

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOs. 2018-151 & 2018-152**

KRISTINE WHITEHILL

APPELLANT

VS.

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

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

APPELLEE

** ** * * * **

These matters came on for an evidentiary hearing on July 25, 2019, at 9:30 a.m., at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Geoffrey Greenawalt, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Kristine Whitehill, was present and was not represented by legal counsel. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Julie Foster.

By Interim Order dated April 26, 2019, the issue at the evidentiary hearing was the Appellant's claim of retaliation. The Appellant was assigned the burden of proof to establish retaliation, which was to be by a preponderance of the evidence.

BACKGROUND

1. The Appellant, Kristine Charity Whitehill, filed Appeal No. 2018-151 and Appeal No. 2018-152 on July 23, 2018, alleging direct retaliation for having filed a Prison Rape Elimination Act (PREA) claim at the Kentucky Correctional Institution for Women (KCIW).

2. The first to testify was the Appellant, **Dr. Kristine Charity Whitehill**. According to Dr. Whitehill, she taught GED courses for inmates at KCIW in 2016. She remained at KCIW until December 2016 when she voluntarily resigned to take a lateral position at another facility.

3. Appellant's Exhibit 1 was introduced into the record and is the Occurrence Report filed by the Appellant on June 22, 2016. This Occurrence Report has to do with an alleged inappropriate conversation between Jose Rodriguez, who was a coworker of the Appellant at the time, and inmates Karen Brown and Sarah White. According to the Appellant, this Occurrence Report was not acted upon by her supervisor, Jennifer Westphal, because she was in or had been in a dating relationship with Mr. Rodriguez.

4. Appellant's Exhibit 2 was introduced in the record and is a copy of an Occurrence Report filed by the Appellant on June 22, 2016. The Occurrence Report speaks for itself and, although unclear, it appears to allege that Mr. Rodriguez had improper contact with inmate Karen Brown.

5. Appellant's Exhibit 3 was introduced into the record and is a copy of the Appellant's written report, requested by the Internal Affairs Investigator, Rebecca Denham.

6. Appellant's Exhibit 4 was introduced into the record and is a copy of a typed summary of alleged instances of retaliatory behavior, prepared by the Appellant and forwarded to Stephen Lyons via email. This report indicates that the Appellant's coworkers knew that she had initiated an Internal Affairs investigation because they suddenly began a pattern of harassment that was organized and consistent. As a result, the Appellant alleges her coworkers isolated and totally ignored her, which made performing her job difficult. According to the Appellant, she did not hear anything more from the Internal Affairs investigation but, in her opinion, Karen Brown was still not being helped. According to the Appellant, the improper relationship between Jose Rodriguez and Karen Brown was continuing and nothing was being done about it by KCIW as late as September 2, 2016.

7. The Appellant stated that, after she filed the subject Occurrence Reports on June 22, 2016, whenever she would walk into a room everyone else would walk out. According to the Appellant, her coworker, Gaytha Phelps, refused to even look at her or talk to her and Jose Rodriguez would only ask her if she needed more toilet paper. This affected her job greatly. She also indicated she taught a deaf student and when she asked for accommodations for this student

there was no help provided. According to the Appellant, prior to her filing the subject Occurrence Reports on June 22, 2016, she had not been shunned by her coworkers but afterward, it was extremely noticeable. The Appellant did not report this treatment to anybody at KCIW because she just wanted it to stop and go away and hoped that, in time, she could get back in her coworkers' good graces.

8. The Appellant also testified as to an incident involving a conversation she had with Brandy Aston, an Administrative Assistant at KCIW. According to the Appellant, Ms. Aston ran into her one day and told her she did not understand why the Appellant had not received any firearms training. She suggested that the Appellant register a complaint, following which the Appellant went to the Human Resources Administrator, Stephen Lyons, and told him she wanted to register a complaint. Mr. Lyons asked her if she had talked to the Warden or anyone else about the firearms training, which she had not due to the way everyone had been treating her. Mr. Lyons then told her to file a retaliation/hostile work environment complaint. The Appellant chose not to file such complaint because she did not want to make things worse and end up having to quit her job.

