

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2012-192

JAMES TINGLE

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

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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 March 27, 2013, and having considered 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 19<sup>th</sup> day of June, 2013.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK, SECRETARY**

A copy hereof this day sent to:

Hon. Angela Cordery  
James R. Tingle  
Stephanie Appel

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NOS. 2012-192**

**JAMES TINGLE**

**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 evidentiary hearing on January 23, 2013, at 9:30 a.m. at 28 Fountain Place, Frankfort, Kentucky, before John C. Ryan, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A.

Appellant, James Tingle, was present and was not represented by legal counsel. The Agency, Justice and Public Safety Cabinet, Department of Corrections, was also present and represented by the Hon. Angela Cordery.

The appeal was the subject of one pre-hearing conference conducted on October 1, 2012, at which the issues were defined and other procedural matters dealt with. Specifically, the Hearing Officer noted that a preliminary review indicates that the relevant facts are not in serious issue, the core complaint being whether the penalization, a three-day suspension, was excessive.

**BACKGROUND**

1. By letter of July 19, 2012 over the signature of Clark Taylor, Warden of the Kentucky State Reformatory (KSR), James Tingle, a Correctional Lieutenant at the facility, was cited for misconduct, i.e., smoking on institutional grounds. He was thereupon suspended from duty and pay for three working days, served in August, 2012. A true copy of the letter is attached hereto as “**Recommended Order Attachment A.**”

2. Lt. Tingle took appeal of the action on August 23, 2012 under the appropriate category of “suspension” and attached a two-page summary of his position. He agreed therein that he was smoking on the grounds, but urged that any punishment for this alleged infraction should be mitigated by the fact that he was signed out at the time, was a considerable distance from the physical structure, and that KRS 61.165 requires accessible indoor smoking areas in all state facilities where smoking is otherwise restricted.

3. Upon convening the evidentiary hearing, following brief preliminary matters, the Agency introduced the testimony of Appellant, **James Tingle**, as if under cross-examination. He confirmed that he holds the position of Lieutenant at KSR and has served with the Agency for fifteen years, working up through the ranks. He supervises inmates and staff for the safeguard of the overall security of the institution and in that role "writes up" both staff and inmates. He discussed examples of staff write-ups. He recalled receiving supervisory training at the institution ranging over a one-year period.

4. Addressing the incident under scrutiny, Appellant prepared a report summarizing the incident on July 2, 2012, wherein he agreed that he smoked a cigarette while riding his motorcycle out to the end of the access road leading to the front of the facility. He recalled that he was out for approximately nine minutes and no one observed him smoking. When he returned and clocked in, he was greeted by then-Warden Pollock who requested whether he smoked and, upon learning of it, asserted "I want a report, I am giving you a three-day suspension" or similar words. Appellant pointed out that several other staff, whom he named for the record, were present and overheard the exchange. He insisted that this mode of handling by the Warden was the aspect that aggrieved him the most, since from his own training and management protocol such discipline is routinely required to be administered in private between manager and employee rather than before an audience.

5. Appellant continued that at least one allegation in the overall workup is incorrect. In addition to the fact that no one observed him with the cigarette and accordingly the discipline is based upon his own admission, he did not light up inside of gate 1 but, rather, outside of what is known as "Box 1" which area is essentially the road or driveway, admittedly facility property, leading to the institution. He identified several documents including his report, an intent to suspend of July 6, 2012, his written response thereto of July 9, 2012, and the suspension letter of July 19, 2012. He also verified two photographs, one of the front of the institution and the other an aerial view of the grounds, all of which were introduced through his testimony without objection.

6. Appellant acknowledged that he has observed officers under his supervision smoking on the grounds and conceded that he did not discipline them if they smoked outside of Box 1, i.e. some distance from the prison structure. He added that in those instances where he viewed it a violation, he reprimanded the officer or otherwise recommended discipline in private, which he viewed was the appropriate procedure.

7. **Clark Taylor** is Warden of KSR. He has served with the Department of Corrections for approximately twenty-five years and attained the current position in July 2012. He recited his history with the Agency and his duties as Warden. As Appointing Authority, he is authorized to impose discipline and did so as to Appellant, assessing a three-day suspension. He ratified the sequence relative thereto acknowledged by Appellant.

