

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-118**

SCOTT STEWART

APPELLANT

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

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

APPELLEE

* * * * *

The Board, at its regular May 2017 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 6, 2017, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be altered as follows:

A. **Delete** Findings of Fact paragraph 4, and substitute the following:

4. Appellant ratified portion of the findings established by the investigation and interviews and admitted that certain of his own actions alleged by the investigation did, in fact, take place, although apparently defending them as not inappropriate. He also acknowledged that his “wait and see” approach to the activities conflicted with standing policy and with the mandates of the in-charge command assigned to him. The security of the institution, safety of the public and welfare of staff and inmates for which he was responsible were, at the least, ignored and potentially jeopardized.

B. **Delete** Conclusions of Law paragraph 3, and substitute the following:

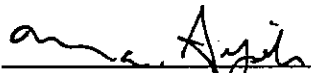
3. The action taken by the Agency with respect to Appellant's handling of his Shift Captain responsibilities was neither excessive nor erroneous in light of the overall circumstances, and his own participation in the prohibited activities.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as Altered, be and they hereby are, approved, adopted and incorporated herein by reference as a part of this Order, and Appellant's appeal is **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 18th day of May, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPER
SECRETARY

A copy hereof this day mailed to:

Hon. Catherine Stevens
Hon. Jessica Durden
Mr. Rodney E. Moore

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-118**

SCOTT STEWART

APPELLANT

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

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

APPELLEE

**** ** * ** ***

This matter came on for evidentiary hearing on December 2, 2016, at approximately 9:35 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, Scott Stewart, was present and was represented by the Hon. Jessica Durden. Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and was represented by the Hon. Catherine Stevens.

This matter was the subject of at least one pre-hearing conference at which the issues were defined and other matters requiring attention dealt with. Appellant also sought and received certain materials and information through discovery, all of which was resolved prior to the hearing. At the outset of the evidentiary hearing, Appellant filed and served a "Motion to Exclude Hearsay Testimony/Evidence" undertaking to limit, or preclude as the case may be, any Agency proof which was developed during its investigation by way of interview that might be offered at the hearing without the presence of the interviewee to be cross-examined. The express thrust of the motion seeks to prohibit consideration of such hearsay evidence, although not necessarily to prevent its presentation for the record. In response thereto, the Agency sought either postponement of the hearing to afford it reasonable opportunity to respond to the motion, or in the alternative, going forward if the Hearing Officer made no immediate ruling thereon. Following presentations by the parties, the Hearing Officer reserved ruling upon the motion, held same in abeyance pending written response thereto and

directed presentment of the sworn proof. At the conclusion of the hearing, the Agency was afforded opportunity to present its written response, which was timely filed. By date of December 27, 2016, Appellant presented a "Motion to Strike," seeking to set aside, or otherwise ignore, the Agency response. The Agency reacted thereto on January 13, 2017, whereupon the entire matter stood submitted for recommended order as of that date.

BACKGROUND

1. Until June 14, 2016, Scott Stewart held the position of Correctional Captain I at the Luther Lockett Correctional Complex in Oldham County, Kentucky. By five-page letter issued on June 13, 2016, over the signature of Scott Jordan, Warden of the facility, he was terminated from the position, having attended a pre-termination hearing on June 7, 2016. A true copy of the termination letter is attached hereto as **Recommended Order Attachment A**.

2. Mr. Stewart took issue with the action by timely appeal filed on June 20, 2016, under the appropriate category of "Dismissal," wherein he urged:

Information provided in the investigation is based on allegations with no evidence, proof or certainty. With nearly thirteen years of service, I have never received documented disciplinary actions until this alleged incident.

3. Pending disposition of the foregoing preliminary matters, the Agency, having the burden of proof, offered the testimony of **Tim Forgy**. He holds the position of Correctional Captain, assigned at the time of hearing as Supervisor of Internal Affairs at the Luther Lockett facility. His experience consists of 18 years in the Corrections field, all served at Luther Lockett. Captain Forgy conducts or supervises various investigations as required, both at the facility and externally, answering to the Warden. He has, in the past, served as Shift Captain upon all shifts.

4. The witness explained that the second shift at this facility covers from 7:00 p.m. through 7:00 a.m., and the Shift Captain on duty is the ranking supervisor in the absence of higher authority, such as the Warden. He is, in that capacity, in charge of and is required to manage staff and keep order. He is provided office quarters, which the witness described together with its physical proximity to other staff quarters at this particular facility. He noted that various members of staff, in the performance of their duties and being answerable to the Shift Captain, are routinely required to visit his office

during the course of their shift. He observed that the facility suffers a chronic staff shortage, which he depicted as severe, with a considerable turnover of membership, thereby necessitating mandatory overtime for most staff.

5. Directed to the circumstance giving rise to the ultimate discipline of Appellant, the witness recalled that he was initially approached by an employee of the food service company which supplies the facility, who informed him that she had observed inappropriate behavior in and around the office of the Shift Captain during the second shift. This individual specifically claimed to have observed a female officer sitting on the lap of a lieutenant upon one or more occasions. The witness interviewed the worker and took her statement, thereafter distilling it for the then-Acting Warden. He was thereupon directed to pursue the matter and did so.

