

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-260**

TODD YONKER

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

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This matter came on for evidentiary hearing on April 23, 2013, at 9:30 a.m., ET, at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Boyce A. Crocker, Hearing Officer. The Appellee, Department of Corrections, was present and represented by the Hon. Wesley Duke. Also present with Mr. Duke was Ms. Ann Smith, Paralegal. Deputy Commissioner Kim Potter-Blair served as the agency representative.

The Appellant, Todd Yonker, was present and was not represented by legal counsel. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

A pre-hearing conference held on January 18, 2013, at 9:30 a.m., ET, at 28 Fountain Place, Frankfort, Kentucky, established that the issue in the evidentiary hearing was the dismissal of Appellant and the burden of proof is upon the Appellee, Department of Corrections, to establish by a preponderance of the evidence that the dismissal of the Appellant was neither erroneous nor excessive and was taken with just cause.

In accordance with the pre-hearing Order which was issued from the January 18, 2013 pre-hearing conference, the Appellee timely filed a witness and exhibit list. The Appellant did not file a witness and exhibit list.

At the commencement of the proceedings, neither party had any pre-hearing motions to make. Neither party wished to make an opening statement, instead reserving those either for closing, or in the case of the Appellant, reserving his before his case-in-chief. As the party having the burden of proof, the Appellee proceeded first in the presentation of evidence.

SUMMARY OF TESTIMONY

1. As its first witness, the Appellee called **Ms. Amie McIntosh**. Upon being properly sworn, Ms. McIntosh offered the following summarized testimony:

2. Ms. McIntosh is employed in the Department of Corrections as an Offender Information Specialist. Previously, at the time of the incidents in question in this appeal, Ms. McIntosh had worked in the Jail Management Section as an Office Support Assistant II.

3. Ms. McIntosh testified that on September 18, 2012, she and Kristin Proctor were at work, and she and the Appellant were talking about how short-staffed they were in the jail section, when the Appellant said, "there are only two of us here, you're (meaning Ms. McIntosh) a half person."

4. Ms. McIntosh recalled no other comments that day. The witness testified Appellant also made other comments about her age. Ms. McIntosh stated she took these comments as an insult. After the comment on September 18, 2012, Ms. McIntosh stated she went to her supervisor, Eddie Newsome, and told him the comment and that it had offended her.

5. The next witness called by the Appellee was **Mr. Eddie Newsome**. Upon being properly sworn, Mr. Newsome offered the following summarized testimony:

6. Mr. Newsome is employed as an Offender Information Supervisor with the Department of Corrections, and was in that same capacity on September 18, 2012. The witness testified he supervised both Appellant and McIntosh at that time, and that McIntosh had reported a comment made to her on that date. Mr. Newsome stated he went straight to his supervisor after McIntosh told him the comment.

7. On cross-examination, Appellant queried the witness as to a meeting the Appellant had with the witness and Mr. Ashley Sullivan (Newsome's supervisor) wherein the Appellant stated he told Newsome and Sullivan that he had a "disability of a mental condition" and that Sullivan's response had been that it was a personal problem and he needed to leave it at home. Newsome denied that Sullivan made such comments.

8. Upon the conclusion of Mr. Newsome's testimony as to the misconduct charge, the next witness called by the Appellee was **Mr. Ashley Sullivan**. Upon being properly sworn, Mr. Sullivan offered the following summarized testimony:

9. Mr. Sullivan testified he is the Offender Information Administrator with the Department of Corrections, having held the position for three years, and having been with the department for seven years.

10. In September 2012 Mr. Sullivan stated he had supervised Eddie Newsome, and the jail management section was under him. Mr. Sullivan testified Newsome had mentioned to him that Amie McIntosh had been upset with Appellant's statement (as earlier noted). Mr. Sullivan testified he met with the Appellant, together with Mr. Robert Belen, to discuss the incident. Sullivan also met with Amie McIntosh who had thought the comment was disrespectful.

11. Sullivan recalled that Yonker told him that his statement may have been taken out of context. Sullivan replied, "Don't make such comments."

12. Sullivan testified the Appellant had previously made disparaging statements to staff. Sullivan recalled there was an instance where Yonker had been removed from Briney King's section due to inappropriate actions on Appellant's part, and placed under Newsome's section. Sullivan offered testimony about a 20-day suspension without pay the Appellant had served in August and September, 2012, for allegations of misconduct. Appellant had just returned from this suspension, in Sullivan's recollection, when the comment was made to McIntosh.

13. Sullivan described Appellant's reaction to the September 21, 2012 meeting Sullivan had with Appellant as Appellant being sort of "dismissive" of the meeting.