8. The Warden explained the background supporting the need for the discipline. He recalled that in 2007 KSR, as a medical related facility, became tobacco free. At that time, it was observed that nearly all inmates used tobacco products and suffered from health issues at least partially due to this use. Tobacco was declared to be contraband. Initially staff was permitted to use tobacco products in the parking area of the institution but soon abused this privilege, leaving butts and tobacco debris for inmates assigned to cleanup to deal with. Consequently, after approximately six months policy was tightened to prohibit smoking anywhere on institutional grounds. As a corollary, work schedules were changed from a 37.5-hour to a 40-hour week, having uniformed staff remain at the facility for lunch and other scheduled breaks, deemed a more safe and efficient arrangement. This also decreased the previous abuse of staff leaving a post or other secured areas to smoke at random times. The Warden identified the relevant policy, made effective January 16, 2007, and recited therefrom the applicable provision under which Appellant was disciplined, specifically that recited in the suspension letter.

9. Under relatively brief cross-examination, Appellant pressed the Warden relative to what he characterized as "due process" which he later corrected to define as progressive discipline within the institution. The Warden explained his own approach to disciplinary matters to require consistency, consideration of past misconduct, and the explanation of the employee if a meeting pending levy of discipline was requested. He urged that he takes such matters quite seriously and undertakes to analyze all circumstances before a decision is reached. He recalled that he has issued three disciplines, including that of Appellant, since assuming the position, briefly explaining the circumstances of each. Addressing concerns raised by Appellant in the cross-examination as to alleged uneven and inconsistent application, wherein Appellant alluded to certain on-going abuses, the witness reiterated that his office undertakes to deal with all such matters brought to his attention. He acknowledged that with more than 600 staff and approximately 2,000 inmates, he has little doubt that some abuses will inevitably occur and go unnoticed. He explained, in response to questioning, that non-uniformed staff remain under a 37.5 work week and are still permitted to leave the facility for an unpaid one-half hour lunch break, during which tobacco might be used.

10. The Agency having completed its proof in chief, following discussion, further protocol, and appropriate motion(s), Appellant offered the testimony of **Robbin Mashburn**. Ms. Mashburn holds the position of Accountant III and moved to employment at the Roederer Correctional Complex (RCC) in September, 2012. She previously served for six and a half years at KSR in the Business Office as a member of administrative staff, having a total of fourteen

years with the Agency. She is a non-smoker but worked with three or more others utilizing the habit at KSR. She depicted a scenario wherein in previous years during her time at KSR there was abuse of breaks; various members with whom she worked would leave for random, varying lengths of time without clocking out, leaving her and a handful of others to continue working. She viewed this as unfair but tolerated it in the circumstances. She recalled routinely leaving the facility for lunch and riding with one or more others who lit up in the vehicle while still in the driveway departing the institution, generally outside of what is designated as Box 1, which is situated past the outer front gate but still on the premises. She urged that the break situation was constantly abused, both as to failing to clock out and utilization of lengthy lunch breaks of up to two hours. However, just before her departure to RCC, upon the arrival of Warden Taylor, there was a "crackdown" wherein the practice began to dissipate. She opined that this occurred when Appellant filed a grievance complaining about the loose enforcement. More specifically, during the approximately two-year interval next preceding the present time matters had changed from general abuse of breaks to more severe enforcement thereof.

11. Under brief cross-examination by the Agency, the witness described her KSR office arrangement, which included both smokers and non-smokers. She essentially reiterated that the smokers appeared to have misused the break circumstances, taking them often and without clocking out, leaving the non-smokers such as herself to continue working. This was reduced noticeably during the brief interval between Warden Taylor assuming command and her departure from the facility for another position at RCC. She acknowledged, or reiterated as the case may be, that non-uniformed personnel such as herself, upon the 37.5-hour work week, were permitted to leave the premises for lunch. When the arrangement was changed to a 40-hour work week for uniformed personnel, who were then required to remain on-site for their entire shift, matters began to change, most notably upon the filing of a grievance by Appellant.

12. **Brian Cote** is an Information Systems Supervisor based at KSR where he has so served for approximately six years. He has been with the Agency for a total of twenty-four years and is a smoker. He asserted that he has never used tobacco inside Box 1, but ordinarily lights a cigarette as he is leaving the facility, departing upon the roadway which adjoins a state highway. He has never been reprimanded for smoking.

13. Under cross-examination, he confirmed the physical aspects of the facility as depicted by Appellant. He further explained that, at least informally until recently, the general perception was that the smoking ban at KSR included all areas inside Box 1, i.e. the outer front gate, but that most personnel never considered the driveway or road leading in to be prohibited, especially while inside moving vehicles coming to or leaving work. He recalled that upon issuance of the directive previously discussed, personnel have been more vigilant concerning clocking out or signing out, noting that these are two separate actions, in conformity with the directive. His own circumstance is unique in that his job duties require him to regularly come

and go, since his services are often needed outside the facility, and as a smoker, he routinely lights up as he is leaving and approaching HWY 146 at the end of the driveway.

