COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-115

ALAN SALYER **APPELLANT**

VS.

FINAL ORDER
SUSTAINING HEARING OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

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

** ** ** ** **

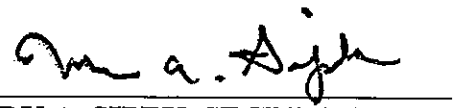
The Board at its regular February 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated January 9, 2015, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be, and they hereby are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **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 20th day of February, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Adam Adkins
Alan Salyer
Joslyn Olinger Glover

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
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JUSTICE AND PUBLIC SAFETY CABINET
DEPARTMENT OF JUVENILE JUSTICE
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** ** ** ** **

This matter came on for evidentiary hearing on November 10, 2014, at 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, Alan Salyer, was present and was not represented by legal counsel. The Agency, Justice and Public Safety Cabinet, Department of Juvenile Justice, was also present and represented by the Hon. Adam Adkins.

This matter was the subject of at least one pre-hearing conference conducted on July 16, 2014, at which time the issues were defined and procedural concerns dealt with.

BACKGROUND

1. As of March 26, 2014, Alan Salyer was a classified employee with status of the Justice and Public Safety Cabinet, in its Department of Juvenile Justice, holding the position of Youth Worker II, to which he was lately demoted, and very recently re-assigned to Woodsbend Youth Development Center, in West Liberty, Kentucky. By letter of that date over the signature Hasan Davis, Commissioner, he was assessed a ten-day suspension for poor work performance and misconduct. More specifically, he was allegedly observed to be sleeping while on duty at the facility at which he previously was employed, namely the Frenchburg Group Home. [Hearing Officer Note: Between February 11, when the alleged violation occurred, and March 26 when the letter was issued, Mr. Salyer was voluntarily demoted and transferred job stations. This arrangement arose from other pending issues, constituting a settlement thereof.] The Agency also alleged a companion violation, namely the presence of ". . . several unidentified prescription medications in your coat pockets . . ." while asleep, the concern being that the medications could be accessed by the residents asserted to be under his care at the time. The length of the suspension stems from Agency progressive discipline policy; the Commissioner

found that he had been disciplined previously upon at least five occasions within approximately two years in addition to a written reprimand in March, 2012. A true copy of the suspension letter is attached as "**Recommended Order Attachment A**."

2. Mr. Salyer challenged the action by appeal filed on May 27, 2014 wherein he wrote:

> Write up states I did not provide supervision of residents. My job duties at the time did not include resident supervision. There were also 4 other youth workers present for direct supervision. I had a doctor's note for the medication I was taking. The medication was secured in and zippered inside coat pocket. There was no misuse of medication. Incident Report forms were also improperly filled out.

3. Upon convening the evidentiary hearing, under standing policy the Agency was assigned the burden of proof and offered the testimony of **Todd Trimble**, Youth Worker at the Frenchburg facility. He has been with the Department of Juvenile Justice (DJJ) approximately fifteen years and has been an Aikido Training Instructor for five years. As Youth Worker, he is generally assigned to supervise the residents and did so, along with Appellant and others. He recalled that he worked with Appellant for several years.

4. Directed to his recollection of events on February 11, 2014, he and two coworkers were removing to another area of the facility for a requisite Aikido review. Five staff, including Appellant, were on duty at the time, variously located upon one or another of its three floors. Appellant was left alone on the top floor with one or more residents, who were watching television. Following the Aikido process, which consumed approximately one hour, the witness and the others returned to the upper floor where they observed the youth still watching television and Appellant asleep. On that particular day the residents were to perform community service at a local dog shelter, and he and one or more of the other staff commenced mustering them together preparatory to departing for the service, leaving Appellant alone and asleep. This witness did not undertake to awaken him but, as they were departing for the dog shelter, Appellant came down from the upper floor.