6. The witness explained that over a period of two and one-half to three weeks he conducted extensive interviews with a variety of staff members, including at least two lengthy sessions with Appellant, the Shift Captain in charge during the timeframe under scrutiny. He also viewed a variety of records and logs, as well as video captured by the internal surveillance system of the facility, and thereupon prepared a lengthy and detailed report for delivery to the Warden. The witness introduced a full copy of his report as part of his testimony.

7. Captain Forgy expanded upon his findings, explaining that he attached to his report a variety of written statements developed from the interviews. He also recorded the two sessions conducted with Appellant, and prepared a compact disk (CD) therefrom, consisting of approximately 75 minutes, a copy of which was also offered as part of his testimony.

8. Directed to certain specifics developed from his investigation, the witness recalled that, under questioning, Appellant admitted having engaged in certain improper behavior, including but not limited to one instance in which he placed the identification card of a female officer down the front of his trousers, whereupon the officer undertook to retrieve it but was unable to do so. Ultimately, Appellant shook the card out of the bottom of his pants leg but, in the course thereof, he urged in the interview, he (himself) felt violated. Appellant also admitted that from time-to-time he observed, without intervening, horseplay-type behavior by staff such as spankings, lap dancing by female officers, so-called "ruler wars" wherein individuals were struck with rulers until they broke, and inappropriate touching between male and female officers. The witness discerned that all of this activity appeared to have occurred either in the

presence of, or within the earshot of, Appellant who, as the supervisor in charge, made no effort to curtail it.

9. The witness continued that part of his investigation developed that personnel, seemingly without enough to do elsewhere, were "hanging out" in the Captain's office for lengthy periods of time during the shift. He noted that in light of the extensive overtime being assigned, if these personnel were not needed, it was the duty of the Captain to have them sign out and leave rather than remain on premises wasting overtime. In summary, he urged, too many staff personnel were coming and going in the area and their presence exceeded any need for them to be there in the performance of their duties. The witness also surmised that certain cliques developed among small groups of staff, leading to a wasteful and unacceptable situation. He identified some or all of these individuals in his report.

10. Under cross-examination, Captain Forgy acknowledged that he previously worked with Appellant, both as Shift Captain and in other capacities. He agreed that a Shift Captain is not authorized to impose discipline, but does possess the authority to process disciplinary documentation and pass it on to upper management with a recommendation. He acknowledged that the food service worker making the initial claim never personally observed Appellant committing any inappropriate behavior, and that, in the course of the investigation, one particular officer, and not Appellant, emerged as the primary instigator of most of the inappropriate activity. He confirmed that none of the videos reflected Appellant misbehaving and that Appellant variously submitted one or more incident reports pertaining to actions which he viewed should be investigated.

11. (**Hearing Officer's Note:** A review of the twelve-page Memorandum from Forgy to Webb Strang, Deputy Warden of the facility, dated April 28, 2016, reveals a rather thorough summary of interviews and conclusions. The interviews and written statements appended to the Memorandum depict a regular, almost daily, atmosphere of horseplay among several staff in and around the office of the Shift Captain.) The investigator concluded his summary with the following:

Findings of this investigation shows that under Captain Stewart's Supervisor Staff were allowed to engage in behavior that violated policies and ethical work standards. He engaged in inappropriate sexual behavior with Ofc. Desurne by poking her breast and by taking her institutional picture ID and placing it down the front of his pant and when she went to retrieve her ID she placed her hands down his pants. Captain Stewart

engaged in sexual conversations with staff in the Captains Office while assigned as Shift Supervisor, he observed and allowed staff to slap, spank, wrestle, sit in other staffs lap, a female staff member laid across his desks while he was the shift supervisor, as well as allowing female staff to perform lap dances in the Captains Office. Captain Stewart failed to correct, address or report the incidents. Captain Stewart was observed by staff to have Officer Torres sitting on his lap, lying across his desk, sitting on top of his desk and sitting in such a way staff described it as inappropriate and unprofessional.

During the investigation Captain Stewart was untruthful with his answers to several of the initial questions asked in the first interview about him taking Ofc Desurnes ID and putting it in the front of his pants. It was also determined that he was being untruthful when asked about being in the floor office of unit 7C. Records show that the notification as sent at approximately 3:40 a.m., (sic)

12. **(Further Hearing Officer's Note:** Audit of the two interviews conducted by Forgy with Appellant upon separate dates in May, 2016 indicates that the questioning was conducted following interviews and/or written reports obtained from other staff established to have been present for various of the events depicted. The interviewer informed Appellant therein that the reports from others were somewhat uniform in their depiction of the episodes of horseplay, with Appellant thereupon requested to supply his version. Appellant generally admitted that the claimed episodes occurred, reporting that he was present for some but not for others.