14. On cross-examination, Sullivan denied making comments to the Appellant regarding Appellant's mental state. Sullivan did recall that Yonker had told him that he believed Briney King had called him a liar.

15. The next witness called by the Appellee was **Mr. Jonathan Hall**. Upon being properly sworn, Mr. Hall offered the following summarized testimony:

16. Mr. Hall is currently the Administrative Coordinator over Administrative Technology and Administrative Services with the Department of Corrections. Mr. Hall oversees the Offender Information Branch. Mr. Hall recalled the September 18, 2012 incident with the Appellant and Amie McIntosh. He stated Ashley Sullivan had reported back to him after meeting with the Appellant on September 21, 2012. Mr. Hall said he had had meetings with the Appellant before the suspension and dismissal on several occasions to address issues.

17. On cross-examination, the Appellant attempted to establish with the witness that the incident with Ms. Briney King that there had been no discussion of misconduct with him.

18. On re-direct, Mr. Hall agreed with counsel for the Appellee that Appellant's statements to Ms. McIntosh on September 18, 2012, did constitute harassment.

19. During the middle of Mr. Hall's testimony, the Appellant indicated he wished to make a motion to dismiss those allegations against him raised in the dismissal letter regarding poor work performance. That motion was reserved until Mr. Hall completed his testimony on the initial misconduct phase. A ruling on such motion was deferred.

20. The next witness called by the Appellee was **Ms. Briney King**. Upon being properly sworn, the witness testified as follows (summarized):

21. Ms. King testified she works in Offender Information Services for the Department of Corrections and has been with the department since November 2009, and has been in her current position since June 2011. Ms. King testified that at one time she supervised the Appellant.

22. Ms. King offered testimony about Appellant's performance from about February to May 2012 when he worked under her supervision, and concerns she had about his conduct. Ms. King reported this incident to her supervisor. Much of Ms. King's testimony dealt with incidents which had occurred which lead to the August 1, 2012 suspension for allegations of misconduct.

23. On cross-examination, Ms. King stated that the Appellant had been trained by Renee Downey. Ms. King also testified at some length while being questioned by the Appellant as to how Offender Information Services functions, i.e. how the specific work is done and various calculations are made.

24. There was also testimony where Ms. King denied having called the Appellant a liar. The Hearing Officer recalls this was the subject of cross-examination on witnesses Newsome and Sullivan as well.

25. Upon conclusion of Ms. King's testimony, the Appellee recalled **Mr. Eddie Newsome** to the stand. He testified regarding the allegations of poor work performance. Mr. Newsome had been properly sworn and offered the following summarized testimony:

26. Mr. Newsome testified as to the shock probation release of Christopher Bain, stating that the Appellant had indicated that Inmate Bain had no pending charges and was free to be released, when, however, there was a pending felony charge which was in CourtNet. Newsome testified it was standard operating procedure to check CourtNet. Newsome testified that the Appellant should have conducted the CourtNet check, and had been trained to do so. In the event, Inmate Bain was not released on probation, as Newsome had reviewed the work product of the Appellant and determined through a routine CourtNet check that Inmate Bain did have a pending felony charge and so informed the Casey County Jail before Bain could be released. In actuality the pending felony charge took the form of a detainer which had been

placed on Bain in the event of a release, the detainer would serve to stop him from being released.

27. Newsome testified that subsequent to this incident he had informed his supervisor, Ashley Sullivan, and that he and Sullivan spoke with the Appellant about the incident. Newsome testified that he had performance issues with the Appellant in the past, and this was the reason he would do "spot checks" and that was how he had caught the issue with Inmate Bain.

28. Newsome agreed with the Appellant on cross-examination that the office was short-handed in September 2012, and that the Appellant's duties included processing shock probations, assigning credit, answering letters, and working on detainers. Newsome agreed the office was short-handed, and that each of the workers "was carrying a little bit more than normal" as far as work-load.

29. **Mr. Ashley Sullivan** was the next witness recalled to testify for the Appellee as to the poor work performance allegations in the dismissal letter. Sullivan had been previously sworn, and offered the following summarized testimony:

30. As to the Inmate Christopher Bain issue, Sullivan stated he and Newsome had spoken with the Appellant subsequent to the error having been caught by Newsome, so that the Appellant could tell Sullivan how he would perform that procedure. According to Sullivan, the Appellant outlined the procedure he was supposed to use, which sounded correct, but he had made the error.

31. Sullivan testified that on September 24, 2012, he received a call from the Class D Coordinator at the Shelby County Jail in regard to Inmate Kristen Shaberts. The Coordinator told Sullivan they had received a shock probation order on Inmate Shaberts two days before the phone call to Sullivan and were wondering when they could expect to receive the release order. Sullivan testified that the Appellant had reviewed the order on this inmate on September 18, 2012, and the actual release date should have been September 22, 2012. The witness referred to what was admitted as Appellee's Exhibit 4 during this testimony.