5. Under cross-examination, the witness confirmed that his time of service with Appellant approximated five years at the Frenchburg facility. He had no recollection of any failure by Appellant to perform his duties during that time. He acknowledged that he did not prepare a Critical Incident Report at the time of the sleeping episode. Pressed as to whether there had been other occasions of staff sleeping while on duty, the witness recalled no specific incident. He confirmed that at the place and time under scrutiny Appellant officially held the position of Counselor rather than Youth Worker and accordingly his duties differed from that of Youth Worker; he added, however, that all staff are expected to supervise any residents in their

physical presence or custody. He estimated Appellant to have slept at the time between twenty and twenty-five minutes. He acknowledged that Appellant had previously alluded to health issues, recalled to be high blood pressure and possibly ulcers, and he had spoken of medication for these.

6. **Scott Castle** has been Youth Worker Supervisor at the Frenchburg Group Home for two years and holds eleven years service with DJJ. He served with Appellant for at least two years. On February 11, 2014 he was working in his office and a staff person brought him a telephone video which depicted Appellant asleep in the upstairs area of the building. The staff was uncertain as to what to do since residents were there as well and otherwise unsupervised. The witness was not Appellant's direct supervisor and informed Mitch Adams, Counselor Supervisor, of the situation. The witness thereupon approached the area, overheard loud snoring as he progressed and ultimately observed Appellant in a deep sleep in the lounge area on the top floor of the facility. Residents were there watching television as well and no other supervisor was present. The witness and others commenced moving the youths out of the area to a mustering location preparatory to taking them off campus for the community service previously discussed. He left the situation with Mr. Adams, Appellant's actual supervisor at the time, to be dealt with. He noted that all personnel, regardless of their title or position, are charged with supervising the residents in their physical presence or custody at this facility.

7. Under brief cross and redirect examination, the witness acknowledged that possession of cell phones at the facility violates policy. He did not prepare a critical Incident Report concerning the sleeping event, but did type up a statement concerning it. He vaguely recalled Appellant discussing certain medical issues with which he was dealing in the past.

8. **Mitch Adams** has been Superintendent of the Frenchburg Youth Home since 2008. He was promoted from Counselor, also at that facility at that time, whereupon Appellant replaced him as Counselor there. He then became Appellant's first-line supervisor. It was he to whom members of staff, whom he identified for the record, reported upon observing Appellant asleep "upstairs" at the center. Upon receiving the information, he observed the circumstance for himself and photographed Appellant in the position, which photo he filed as part of his testimony. He explained that he took this photo for the reason that there had been "numerous issues" with Appellant's performance in the past and he wanted no misunderstanding about it. He confirmed that under standard operating procedure at this facility, although serving as Counselor, Appellant was likewise responsible for the youth in his presence and custody regardless of his title; consequently, at the time and place wherein he dozed off the residents there were considered under his direct supervision.

9. As Superintendent of the facility since 2008 and likewise Appellant's supervisor, this witness has observed deteriorating work performance and increased negligence on his part, essentially from the outset of his appointment as Counselor. He recalled that Appellant's recordkeeping and record maintenance were poor, sporadic, and did not comply with policy. Commencing in August, 2010 there began a series of supervisory conferences wherein the witness undertook to work with Appellant to rectify his performance and bring it into line with policy requirements. These failed to have any affect. Commencing in March, 2012 Appellant received a written reprimand and, ranging through January, 2014 he was suspended from duty upon at least four occasions. Finally, in January, 2014 he was threatened with dismissal. Even as an intent to dismiss, issued to him on January 15, 2014, was pending the sleeping incident occurred on February 11, 2014. Ultimately Appellant accepted a voluntary demotion to Youth Worker II, grade 10, and a voluntary move to the Woodsbend Youth Development Center at West Liberty, Kentucky, in lieu of dismissal.

10. The witness explained that the suspensions, varying from two days in May, 2012 up to seven days in November, 2013, were for a variety of offenses, all under the general category of "poor performance" and all of which Appellant served without challenge. He viewed that given this history, the ten days now assessed for the latest infraction was in keeping with the well known progressive discipline policy employed by the Agency. He noted that Appellant did indicate from time-to-time that he was under the care of a doctor or was at least seeing a doctor, but at no time did he request accommodation or other relief associated with any medical condition.