13. Appellant expressly denied in the interviews that he personally participated in many of the episodes depicted, insisting that he suffers an aversion to having others put their hands upon him due to a PTSD condition. He disputed most of those claims by the other interviewees concerning any episodes in which he allegedly physically participated, with one exception. He acknowledged that the identification badge of one female officer was put down his pants and that she undertook to retrieve it, without success. He was unclear whether she "touched skin" while reaching into his pants, but acknowledged that eventually he shook the badge out of his pants leg. Appellant insisted that he never poked any female officer in her breast, but conceded he may have touched the shoulder of one or another of the female officers while looking over her shoulder at a computer screen.)

14. (Some responses by Appellant in the recorded interviews appear equivocal but not necessarily untruthful. He urged that he knows several of the officers, including the females, fairly well, but that his relationship with them always remained professional and that there was little or no contact while off duty. As eventually stated in his testimony at hearing, Appellant insisted that his approach coming into the situation was in the nature of counseling and warnings to "knock it off" rather than any recommendation for discipline. He conceded that none of the warnings or episodes were documented. When pressed, toward the conclusion of the interviews, whether staff, and perhaps he, "crossed several lines here," Appellant conceded such did occur while under his watch. He also acknowledged that he was under an obligation to set an example or standard of behavior and that his performance did not measure up.)

15. The Agency sought testimony from Appellant, Scott Stewart, under cross-examination. He ratified his service as a Shift Captain at the Luther Luckett facility, having obtained the assignment to the second shift approximately one month prior to commencement of the investigation. He briefly described the duties attendant to the position, including but not limited to preparation of rosters for each day, allocation of staff assignments, and generally utilizing personnel where most needed. He discussed certain training aspects, perceived to be an on-going process. He acknowledged that a Shift Captain, as the ranking officer on duty, is authorized to recommend but not impose disciplinary action; specifically, he should prepare a report with the recommendation and supply it to upper management.

16. Further addressing the authority to suggest discipline aspect, Appellant noted that his own procedure in prior supervisory positions was to conduct counseling sessions with appropriate staff prior to seeking any discipline. He has attended training upon various aspects of law and policy, including recognition of and prevention of sexual harassment and other prohibited activities. He confirmed timely receipt of a printed "Policy Statement on Harassment Prevention" for which he had signed, and a copy of departmental policy, both offered as part of his testimony.

17. Appellant ratified his awareness of and participation in the investigation conducted by Captain Forgy. He recalled at least three sessions of interviews/interrogations concerning the events depicted, including his awareness that at least two of the interviews were recorded. He did not listen to the recordings but assumed them to be an accurate depiction of his statements. He had no issue with the protocol utilized in his dismissal, including receipt of the letters terminating him and his attendance at a pre-termination meeting with the Warden.

18. Appellant conceded that he did not report any of the so-called horseplay which occurred under his watch, explaining that he never officially addressed the subject for the reason that no staff ever complained about the activities. Further, he expanded, he was new to the shift, having assumed the position in early March 2016, and felt that he should become more acquainted with its requirements and with the personnel before taking action. His approach toward the misbehavior during that interval was to advise them to "knock it off" and to counsel with them rather than submit disciplinary recommendations so quickly.

19. Appellant was requested to expressly address the episode concerning placement of a female officer's identification card in his pants. He ratified the sequence as depicted, explaining the particular design of his uniform and his own discomfort with the event, having felt violated when the officer put her hands in his pants seeking to retrieve the ID.

20. **Scott Jordan** became Warden of the Luther Luckett Correctional Complex on May 23, 2016, transferring there from another facility within the Department. He commenced with the Agency in 2001 as a Correctional Officer, achieving numerous promotions thereafter, including serving as a Shift Captain upon one or more occasions. He was accordingly inherently familiar with the duties of the position. He came on assignment at Luther Luckett as Forgy's investigation was concluding, whereupon he was presented with the complete file including eight hours of recorded interviews. He reviewed all of the materials thoroughly, having audited the entirety of the interviews three separate times before reaching any conclusions. He knew Appellant casually but never before served with him at any facility, their prior contacts consisting of attendance at certain training together. He held no preconceived opinion of Appellant or of his abilities.

21. The Warden depicted the position of Shift Captain as possession of full control of the facility, constituting the authority figure while on duty and responsible for all activities throughout the prison. He (or she) is charged with the safety of staff, inmates and the general public. Absent emergency occurrences requiring upper management participation, the Shift Captain is the ultimate authority and is expected to function accordingly. It is, he noted, "a very important job."

22. Directed to his review of the events under scrutiny, the Warden recalled that his initial reaction thereto was one of embarrassment, a perceived risk to the security of the facility, and a failure of responsibility to the general public and other staff. Faced with the decision as to an appropriate disposition of the matter, he reviewed

the relevant policies and analyzed what preventative measures might be implemented. Ultimately, in addition to Appellant, at least two other staff were disciplined; one Lieutenant found guilty of sexual harassment was terminated, and another Lieutenant responsible for much of the horseplay received a ten-day suspension. He pointed out that a clear distinction exists between common horseplay and sexual harassment; one might be remedied through discipline or education, whereas the other is absolutely prohibited. He viewed that the decision to terminate Appellant, which he recognized is the most severe penalty, was mandated for the reason that the reports and interviews clearly signaled that Appellant was obligated to both address and report the situation but did not do so. Further, he was a willing participant in some aspects of the sexual harassment, and the behavior was out of control during his watch. He interprets CPP 3.5 to depict a zero tolerance for any sexual harassment with no exceptions.

