August 21, 2014. Such suspension was based on an allegation of poor work performance, in particular, violation of CPP 9.6, Contraband, Section 2-A6; Post Order #55, Section B19; and 101 KAR 1:345, Section 1.¹

13. The Justice and Public Safety Cabinet, Department of Corrections, employs progressive discipline.

14. Appellant has had no prior disciplinary action against him in his nearly ten years of state employment.

15. Appellant timely filed his appeal with the Kentucky Personnel Board. As relief, Appellant requests his discipline be reduced to a lesser punishment or action, such as a written reprimand.

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 for 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).

¹ Post Order #55 was not produced at the hearing or tendered as an exhibit for consideration by the Hearing Officer.

2. The Appellee issued Lt. Steinbergen a ten-day suspension by letter of July 30, 2014 (Appellee's Exhibit 1). That suspension was based on an allegation of poor work performance for violating CPP 9.6, Contraband, Section II, A.6.; and Post Order #55, Section B. 19. Although the Hearing Officer was not provided with Post Order #55, Section B.19, nor was such document admitted as an exhibit, the suspension letter states that Post Order prohibits the use of personal cell phones when transporting inmates.

3. It was clear from the testimony of Warden Smith that the mere fact Appellant directed the convoy to stop at the Love's Truck Stop was not a violation of any policy at all. However, Lt. Steinbergen did violate the contraband policy and Post Order #55 in the following particulars:

- When he discovered there was only one working state-issued cell phone, he should have reported this to the Transportation personnel in order to secure a second working cell phone. He failed to do this.
- He retrieved, brought with him, and utilized his personal cell phone while transporting inmates;
- He conducted personal business on his personal cell phone while transporting inmates, which Lt. Steinbergen admitted was improper.

4. A closer examination of CPP 9.6 is required. Under Policy and Procedures, it states:

Anyone who promotes contraband or dangerous contraband may be subject to the administrative disciplinary procedures outlined in CPP 15.2 or may be prosecuted as provided in KRS 520.050 or 520.060.

Included in the definition of "Dangerous contraband" are cell phones. Although a cell phone is defined under the policy as dangerous contraband, there was a failure of a preponderance of the evidence to show that Appellant "promoted" such dangerous contraband. "To promote" means "to contribute to growth, enlargement, or prosperity of; to forward; to further; to encourage; to advance." Black's Law Dictionary, 5th Ed., p. 1093. The evidence does not show any intent on the part of Appellant to "promote" or "advance" or "encourage" the use of contraband, that is, a personal cell phone. There is no doubt, however, that Appellant did possess what is defined as "dangerous contraband," utilized his personal cell phone for personal matters while on duty, and failed to report a non-working state-issued cell phone.

5. Appellant had admitted that his use of a personal cell phone for personal matters while on duty and taking the cell phone with him during the transport of inmates was improper. He is correct, and it is for that action alone, that he should receive discipline.

6. Appellee has shown by a preponderance of the evidence that there was just cause for disciplinary action against the Appellant. However, it has failed to show by a preponderance of the evidence that the disciplinary action taken, a ten-day suspension, was neither excessive nor erroneous. As there was no evidence of Appellant having "promoted" dangerous contraband, but that he had violated other policy, and as Lt. Steinbergen has received absolutely no disciplinary action in more than ten years of state service, a suspension was proper, but a ten-day suspension was excessive and erroneous.

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 **ERICK STEINBERGEN VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2014-183)** be **SUSTAINED to the following extent:** The suspension of the Appellant from duty and pay for ten working days shall be reduced to three working days. Appellant shall be restored all pay, benefits and made whole with respect to the restoration of the seven working days. **Further**, Appellee shall reimburse Appellant for any leave time he used attending the hearing and any pre-hearing conferences at the Board. **[KRS 18A.105, 18A.095(25), and 200 KAR 12:030.]**

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 **Hearing Officer Roland Merkel** this 2ND day of March,
2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Edward Baylous
Erick Steinbergen