11. Under his cross-examination of the witness, Appellant focused upon his own medical circumstances and the "unidentified prescription medications" referenced in the suspension letter. He produced the heavy jacket which he was reflected as wearing in the photograph previously introduced and pressed the witness concerning whether its design presents any risk of medications falling therefrom or being easily pilfered. The witness agreed that such may be difficult unless the wearer cooperated. He confirmed that Appellant was forthcoming when quizzed about the sleeping and in due course he presented a doctor's statement addressing his medical needs. He acknowledged that Appellant had indicated his need for medical treatment from time-to-time previously as well as prescribed drugs, although he was unaware that one or another of them might cause drowsiness. He agreed that during the time of his supervision, Appellant was faithful in producing medical statements when requested. He recalled there was an increase in the level thereof during 2013.

12. The witness addressed the series of penalizations. He confirmed that the majority of the prior suspensions and other disciplines of Appellant related for the most part to his sloppy or non-existent recordkeeping rather than any specific failure of supervision of the residents. He noted, however, that at least one or two of the citations did refer to his use of excess force while in a supervisory capacity.

13. **Mary Caldwell** is the Human Resources Administrator for DJJ. In that capacity, she manages all personnel matters for the Department. Her duties include the receipt, research, and drafting of disciplinary actions as requested from the various managers of agency facilities. She described the procedure utilized by the Agency and explained the elements and factors which management considers both in imposing discipline and the level thereof. She pointed to a set of three Agency policies and one facility policy, all of which came to bear upon the ultimate disposition of Appellant's circumstance in this particular case.

14. This witness handled the research and processing of the ten-day penalization assessed Appellant now under scrutiny. She did not have any input in the length thereof which was ultimately approved through the chain of command but viewed, in light of the contents of Appellant's personnel file, namely the series of past disciplines for various infractions, that the ten-day penalty was appropriate and in keeping with Agency progressive discipline policy.

15. The Agency having completed its proof-in-chief Appellant, **Alan Salyer**, offered his own testimony. As of the date of hearing, he is a Youth Worker II assigned to the Woodsbend Youth Development Center at West Liberty, Kentucky. He does not dispute that he fell asleep while on duty on February 11, 2014 at the Frenchburg Group Home and was so found in that posture around 3:40 p.m. that day by other workers. He disputed that his medications were easily accessible in the jacket or coat he was wearing at the time, explaining that any effort to reach them by anyone would have awakened him due to their location in its pockets. He insisted that one or another of these medications causes drowsiness and he dozed off after taking the prescribed dosage. He did not view that he was in an officially assigned supervisory capacity of the residents at the time since other staff were coming and going in the lounge area.

16. Appellant acknowledged the prior disciplines previously enumerated and detailed in the suspension letter. He urged, however, that all of them were unrelated to the immediate circumstance due to the fact that they were for infractions mostly related to poor recordkeeping and not personal behavior such as sleeping on duty. He expressly seeks a reduction of the penalty to some amount less than ten days.

17. Under brief cross-examination, Appellant acknowledged that he did not request any medical accommodation or leave for the date in question, nor did he disclose any medical problems to management upon his arrival for work. He insisted that he was not in a supervisory capacity when he dozed off but conceded that for certain periods of time he was the only staff person in the room with the residents there. He reiterated his posture that his previous disciplines, not challenged, were assessed for paperwork issues and not personal behavioral issues. The sworn testimony was thereupon concluded and the matter stood submitted for recommended order.

18. KRS 18A.095(1) requires that "A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause."

19. KRS 18A.095(8) outlines the procedure to be implemented when a classified employee with status is penalized. Appellant has not challenged the procedure employed by the Agency.

20. 101 KAR 1:345 is the regulation relating to disciplinary actions. Section 1 thereof allows that "Appointing authorities may discipline employees for lack of good behavior or the unsatisfactory performance of duties." Section 4 of the regulation relates to suspensions, providing that no suspension shall exceed thirty working days.

21. In addition to relevant statutory and regulatory authority, the Agency has in place a series of policy requirements which are disseminated among its staff including, but not limited to a code of conduct, and general guidelines. In this instance, Appellant readily concedes that sleeping while on duty is violative of one or another provision of the policy and constitutes lack of good behavior and/or unsatisfactory performance of duties.