23. Briefly addressing the subject of participation by others in the events, the Warden recognized that at least two female officers were also implicated. However, he observed, one or both of them were outranked by nearly all of the other staff in authority and, for that matter, no request or recommendation for their discipline was received.

24. The Warden identified and introduced copies of the Intent to Dismiss and the Dismissal letters. He discussed his conduct of the pre-termination meeting wherein, he recalled, Appellant undertook to amplify his version of events and to clarify certain aspects of his behavior and his intentions. However, Appellant's depiction of his years of training and service with the Agency only enhanced the perception that he was abundantly aware that his behavior and that of staff for whom he was responsible was inappropriate, including the sexual harassment accusations. The Warden noted that various penalization options are always considered, including suspension but, after interviewing him and becoming still further convinced that Appellant, with his extensive training and many years of service, nonetheless allowed and participated in the misbehavior, he decided that Appellant must be dismissed under the zero tolerance policy.

25. Under cross-examination, Appellant presented the Warden with copies of letters asserted to have been issued to two other participants in the events under scrutiny. He confirmed that one letter notified a Lieutenant of his dismissal, and the other informed another participant of a five-day suspension, reduced from a previously suggested ten days. Appellant explored with him the various levels of disciplines assessed, including no penalty issued to the two female officers implicated in the misbehavior. He explained that one of those officers resigned and moved away prior to

his review, and that the other female officer received no discipline for the reason that none was requested or recommended. He ratified that the Lieutenant who was terminated expressly violated the sexual harassment policy; specifically, that individual admitted exposing himself to a female officer while on duty and present in the Captain's office. He agreed that other officers engaged in the horseplay, but not charged with sexual harassment, were not disciplined.

26. The Warden continued that the one female officer still employed took responsibility for her participation in the activities, reiterating that she was among the lowest ranking staff present throughout the sequence and that no recommendation to discipline her was received. He acknowledged that Appellant accepted responsibility for those events in which he admitted participating noting, however, that he never accepted any responsibility for his role in the placement of the female officer's identification badge down the front of his pants, nor did he appear to ever understand that this was a direct violation of the sexual harassment policy while insisting that he felt violated himself.

27. The Agency having concluded its case-in-chief, **Appellant Scott Stewart** offered further testimony in his behalf. He reported that at the time of hearing he was employed in the private sector in a managerial position, working approximately 90 hours weekly. Prior to his termination, he was with the Agency for nearly 13 years, commencing in August 2003. He seeks reinstatement, including retirement and related benefits. He most recently was assigned to the Luther Luckett facility in March 2015, coming in as a Correctional Captain initially in charge of or involved with Internal Affairs. He assumed the duties of Correctional Captain on the second shift on or about March 2, 2016. The two Lieutenants who were eventually disciplined through either suspension or dismissal were second and third in command on the shift respectively when he took charge.

28. Appellant recognized that, as the official in charge of the shift, he held the authority to counsel, make recommendations for discipline, send staff home if unneeded or misbehaving, or reassign staff to other duties elsewhere in the institution. He reiterated that his own approach was to first counsel or warn any member perceived to be in violation, which he intimated previously had been successful. He was undertaking to utilize this method when the referenced investigation ensued rather shortly after he assumed command of the shift.

29. Appellant addressed his own work record with the Agency. He asserted that he was never disciplined prior to the current dismissal and enjoyed good to

excellent evaluations. He produced, in the course of his testimony, some or all of his interim and annual personnel evaluations performed throughout his time with the Agency and reviewed a sampling thereof, from the year 2015, for the record. He urged that the evaluations, which were uniformly excellent, typified those received throughout his service.

30. Appellant acknowledged that a description of the Captain's office and its physical layout depicted by Captain Forgy was "almost correct." However, he expanded, what is not referenced therein is that the Captain's desk is situated so that his back is to the remainder of the quarters while seated at the desk. Accordingly, he urged, not all activities are observable while the occupant is engaged in other duties and paperwork at the desk. It was his practice to always lock the office when absent therefrom while performing other duties within the facility, unless someone was present therein. He noted that throughout the shift various members of staff were coming and going in the performance of their assigned duties.

31. Appellant reiterated that he was placed in charge of this shift, approximately six weeks prior to the investigation. He acknowledged that his predecessor in the position and/or others warned him coming in that it was "wild," with so-called "ruler wars," "rubberband wars," and lap dancing activities occurring. Further, other horseplay and call-ins were prevalent, with staff perceived as slacking off and performing duties in a shoddy manner. He did not want to immediately begin making changes without first observing for himself what the issues were. He quickly realized that the excessive horseplay was occurring, but insisted that under his management, counseling and guidance, the misbehavior was commencing to slack off and that unnecessary call-ins were decreasing. However, the complaint by the food service worker occurred and the investigation commenced before he could implement many of the remedies which he saw as needed to get the shift under control.