9. Appellant's Exhibit 4 also demonstrates that the Appellant went to the Human Resources Administrator about her firearms training and not about her hostile work environment. The statement attached to Appellant's Exhibit 4 caused Deputy Warden Vanessa Kennedy to call a meeting between her, the Appellant, and Stephen Lyons, to discuss the Appellant's concerns. According to the Appellant, Ms. Kennedy told her that because she had filed an Occurrence Report against one of her coworkers, he and the rest of her coworkers were naturally going to be upset with her, at least for a while. However, the hostility continued until she finally felt she had to quit.

10. The Appellant relayed another incident that she felt ended up being overblown by her superiors. One morning when she arrived at work, no one was at the school. As such, having time on her hands and wanting to be helpful because they were short-staffed with guards, she picked up a temporary guard post. After a short while, she was replaced at the post and went on to the school. As a result of this incident, Deputy Warden Kennedy called the Appellant and asked her to come speak with her. Ms. Kennedy then told the Appellant she should not have picked up that post and that doing so was a pretty serious situation. According to the Appellant, her Captain had told her to pick up the post and she felt her scolding was a pretty serious consequence for such a "silly" misunderstanding and for trying to be a good employee. According to the Appellant, all of this made her feel like Jose Rodriguez was setting her up.

11. Shortly thereafter, the Appellant was able to transfer to a lateral position in a different correctional facility. According to her, the hostility continued after her transfer, which is now the subject of a separate Personnel Board appeal. It was around this time that the Appellant decided she wanted to know what really happened at KCIW, so she initiated an Open Records request.

12. Appellant's Exhibit 5 was introduced into the record and is a copy of the report prepared by Shawn Atkins of Internal Affairs regarding the alleged sexual harassment of an inmate reported by the Appellant. According to the Appellant, she found nothing in the report that addressed what she believed to be a PREA complaint. Because she wanted to know why nothing was mentioned about her PREA complaint in the said report, the Appellant instituted a separate court action in an attempt to retrieve more records.

13. According to the Appellant, the report marked as Appellant's Exhibit 5 mentioned her name 23 times, Jose Rodriquez' name was mentioned only 4 times and both of the alleged inmate victims' names were mentioned zero times. To the Appellant, for reasons unknown, the report focused mainly on her rather than the alleged victims or perpetrators. She also detected anger toward her in the report, which demonstrated there had been a lot of talking about her behind her back. In the Appellant's opinion, the report was nothing short of a character assassination and an effort to cover up improper acts of her coworkers by shifting the focus onto her. There was no concern shown for the alleged inmate victims. In the end, the Internal Affairs investigation could not substantiate any inmate rape or establish that there was an intimate relationship between Ms. Westphal and Mr. Rodriquez.

14. Appellant's Exhibit 6 was introduced into the record and is the Appellant's 2016 Annual Performance Evaluation.

15. Appellant's Exhibit 7 was introduced into the record and is a copy of an Occurrence Report prepared by Jose Rodriquez against the Appellant. According to the Appellant, she was never made aware of this complaint and was never disciplined as a result.

16. On cross-examination, Appellee's Exhibit 1 was introduced into the record and is a copy of the Summary Judgment entered in the Oldham Circuit Court, an Open Records action filed by Appellant, whereby the Department of Corrections prevailed.

17. In September 2016, the Appellant told Ms. Denham and Ms. Kennedy that things at work had become much better. The Appellant never complained after this date.

18. Appellee's Exhibit 2 was entered into the record and is the voluntary transfer agreement form signed by the Appellant on December 1, 2016. This document confirms that the Appellant voluntarily transferred to a correctional facility in Oldham County.

19. The next to testify at the hearing was **Rebecca Denham**, who is the Internal Affairs Captain at KCIW. Ms. Denham is a trained investigator and is also trained to perform PREA investigations.

20. Ms. Denham testified that the Appellant came to her in June 2016 distraught and upset over things happening at the school. The Appellant was concerned about the way her coworkers were treating her and about certain interactions between staff and inmates. According to Ms. Denham, the Appellant's complaints were very indirect, so she brought in Captain Shawn Atkins to help her investigate the matter. Appellee's Exhibit 3 was introduced into the record and is the same document previously entered into the record as Appellant's Exhibit 5.