14. Appellant having concluded his proof in chief, the Agency offered rebuttal through **Warden Clark Taylor**. The substance of his rebuttal pertained to the timeframe within which the institution commenced enforcing a policy already in place regulating breaks and lengthy lunches. He pinpointed the initiation of strict enforcement to August 30, 2012. It was upon that date that he convened a meeting attended by various personnel wherein it was made clear that security staff was not to leave the grounds during work time and non-uniformed personnel would be afforded an unpaid half hour break for lunch. Anyone leaving for any purpose, whether lunch or otherwise, would be required to clock out and clock in. The directive was widely disseminated among all staff through supervisors of both uniformed and non-uniformed personnel and adherence thereto has been constantly emphasized since that date.

15. The Warden concluded his testimony by urging that management, such as Appellant, is held to a higher standard of compliance with policy and that this requirement impacted the assessment of the three-day suspension of Appellant as Lieutenant. He recalled conferring with Appellant and emphasizing conformity with the rules and policy. He also sought to verify whether his own admitted violation might signal lax enforcement by him among those under his supervision. He recalled receiving assurance that this would not occur. The sworn testimony was thereupon concluded and, following closing statements by the parties, the matter stood submitted for recommended order.

16. KRS 18A.095(1) requires that "A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause." A suspension without pay is a penalization.

17. 101 KAR 1:345 is the relevant regulation relating to disciplinary actions. Section 1 affords the right of appointing authorities to discipline employees for lack of good behavior or the unsatisfactory performance of duties. Section 4 thereof provides for levying of suspensions not to exceed thirty working days.

18. KRS 18A.095(2), cited in the suspension letter, relates to dismissals and is inapplicable herein. Subsection (8) of the statute, also cited in the suspension letter, defines the protocol for notification and intended disposition of the offense and assessment of the suspension. Appellant does not dispute that the Agency complied with the technical aspects of this provision.

19. Policy KSR IPP 03-00-14 was implemented by the Agency effective January 16, 2007. Section III. A. provides that:

All areas of KSR shall be free from tobacco use and no tobacco products, cigarette rolling papers, matches or lighters shall be permitted past Gate 1 or through any gate accessing the prison yard.

Subsection B. provides that:

Tobacco at the Kentucky State Reformatory shall be considered contraband as defined in KRS 520.010.

Subsection C. further provides that:

Employees shall be permitted to keep tobacco products, matches and lighters in their personal vehicle.

The policy also blueprints the reporting and imposition of disciplinary action relative to discovery or possession of tobacco contraband. Portions thereof mirror the procedure outlined in KRS 18A.095(8). Appellant has not challenged the procedure with one notable exception: He was aggrieved concerning the oral, public approach engaged by the then-Deputy Warden upon his admission of smoking a cigarette on the outer roadway of the facility when he returned from the break on the date in question. The policy does not appear to directly address this aspect, although Appellant alluded to the treatment somewhat extensively in his testimony.

### **FINDINGS OF FACT**

1. At all times germane herein Appellant, James Tingle, was a classified employee with status of the Agency, holding the position of Correctional Lieutenant at Kentucky State Reformatory in LaGrange, Kentucky. On July 2, 2012 at approximately 8:41 p.m. he exited from the main institution through Gate 1, mounted his motorcycle and rode away from the institution along the driveway connecting to HWY 146, a public highway. While riding the motorcycle, he lit and smoked at least a portion of a cigarette. He then snuffed it out and placed the remnants in his saddlebag. He previously signed out for this break.

2. Upon returning to the institution after approximately nine minutes, he reentered through Gate 1 and was met by then-Deputy Warden Pollock. Several other staff was present, and the Deputy Warden inquired of him directly whether he smoked. Appellant readily admitted the event and was immediately directed to prepare a report and informed that he would be assessed a three-day suspension from duty and pay. Despite administrative challenge thereof through appropriate channels, the suspension became final and was served in August 2012.

3. No issue is raised concerning Appellant's overall work performance nor is the matter the subject of progressive discipline. It is keyed, rather, to the fact that Appellant is a supervisor and the asserted violation provides poor example for staff under his supervision as well as his potential lax of enforcement for infractions of this nature. Prohibition of possession and use of tobacco products is a relatively recent policy and has generated notable controversy as to level of enforcement.

4. The Hearing Officer finds the testimony of all witnesses to be credible.

### **CONCLUSIONS OF LAW**

1. The immediate appeal presents an issue which will inevitably arise in the circumstance when an appointing authority undertakes, for the betterment of all impacted thereby, to alter ingrained habits. Drafting and implementation of regulation or policy intended to capture every circumstance is most difficult and, in circumstances such as presented herein, both intent and trust assume a significant role. The evidence presented demonstrates a relatively recent mandate being phased in, presumably in recognition of inability of those impacted, particularly staff, to instantly cease a long-standing practice.