32. Appellant asserted that he never observed or personally heard some of the alleged actions reported in the investigation. For example, he noted, he only heard about the "ruler wars" and the "rubberband wars," but never observed them himself. He noted that, among other duties, the Shift Captain is required to make certain rounds and is not in a position to constantly supervise the behavior of each staff member.

33. Appellant discussed certain specific allegations. He disputed whether any straddling by one staff member of another occurred in the office, since the chairs in the office have arms and are quite snug when an individual wearing a service belt with its attachments (flashlight, handcuffs, radio, etc.) sits therein. Specifically, there is no room

for any straddling while using these chairs. Further, he amplified, in his own case he is a victim of Post-Traumatic Stress Disorder (PTSD) for which he has receives counseling, and he is most uncomfortable when he is grabbed or held by others. Consequently, he shuns such behavior and does not participate therein. He expressly insisted that he was completely unaware of the sexual harassment episode between a Lieutenant and a female officer depicted in the investigation report (and for which the Lieutenant was later dismissed) until informed of it by his own attorney whereupon, he urged, he was "horrified."

34. Appellant recalled that he previously sought transfer from the Luther Luckett facility upon two occasions. The first was in November 2015, at a time when he was under administrative leave due to an ex-fiancé having obtained an EPO against him (which, he asserted, was later proven false and dismissed). Another officer was also under an EPO at the time, but was not placed on leave; Appellant viewed this as unfair treatment, complained about it, and sought reassignment to Kentucky State Reformatory from where he had come previously. He felt that possibly his complaint may have offended upper management and contributed to the action taken against him.

35. The Agency sought further cross-examination of Appellant. He acknowledged that the referenced EPO sequence and its disposition occurred prior to the arrival of Warden Jordan. Further addressing his asserted failure to immediately curtail or address the horseplay despite the alert he received coming into the second shift, Appellant reiterated that he desired to make his own "visual assumptions" before making changes rather than rely upon the judgment of others. In that regard, he reiterated, he either was not present for or did not observe some of the incidents later developed in the investigative report by Forgy. He agreed that ordinarily any verbal warnings or other recommended actions engaged by the Shift Captain are required to be documented in writing but he had not done so, despite his insistence that he issued verbal warnings and/or conducted counseling sessions. He urged that certain electronic files are maintained, as well as progress notes, which may be utilized in making the interim evaluations which he intended to perform but which never occurred due to his termination.

36. The Agency quizzed Appellant concerning the lap-sitting episode involving the female officer. He acknowledged observing, upon one occasion, when the female either stumbled or, in any event, landed upon the Lieutenant's leg, whereupon she promptly jumped up. He agreed that in his initial interview with Captain Forgy, he conceded that a "couple of people" on the shift needed to tone down their behavior, and that he had been slow to implement corrective action. He recognized that, while a Shift

Captain cannot impose discipline, he does have the authority to send someone home if unneeded, or to reassign a staff member to another area of the institution during the shift to avoid inappropriate circumstances. There was thereupon concluded the sworn testimony.

37. KRS 18A.095(1) requires that "A classified employee with status shall not be dismissed, demoted, suspended or otherwise penalized except for cause." Subsequent subsections of the statute outline the protocol to be followed in the event an agency undertakes to dismiss an employee. Appellant has not challenged this aspect of the process.

38. 101 KAR 1:345 is the regulation pertaining to imposition of disciplinary actions. Section 1 allows that "Appointing authorities may discipline employees for lack of good behavior or the unsatisfactory performance of duties." Section 2 of the regulation relates to the nature of the notice to be supplied, not an issue herein.

39. The Agency has in place certain policies and procedures including, but not limited to Policy No. 3.5, which most recently became effective on February 3, 2014, defining and expressly prohibiting on-the-job sexual contact and sexual harassment. Appellant has acknowledged one or more sessions of training dealing with this subject and received a copy thereof.

40. As noted, Appellant moved to exclude consideration of any hearsay evidence gathered by the investigator. Specifically, he urges, certain written statements were obtained from alleged participants in the on-the-job behavior who were never subjected to cross-examination through any testimony at evidentiary hearing. KRS 13B.090(1) provides that:

In an administrative hearing, findings of fact shall be based exclusively on the evidence on the record. The hearing officer shall exclude evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this Commonwealth. Hearsay evidence may be admissible, if it is the type of evidence that reasonable and prudent persons would rely on in their daily affairs, but it shall not be sufficient in itself to support an agency's findings of facts unless it would be admissible over objections in civil actions.

FINDINGS OF FACT

1. At all times germane to this proceeding, Appellant, Scott Stewart, was a classified employee with status, serving as Correctional Captain I assigned to the Luther Luckett Correctional Complex. He was newly placed in this position, having assumed the duty station approximately five weeks prior to commencement of an investigation of alleged inappropriate behavior by staff assigned to the shift, including "horseplay" and questionable interplay between male and female staff. By most accounts, the activity was on-going prior to his arrival and continued unabated after he assumed command.