21. Ms. Denham testified that there was no PREA investigation because, after interviewing Mr. Rodriguez and inmate Karen Brown, it was apparent that the "offending" conversation had been taken out of context by the Appellant and did not amount to a PREA violation or warrant a PREA investigation.

22. Appellee's Exhibit 4 was introduced into the record and is a copy of Ms. Denham's affidavit regarding the Appellant's complaints. According to Ms. Denham, she agreed with Shawn Atkins' conclusion that there were no violations and that the Appellant's complaints were unsubstantiated.

23. Appellee's Exhibit 5 was introduced into the record and is a copy of email communication regarding a strange interaction between Ms. Denham and the Appellant.

24. Next to testify was **Jose Rodriguez**, who is the Institution Training Instructor Coordinator at KCIW. In 2016, Mr. Rodriguez was an Administrative Specialist III. Mr. Rodriguez testified that he knows the Appellant and that she was his coworker.

25. Mr. Rodriguez testified that he had a conversation with inmates Karen Brown and Sara White regarding the content of the magazines inmates were allowed to have delivered to them. The inmates were complaining about not being able to have sexy magazines delivered to them. According to Mr. Rodriguez, he never mentioned anything about sexual penetration to the inmates. He further stated that, because of his PREA training, he knew better than to ever say anything along those lines. Mr. Rodriguez also testified that he had never had a romantic or sexual relationship with Ms. Westphal. Finally, he testified that following the filing of the subject occurrence reports, he and his coworkers worried that any innocent conversations they had with the Appellant would be misconstrued and result in the filing of more occurrence reports. So, rather than risk it, they stayed to themselves and did not speak to the Appellant any more than they had to for work purposes.

26. The next to testify was **Jennifer Westphal**, who is presently the Corrections Education Administrator at Luther Luckett. Prior to that, she supervised the education staff at KCIW and was the Appellant's supervisor.

27. According to Ms. Westphal, the Appellant was a good employee and teacher, but had a lot of social issues. According to Ms. Westphal, the Appellant overshared her family history. She would show up at her (Westphal's) house uninvited. The Appellant would also habitually call her around 7:30 a.m. most mornings. According to Ms. Westphal, these calls were so prevalent that her coworkers would tease her about her girl crush being on the phone. As another example of the Appellant's odd behavior, Ms. Westphal told of an instance where she had just returned from a trip of a lifetime. Rather than asking her how her trip was like the rest of her coworkers, the Appellant reacted by stating abruptly, "Did you have a good time with your friend?" From that point forward, Ms. Westphal started drawing a line with the Appellant. It was about this time that the Appellant filed her Occurrence Reports. As a result of these filings, Ms. Westphal was admonished not to talk about the investigation, so she, like everyone else, just hunkered down, kept to themselves, and did their jobs.

28. Ms. Westphal also recalled a conversation she had with the Appellant during which the Appellant stated that their relationship is going to work; she had put in too much time to let it go and they had too much in common. According to Ms. Westphal, in actuality, she and the Appellant had very little in common. Finally, Ms. Westphal testified that she should have set boundaries with the Appellant much sooner and should have informed her about the Kentucky Employee Assistance Program (KEAP). In addition, she noted that because of the

Appellant's unusual behavior, for safety sake, she ended up putting a peephole in the front door of her residence and purchased a gun.

29. The next to testify was **Vanessa Kennedy** who is now the Warden at KCIW. Prior to that and during the time in question, she was the Deputy Warden of Security and Programs at KCIW. Ms. Kennedy stated that she has been with the Department of Corrections for 20 plus years and is trained on harassment investigations. She also testified that she knows the Appellant.

30. Ms. Kennedy reviewed the report marked as Appellant's Exhibit 5 and stated that it contained an accurate summary of the interviews performed during the investigation of the Appellant's complaints. To alleviate the tension at work, Ms. Kennedy asked the Appellant if she wanted to mediate the matter with Ms. Westphal. Ms. Westphal agreed, but the Appellant did not. According to Ms. Kennedy, after the Appellant filed her Occurrence Reports, all of her coworkers were tense and on edge and became non-communicative with the Appellant. According to Ms. Kennedy, this was a natural reaction and did not constitute a violation of Appellee policy.