2. The cited policy, while clearly intended to prohibit the use of, although not necessarily possession of, tobacco products upon all institution grounds, is not clear in at least one aspect. Appellant and one or more witnesses make a distinction between what is designated as Gate 1 and Box 1 at KSR. The relevant portion of the regulation expressly references only Gate 1 and "... or through any gate accessing the prison yard." Consequently, Appellant as well as others did not interpret that the prohibition also extended past Box 1, which is well outside of Gate 1.

3. The circumstances of this matter dictate some latitude. Although Appellant, a Lieutenant and thus a member of management, might be held to a higher standard, the policy under which he has been penalized is subject to more than one interpretation. The proof signals a general belief, whether accurate or not, that the so-called Box, which is the driveway exiting the premises, is not included in the ban and that tobacco products may be utilized while traversing it. A written reprimand would have been sufficient to alert Appellant of the presumed intent to include the area, as well as enabling him to so inform those under his supervision. As a corollary, while his forthrightness in disclosing his action is commendable, it has no bearing in the disposition of his appeal since all staff have a duty to be truthful with upper management at all times.



**RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **JAMES TINGLE VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (Appeal No. 2012-192)** be **SUSTAINED to the extent** that the three-day suspension be set aside and that Appellant be issued a written reprimand. The Hearing Officer further recommends that the Appellant be awarded back pay and benefits lost as a result of the three-day suspension; to reimburse Appellant for any leave time he used attending the hearing and any pre-hearing conferences at the Board; 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).

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 John C. Ryan** this 27<sup>th</sup> day of March 2013.

**KENTUCKY PERSONNEL BOARD**

  
**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy hereof mailed to:

Hon. Angela Cordery  
James Tingle



## DEPARTMENT OF CORRECTIONS

LaDonna H. Thompson  
Commissioner

Kentucky State Reformatory  
3001 W. Hwy 146  
LaGrange, Kentucky 40032  
Telephone: 502/222-9441  
www.kentucky.gov

Clark Taylor  
Warden

July 19, 2012

James Tingle

Dear Mr. Tingle:

After careful consideration of the statements made on your behalf in the disciplinary meeting held on July 12, 2012, I find no reason to alter my decision to suspend you from duty and pay.

Based on the authority 101 KAR 1:345, Section 1 and 4, and in accordance with KRS 18A.095 (2) and (8), you are hereby notified that you are suspended from duty and pay for a period of three (3) working days beginning August 6, 2012 and continuing through August 8, 2012. You may return for your next regular shift on August 9, 2012.

You are suspended from your position as Correctional Lieutenant with the Department of Corrections, Kentucky State Reformatory for the following specific reason:

**Misconduct, i.e., smoking on institutional grounds.** As reported by Deputy Warden Troy Pollock and per your admission, on July 2 2012, at approximately 8:41 pm, you exited the main institution through Gate 1, got on your motorcycle, drove to the parking lot area beyond Box 1, and smoked part of a cigarette. You admitted to Deputy Warden Pollock when questioned, that you had smoked a cigarette on institutional grounds.

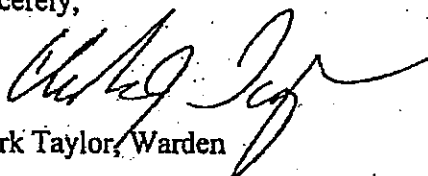
Your actions are in direct violation of KSR IPP 03-00-14 Section 3-A, which states "All areas of KSR shall be free from tobacco use and no tobacco products, cigarette rolling papers, matches or lighters shall be permitted past Gate 1 or through any gate accessing the prison yard".

As a Supervisor, it is incumbent on you not only to accurately perform your job duties at all times and to follow all policies and procedures, but also to set an example for staff to follow. You knew or should have known that the use of tobacco on institutional grounds is prohibited. Failure to improve your conduct will lead to further disciplinary action taken against you, up to and including dismissal.

A copy of this notice shall be provided to the Personnel Cabinet in accordance with Personnel rules. As provided by KRS 18A.095, you may appeal this action to the Personnel Board within sixty (60) days after

receipt of this notice, excluding the date notification is received. An appeal must be filed in writing using the attached appeal form and in the manner prescribed on the form

Sincerely,



Clark Taylor, Warden

cc: Tim Longmeyer, Secretary-Personnel Cabinet  
LaDonna Thompson, Commissioner – Department of Corrections  
James Erwin, Deputy Commissioner – Department of Corrections  
Stephanie Appel, Director - Division of Personnel Services  
Regional Personnel File  
Evaluation File

*Issued  
7-19-12  
SO [signature]*