2. Appellant was and is a seasoned Correctional Officer, employed in one capacity or another by the Agency for nearly 13 years prior to his departure. He received various sessions of training in the course of his career with the Agency, including identification of and prevention of sexual harassment. By his own account, as a supervisor he tends to take a somewhat cautionary approach to imposition of discipline, preferring to counsel with errant staff rather than promptly initiate formal recommendation of any penalization. He applied this approach upon his assumption of the Shift Captain duties at Luther Luckett, his stated intention being to bring order to the chaotic and undisciplined behavior in due course without drastic action.

3. The prohibited behavior, independently reported as on-going under Appellant's watch, is undisputed. Both male and female staff were willing and regular participants, sometimes with sexual overtones and involving one or more episodes of outright sexual behavior. The two female staff were under the command of officers senior to them, as well as Appellant.

4. Appellant ratified portions of the findings established by the investigation and interviews while disputing the extent of his own participation. He also acknowledged that his "wait and see" approach to the activities conflicted with standing policy and with the mandates of the in-charge command assigned to him. The security of the institution, safety of the public and welfare of staff and inmates for which he was responsible were, at the least, ignored and potentially jeopardized.

5. The Hearing Officer finds the testimony of all witnesses at the evidentiary hearing, including that of Appellant, to be credible.

CONCLUSIONS OF LAW

1. The proof establishes that staff at Luther Lockett engaged in unprofessional activity while under Appellant's direct supervision throughout his brief tenure as Shift Captain. He does not deny this; thus, this "lack of good behavior" was and is subject to penalty and remedy under 101 KAR 1:345. Appellant's claim that hearsay evidence gathered concerning the occurrences (i.e. statements from the participants in the behavior) may not be considered is mooted, since he concedes recognition thereof and urges on-going efforts to curtail it.

2. Appellant's primary challenge relates to the conclusions of the investigator as to the extent and nature of his own participation in the behavior as well as, presumably, his handling thereof. The Warden chose to accept and follow the findings of the investigator, who reflected no bias, rather than Appellant's efforts to justify his actions, or lack thereof as the case may be, especially as to the sexual harassment aspects. In a circumstance wherein a clear violation of policy, as well as statutory or regulatory requirements, occurs within a penal institution, the overall safety of those potentially or actually impacted must be paramount. The conclusions by management that Appellant, despite his extensive experience and training, knowingly failed to sufficiently uphold this is supported by a preponderance of the evidence. Similarly, the penalization imposed, despite its severity, is also within the remedy afforded under 101 KAR 1:345 and the statutory scheme.

3. The action taken by the Agency with respect to Appellant's handling of his Shift Captain responsibilities was neither excessive nor erroneous in light of the overall circumstances.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **SCOTT STEWART V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS, (APPEAL NO. 2016-118)** 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).

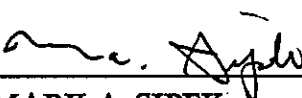
Any document filed with the Personnel Board shall be served on the opposing party.

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 John Ryan this 6th day of March, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Catherine Stevens
Hon. Jessica Durden



Matthew G. Bevin
Governor

John C. Tilley
Secretary

DEPARTMENT OF CORRECTIONS
Scott Jordan, Warden
LUTHER LUCKETT CORRECTIONAL COMPLEX
P.O. Box 6
LaGrange, Kentucky 40031
Telephone: (502)222-0363

Rodney Ballard
Commissioner

James Erwin
Deputy Commissioner

June 13, 2016

Scott A. Stewart
Personnel #

Dear Mr. Stewart:

On May 31, 2016 you were delivered a certified letter outlining my intent to dismiss you from your position of Correctional Captain I with the Department of Corrections, Luther Lockett Correctional Complex. On June 3, 2016 we received your Pre-termination Hearing Request Form which indicated that you wished to have a meeting with me in reply to the charges contained in the notice of intent to dismiss. This meeting was held in my office on June 7, 2016. I have taken into careful consideration the statements you made on your own behalf during this meeting. However, I have determined that the clear weight of evidence establishes that you did commit the charges as outlined in the letter of intent to dismiss dated May 27, 2016. Therefore, based on the authority of KRS 18A.095, you are hereby notified of my decision to dismiss you from your position of Correctional Captain I with the Department of Corrections, Luther Lockett Correctional Complex. This action is effective beginning of business June 14, 2016.

Misconduct: i.e. On April 28, 2016 Internal Affairs Captain Tim Forgy received information alleging that staff were engaging in horseplay and sexual behavior in the Captain's office during the 7PM-7AM shift. After receiving approval from Interim Warden Webb Strang, Captain Forgy began an investigation into these allegations. As part of the investigation, multiple staff members were interviewed regarding activities they had either participated in or observed in the Captain's Office.

On April 28, 2016, Aramark employee Tameka Hunt was interviewed. She reported that on April 26, 2016, she arrived to work at 3:00 AM and stopped in the Captain's Office to speak with you. She stated that upon entering the Captain's Office, she observed Officer Sarah Torres sitting on the lap of Lieutenant Jeremiah Blair, straddling and facing him. She added that you were watching them and laughing.