31. The next to testify was **Stephen Lyons**, who is presently the Deputy Warden of Security at KCIW. During the time in question, he was the HR Administrator at KCIW. Mr. Lyons testified that he has extensive training in performing investigations regarding harassment and hostile work environments. He is also the EEO coordinator at KCIW.

32. Mr. Lyons testified that he has found retaliation following previous investigations he has performed. He stated that the Appellant came to him with concerns that she was being retaliated against after initiating an Internal Affairs investigation against some of her coworkers. Mr. Lyons viewed the Appellant's summary of events, marked as Appellant's Exhibit 4, and passed them along to his superiors. According to Mr. Lyons, as far as he was aware, the report marked as Exhibit 5 was an accurate summary of the interviews that took place during the investigation. He testified that mediation was offered to help "heal the wounds" from the previous investigation. Ms. Westphal agreed to mediation, but the Appellant did not. Mr. Lyons also testified that he agrees with the conclusion of the summary set forth in Appellant's Exhibit 5. According to Mr. Lyons, there was no indication of any tangible adverse employment action ever being taken against the Appellant. Instead, the report correctly found that as a result of the Internal Affairs investigation, coworkers were not speaking to each other. To that end, Mr. Lyons opined that no one can dictate who to be friends with.

33. Following the evidentiary hearing, a briefing schedule was entered. The Appellee filed its brief timely, the Appellant's brief was filed late. The Hearing Officer overruled the Appellee's Motion to Strike. As a result of briefing and motion practice, the appeals were submitted to the Hearing Officer for a Recommended Order on December 12, 2019.

34. The Hearing Officer has considered the entire administrative record, including the testimony and exhibits therein.

FINDINGS OF FACT

The Hearing Officer makes the following findings of fact by preponderance of the evidence:

1. The Appellant, Kristine Charity Whitehill, a classified employee with status, filed Appeal Nos. 2018-151 and 2018-152 on July 23, 2018, alleging that she had been retaliated against after filing the Occurrence Reports marked as Appellant's Exhibits 1 and 2.

2. Pursuant to the Interim Order dated April 26, 2019, the issue before the Personnel Board was the Appellant's claim of retaliation.

3. On June 22, 2016, the Appellant filed two Occurrence Reports. One involved an alleged inappropriate conversation Jose Rodriquez had with two inmates and the other apparently alleged an improper relationship between Mr. Rodriquez and inmate Karen Brown.

4. According to the testimony of the Appellant, following the filing of the subject Occurrence Reports, her coworkers stopped talking to her and began excluding her from any normal inner-office social banter and activities.

5. The Appellant's complaints were investigated by Shawn Atkins, Internal Affairs Captain, and Rebecca Denham, Internal Affairs Lieutenant, which resulted in the memorandum marked as Appellant's Exhibit 5 and re-marked as Appellee's Exhibit 3. According to the testimony of Rebecca Denham, Stephen Lyons, Vanessa Kennedy, Jennifer Westphal, and Jose Rodriquez, the summary of interviews contained in the memorandum, marked as Appellant's Exhibit 5, were accurate.

6. Following his investigation, Shawn Atkins concluded that no policy violations had occurred and that the Appellant's allegations of retaliation were unsubstantiated.

7. The testimony of Rebecca Denham, Vanessa Kennedy, Jennifer Westphal, Stephen Lyons, and Jose Rodriguez confirms that, once they became aware the Appellant had filed the subject Occurrence Reports, the work atmosphere became tense and her coworkers simply kept to themselves and spoke to the Appellant only when necessary. This in and of itself does not constitute a violation of the Appellee's policy or an adverse employment action.

8. The evidence of record dictates that the subject Occurrence Reports filed by the Appellant did not rise to the level of a PREA complaint.

CONCLUSION OF LAW

The Appellant has failed to demonstrate by a preponderance of the evidence that she was retaliated against by the Appellee for filing the two Occurrence Reports marked as Appellant's Exhibits 1 and 2.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusion of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **KRISTINE CHARITY WHITEHILL VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NOS. 2018-151 AND 2018-152)** be **DISMISSED**.

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 Geoffrey Greenawalt** this 19th day of February, 2020.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Julie Foster

Dr. Kristine Charity Whitehill