32. On cross-examination, Sullivan testified he did not recall any other errors such as these which were documented in the disciplinary action of dismissal committed by the Appellant. He had, however, on direct examination, stated that the errors the Appellant had made here were consistent with his work performance.

33. The next witness called by the Appellee was **Mr. Jonathan Hall**, recalled to testify about the poor work performance allegations. Mr. Hall had been previously sworn, and offered the following summarized testimony:

34. Questioning by counsel for the Appellee concerned Mr. Hall's general knowledge and impressions of Appellant's work performance; this was objected to by the Appellant, which was sustained due to the two specific incidents which were cited in the letter of dismissal.

35. Hall testified that he did not believe the corrective actions taken by means of the 20-day suspension in August 2012 were successful due to the mistakes being made almost immediately upon his returning to work after the suspension.

36. Upon cross-examination, Hall recalled various allegations the Appellant had made, including that Ashley Sullivan had made disparaging comments about Appellant's mental state and allegations that Appellant's error rate was better than Ashley Sullivan's, though Hall did not necessarily agree with those allegations.

37. Hall did confirm no disciplinary action had been taken against Ashley Sullivan or Briney King.

38. Hall did recall that Appellant had asked him to tell the Appellant if he saw Appellant having erratic behavior, though Hall stated he was not a mental health professional.

39. The next witness to testify for the Appellee was **Deputy Commissioner Kimberly Potter-Blair**. Upon being properly sworn, Ms. Potter-Blair offered the following summarized testimony:

40. Ms. Potter-Blair confirmed that Mr. Hall and the Offender Information Branch were under her supervision. She testified the intent to dismiss and the dismissal was issued to the Appellant because they had repeatedly attempted to implement efforts to improve his work performance which had no effect. She testified that based upon a totality of the circumstances as she knew them, dismissal was appropriate for the Appellant.

41. Appellant did confirm, as he did on his cross-examination of Mr. Hall, that during the pre-termination conference with Ms. Potter-Blair the alleged disparaging comments made by Ashley Sullivan about the Appellant's mental state and the allegations of Ashley Sullivan having a higher error rate than the Appellant were discussed.

42. Ms. Potter-Blair stated that progressive discipline was followed and that termination was appropriate. On re-cross-examination, Ms. Potter-Blair agreed that progressive discipline should be followed regardless of a person's position.

43. Upon conclusion of Ms. Potter-Blair's testimony, the Appellee rested.

44. As his only witness, the Appellant called himself. Upon being properly sworn, the **Appellant Todd Yonker** offered the following summarized testimony:

45. Appellant offered testimony in a narrative fashion. He stated that in the incident which occurred with Ms. Briney King in the Spring of 2012, he was undergoing treatment for a mental disorder involving depression and anxiety at the time, and Ms. King "pushed some buttons" which he believes was unintentional on Ms. King's part. Appellant reiterated he had told Mr. John Hall that Ms. King had implied the Appellant was lying to her. Subsequent to that incident, Ms. King and the Appellant apologized to each other, but the Appellant got the impression that it was not okay. The Appellant stated this continued to play on his anxieties, stating, "When you are anxious, it is easy to make mistakes."

46. The Appellant stated he had asked Ms. King for more training, and that Ms. Downey had not given him good training. His requests for more training were denied.

47. The Appellant expressed frustration, noting that some of the statements in the letter of suspension – those matters had not been documented by those people at the time, and he felt at a loss as how to challenge those. He believed he would try to get past that and go on.

48. However, when the Appellant returned to work in September 2012, he immediately had more issues. This is when, Appellant states, that Ashley Sullivan made disparaging remarks regarding his condition. Appellant stated that even though Ms. Potter-Blair had testified she was not aware of anything else which could have been done, that other things could have been done, such as his asking for more training by a supervisor, which was not done. Appellant testified that as best as he could tell, regarding his disability, he followed his responsibilities but such concerns were dismissed.

49. Appellant testified he did not provide any medical documentation to DOC staff, nor had he been asked by staff to provide any. The Appellant states Mr. Hall told him he did not need to bring doctor's notes, even though the Appellant had offered to do so. The Appellant stated this occurred when he first made Mr. Hall aware of his condition in the Spring of 2012.

50. In regards to the suspension issue in August 2012, the Appellant doesn't recall making some of those statements attributed to him. Appellant states in regards to the statements in the suspension, that things were not documented, sometimes it was days, weeks or months later until they were brought to his attention. Mr. Hall's and Mr. Sullivan's contention and statements were not contemporaneous.