Kentucky
UNBRIDLED SPIRIT

AN EQUAL OPPORTUNITY EMPLOYER M/F/D

APPELLEE'S
EXHIBIT

#6

Recommended Order
Attachment A

On April 28, 2016, Officer John Aul was interviewed by Captain Tim Forgy. During the interview, when asked if he had ever witnessed any inappropriate behavior in the Captain's Office, he stated that Officer Sarah Torres was causing all the issues on the PM shift. Officer Aul stated that he had seen Officer Torres sitting on the lap of Lieutenant Jeremiah Blair, facing him and straddling him. He also stated that he had also witnessed Officer Torres sitting on your lap in the Captain's Office.

On April 28, 2016 Officer Kelly Desurne was interviewed by Captain Forgy and Deputy Warden Webb Strang. Officer Desurne is assigned as the Captain's Office Clerk between the hours of 3:00 PM and 3:00 AM. During her interview, Officer Desurne described common activities in the Captain's Office as joking, laughing, poking each other, slapping each other on the buttocks, wrestling, and rough-housing. She was asked to identify the staff that participated in these activities and she named you, Officer Torres, Lieutenant Blair and herself. She added that at one time, she had witnessed Officer Torres physically put you on a table in the back room of the Captain's Office.

On April 28, 2016, Lieutenant Charles Risinger was interviewed by Captain Forgy. Lieutenant Risinger was asked if he had ever witnessed behavior in the Captain's Office that he would consider to be inappropriate. He said that he had observed such behavior. He was asked to name the staff that had been participating in the behavior and he named Lieutenant Blair, Officer Torres, Officer Desurne and you as the main participants. When asked to describe the types of activities he had seen, he stated that he had seen Officers Torres and Desurne holding down Lieutenant Blair and attempting to place duct tape on him. He added that when he is assigned to work central control or the front desk, he can often hear Officer Torres yelling and laughing in the Captain's Office.

On April 28, 2016, you were interviewed by Captain Forgy regarding the allegations. When asked if you were aware of inappropriate behavior, you stated that there were a few staff members who needed to be reeled in and identified them as Officer Torres and Officer Desurne. You stated that sometimes Officer Aul would tell jokes and that sometimes you would play along with Officer Aul but sometimes the jokes went too far. During this interview you admitted to seeing Officer Torres sitting on the leg of Lieutenant Blair but denied ever seeing the two of them wrestling. You admitted that Officer Torres had sat on your lap and added that she had grabbed your arm several times.

On May 11, 2016 Officer Sarah Torres was interviewed by Captain Forgy and Lieutenant Scott Stovall regarding the allegations of unprofessional behavior in the Captain's Office on the PM shift. Officer Torres stated that there is a lot of joking and tickling done in the Captain's Office. She described incidents of staff pinning other staff down while trying to put duct take on them, physically placing people on the table in the back room, and staff slapping other staff on the buttocks. She said that she had ended up in your lap while wrestling in the office. When asked the names of the people who participated in the unprofessional behavior in the office she named Officer Desurne, yourself, Lieutenant Blair, Officer John Aul and Officer Daniel Grau.

On May 11, 2016 Officer Dagon Moon was interviewed by Captain Forgy. Officer Moon is assigned as the Captain's Office Clerk between the hours of 3:00AM and 3:00PM. Officer Moon stated that on one occasion, he had observed you and Officer Torres sitting facing each other in the Captain's Office. He said that you were sitting face to face and were so close that your legs were between each other's, with your feet resting on the opposite persons chair. He said that one morning when he arrived to work his ruler had been broken. He stated that Officer Desurne told him that she had broken it when she hit Officer Torres on the buttocks. He added that he had also walked into the Captain's Office and seen

Officer Torres sitting on top of the desk where you were working and that often when he arrived to work at 3:00AM, there were usually 3 or more security staff sitting or standing around.

On May 11, 2016, due to additional information being received, a second interview was held with Officer Desurne. Officer Desurne stated that she had observed you and Officer Torres sitting very close to each other in the Captain's Office. She said that on an earlier occasion, you took her Institutional ID card and placed it down the front of your pants and that she reacted by placing her hand inside of your pants. She stated that as soon as she realized what she was doing, she immediately pulled her hand out of your pants. She added that she did make contact with the skin on your upper thigh, but denied coming in contact with your genitals. Officer Desurne stated that she had been in the back room of the Captain's Office and had taken part in the placing of you on the table. She said that she exited the room afterwards but that you and Officer Torres remained for several more minutes and that she could hear laughter. Officer Desurne added that you had once poked her in the breast. She also said that Officer Torres had given her a lap dance in the Captain's Office in front of you and that it lasted approximately 30 seconds. She described a ruler war that had taken place, in which four (4) staff all had rulers and were slapping each other on the buttocks with them. She then stated that Officer Torres had once placed her on the ground and sat on her back, while slapping her on the buttocks.

On May 11, 2016 you were interviewed for a second time due to new information being received. Captain Forgy and Senior Captain Tim Crutcher asked you additional questions about the behavior in the Captain's Office while the shift was under your direct supervision. You denied being present during the ruler war, and stated that you had heard about it. You were asked if you had ever taken a staff members institutional ID and placed it down the front of your pants. You stated "no" that you had taken Officer Desurne's ID and placed it in the belt line of your uniform and when she tried to retrieve it, you stated "that's inappropriate" and she did not touch you. When asked if you had ever poked Officer Desurne in the breast, you said that you had poked her in the shoulder, but that she had poked you in the breast several times. You were asked if you had ever been placed on the table in the back room, and you said that you had not.

In a written statement dated May 12, 2016, Lieutenant Ashton Adkins stated that on a recent occasion, you removed Officer Desurne's institutional ID and placed it down the front of your pants. He added that Officer Desurne grabbed your pants, reached down in them to retrieve her ID and stated that she felt skin.

On May 14, 2016, Officer Daniel Grau was interviewed by Captain Forgy. Officer Grau said that he was present in the Captain's Office for the ruler war and added that you were one of the staff involved.

On May 19, 2016 Officer Torres was interviewed a second time by Captain Forgy. Officer Torres was asked about the ruler war incident that had taken place and she stated that a ruler had been broken over her buttocks. She stated that she could not remember if you were a participant or not. She then stated that she had participated in wrestling and in placing staff on the table in the back room. She identified the staff as being yourself and Officer Aul. When asked if she had sat close to you while in the Captain's Office, she said that she would sit close enough that your knees were touching hers, and she had placed her hand on top of your hand and on your knee during those times. She added that she had spanked people in the Captain's Office and she had fallen in your lap on one occasion. Officer Torres was asked if she had participated in sexual conversations in the Captain's Office and she stated "all the time." She admitted to performing a lap dance on Officer Desurne and stated that you were present at the time.

On May 19, 2016 a final interview was held with you based on the ongoing investigation. Captain Forgy asked you again if you had witnessed the ruler war in the Captain's Office. You again stated that you were not present, but that you heard about it. You were asked about poking an officer in the breast, and you again denied that you ever intentionally touched her breast. You were asked if you had ever wrestled with staff in the office, and you said that you hadn't, but that you had been present when others had wrestled. You were again asked about the incident in which you took the institutional ID from Officer Kelly Desurne and placed it in the belt line of your pants. You stated in this interview that her hand did go into the waist line of your pants in an attempt to retrieve her ID. In your interview on May 11, 2016, you stated that you had stopped her before she was able to touch you. During this interview, you stated that you had participated in a number of conversations dealing with life experiences and of a sexual nature. You were told that reports from other staff show that you were present during the lap dance performed by Officer Torres. You again denied being present. When asked if you had ever witnessed inappropriate sexual behavior in the Captain's Office, you stated that the wrestling between Lieutenant Blair and Officer Torres was the most inappropriate thing you had seen and added that it began as educational and turned into horseplay. You were asked how many times Officer Torres had sat in your lap and you replied "two times." You were asked how many times she had lain across your desk while you were working, and you replied "once."

Findings of this investigation show that under your direct supervision, staff were allowed to engage in behavior that violated policies and ethical work standards. You engaged in inappropriate sexual behavior with Officer Desurne by poking her breast and by taking her institutional ID and placing it down the front of your pants, allowing her to place her hands down your pants. You engaged in sexual conversations with staff in the Captain's Office while assigned as Shift Supervisor. You observed and allowed staff to sit in each other's laps, and slap, spank and wrestle each other. A female staff member lay across your desk while you were the shift supervisor, and you allowed female staff to perform lap dances in the Captain's Office. You failed to correct, address or report the incidents and therefore failed to properly and professionally execute your duties as a Correctional Captain.

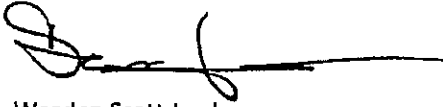
Your actions are highly inappropriate for a Correctional professional and a supervisor and are direct violations of the following policies:

CPP 3.5 II. Which states "Corrections' employees shall avoid offensive or inappropriate conduct or sexually harassing behavior at work.

CPP 3.5 II. A. 3. which states "Prohibited Behavior In addition to the conduct prohibited by 29 C.F.R. §1604.11, 29 C.F.R. §1606.8, 29 U.S.C.A. §621 et seq., 42 U.S.C.A. §2000e et seq., 42 U.S.C.A. §12101 et seq., other prohibited behavior shall include: 3. Vulgar or indecent gesture, language, or joke; & 4. Sexual contact;

By the provision of KRS 18A.095, as a classified employee with status, you may appeal this action to the Personnel Board within sixty (60) days after receipt of this notice of dismissal, excluding the date notification is received. Such appeal must be filed in writing utilizing the attached appeal form and in the manner prescribed on the form.

Sincerely,

A handwritten signature in black ink, appearing to read 'Scott Jordan', with a long horizontal line extending to the right.

Warden Scott Jordan
Luther Lockett Correctional Complex

Attachment: Appeal Form

cc: Thomas B. Stephens, Secretary, Personnel Cabinet
Rodney Ballard, Commissioner, Department of Corrections
James Erwin, Deputy Commissioner, Department of Corrections
Rodney Moore, Director, Division of Personnel Services
Mark Sipek, Executive Director, Personnel Board
Personnel File