51. In relation to the Shabert case, which was a document testified to earlier in the hearing and which documents were admitted as Appellee's Exhibit 4, Appellant testified it was standard operating procedure to wait until as close as possible to issue the release date, because pending charges could pop up on CourtNet. Again, the Appellant stated that in the normal course of business, you would want to check CourtNet as close as possible to the time of sending out the release to make certain nothing had popped up on CourtNet.

52. Upon conclusion of the Appellant's testimony, he rested.

53. The parties made closing statements. Upon the closing statements being concluded, the record was closed.

FINDINGS OF FACT

1. During the relevant times, the Appellant, Todd Yonker, was a classified employee with status.

2. The Hearing Officer finds that the Appellee proved by a preponderance of the evidence the issues related to poor work performance as specified in the letter of dismissal introduced as Appellee's Exhibit 6. There was no real rebuttal, save for the Appellant's claim of lack of adequate training to the serious mistakes made with regards to Inmates Shaberts and Bain.

3. The Hearing Officer finds that the Appellant committed misconduct as detailed in the letter of dismissal introduced as Appellee's Exhibit 6. The Hearing Officer is persuaded the comment was offensive and was indeed offensive to the recipient, Ms. Amie McIntosh. The Hearing Officer rejects any claims which attempted to define it as being discriminatory or likening it to any comments alleged to have been made to the Appellant. The Hearing Officer believes the charge should stand on its own and finds it was misconduct.

4. The Hearing Officer notes that much of the testimony and most of the time at the evidentiary hearing was spent by both parties discussing events leading up to the August 1, 2012 letter of suspension, which had been introduced as Appellee's Exhibit 1. Aside from noting that the suspension had been served and had not been appealed, and for whatever purposes it may have for the argument made by the Appellee as to progressive discipline, the Hearing Officer did not believe any of the testimony from either side to be especially persuasive or meaningful regarding the suspension or the events leading up to it.

5. The Hearing Officer will, however, address specifically the Appellant's contentions that 'none of this' (apparently 'the this' meaning the suspension he received and ultimately the dismissal) would have occurred but for his confrontation with Ms. Briney King in the Spring of 2012. The Appellant believes that all the subsequent actions which occurred were retaliation, and points to the timeline in support of this, arguing that the letter of suspension included many of the issues which had occurred, if not all, prior to the incident with Ms. King. Again, the Hearing Officer is not persuaded by this argument. The suspension was not challenged, and the allegations contained therein speak for themselves. Likewise, the letter of dismissal and the allegations of misconduct and poor work performance were, to the Hearing Officer's mind, proven by a preponderance of the evidence. In other words, the Appellee did not

need to search for anything to find to hold the Appellant accountable for and to ultimately dismiss him. Instead, the Appellant committed the misdeeds.

6. The Hearing Officer also addresses Appellant's claims of disability discrimination. In reviewing the file, the Hearing Officer notes that Appellant did not raise this issue either on his appeal form or at any other time prior to the evidentiary hearing, to the best of the Hearing Officer's recollection. However, to the extent that Appellant is claiming discrimination against him based on a claimed disability of an anxiety disorder and depression, the Hearing Officer again does not find this persuasive as to any of the acts committed. Other than requesting Mr. Hall alert him if he noticed him acting out of character (presumably this occurred in the Spring of 2012 following the Briney King incident), the Appellant never made any other request for accommodation or backed up such claims with documentation. Such would have been the Appellant's responsibility regarding any requests for accommodation. The Hearing Officer finds that what the Appellant told and requested of Mr. Hall was not an affirmative claim of disability or any affirmative claim of request for help; it was rather a request to help the Appellant avoid future misconduct.

7. Regardless, the Appellant's failure to have sought accommodations, and most importantly, his failure to have raised this as an issue on appeal for this evidentiary hearing deprived the Hearing Officer of any ability to meaningfully address his claims of disability.

8. The Hearing Officer finds that the penalty imposed was neither excessive nor erroneous.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law that the dismissal of the Appellant was appropriate for the reasons stated above, pursuant to 101 KAR 1:345, and the Appellee proved by a preponderance of the evidence the allegations made against the Appellant of misconduct and poor work performance as detailed in the letter of dismissal introduced as Appellee's Exhibit 6.

2. The Hearing Officer concludes the appeal should be dismissed.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **TODD YONKER V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS, (APPEAL NO. 2012-260)** 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).

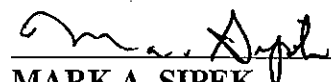
Any document filed with the Personnel Board shall be served on the opposing party.

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

ISSUED at the direction of **Hearing Officer Boyce A. Crocker** this 20th day of June, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day ^{mailed} ~~faxed~~ to:
Gbm

Hon. Wesley Duke
Mr. Todd Yonker