FINDINGS OF FACT

1. Through at least February 11, 2014, Alan Salyer was a classified employee with status of the Justice and Public Safety Cabinet, Department of Juvenile Justice, holding the position of Social Service Worker II, grade 13, stationed at the Agency's Frenchburg Group Home. Upon that date, at around 3:40 p.m. he was observed to be sleeping on duty while in the presence of several youth residents. Other than the violation, no noteworthy incidents arising expressly from his dozing off were reported. He previously experienced undisclosed medical ailments and was under prescribed medication, some of which was on his person in the pockets of his heavy coat, but never accessed by the residents or others.

2. At the time the sleeping infraction occurred, Appellant was under a pending threat of dismissal from his position. That aspect was resolved through a voluntary demotion and transfer, from the Frenchburg facility to the Woodsbend facility. Thereafter, in March, 2014 the sleeping violation was dealt with through assessment of the ten-day suspension from his newly assigned position now under challenge here.

3. The length of the latest suspension has its foundation in the fact that Appellant has chronically performed poorly in some job duties, evidenced by several supervisory conferences within the prior two years, at least one written reprimand, and at least four suspensions of varying lengths in less than two years. The Agency has in place a progressive discipline policy and it views that the ten day assessment was the next step up.

4. Appellant does not dispute the sequence of events but urges that the length of the penalization is too harsh for what occurred, taking the position that his prior disciplines were for non-behavioral and dissimilar shortcomings, primarily relating to his sloppy recordkeeping.

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

CONCLUSIONS OF LAW

1. In light of the uncontroverted sworn testimony, the sole issue to be resolved is whether the penalization is excessive. Had this been Appellant's first violation and, absent proof of any other negative occurrences arising from his having dozed off, even the Agency would agree that ten days without salary would have been unduly harsh. However, there is then presented, as must be considered where progressive discipline is applied, the personnel history. In Appellant's case, it is rather dismal.

2. Given the series of supervisory conferences which apparently were of only limited impact, a reprimand, at least four separate suspensions, and a threat of dismissal Appellant, whether intentionally or not, demonstrates a disregard for the duties attendant to his position. While the proof reflects an apparent distaste on his part for the so-called "paperwork" and this has caused him difficulties, the underlying policy of progressive discipline envisions learning from mistakes and, more importantly, overall improvement in job performance. Good behavior of staff working with youth would seem especially important since example is constantly upon display and no doubt closely monitored by the impressionable residents. The proof is clear that Appellant's behavior has violated several provisions of well established policy and efforts by management to rectify his non-compliance remain a work-in-progress.

3. The assessment of a ten-day suspension in this instance complies with established policy and was neither erroneous nor excessive in light of the overall circumstances.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **ALAN SALYER VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF JUVENILE JUSTICE (APPEAL NO. 2014-115)** be **DISMISSED.**

NOTICE OF EXCEPTION AND APPEAL RIGHTS

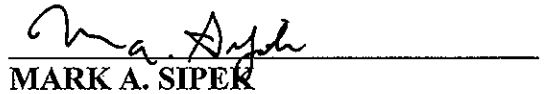
Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are 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 John C. Ryan** this 9th day of January, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof mailed to:

Hon. Adam Adkins
Alan Salyer

JUSTICE AND PUBLIC SAFETY CABINET

Steven L. Beshear
Governor

Department of Juvenile Justice
1025 Capital Center Drive, 3rd Floor
Frankfort, Kentucky 40601-8205
Phone (502) 573-2738
Fax (502) 573-4308
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J. Michael Brown
Secretary

A. Hasan Davis
Commissioner

March 26, 2014

Mr. Alan Reid Salyer

VIA HAND-DELIVERY

Dear Mr. Salyer:

Based on the authority of KRS 18A.095 (1) and (8) and 101 KAR 1:345, Section 4, you are hereby notified that you are officially suspended from duty and pay for a period of ten (10) working days, effective beginning April 8, 2014, again on April 10, continuing on April 11, again on April 17, again on April 22, again on April 28, again on May 8, continuing on May 9, again on May 12 and again on May 15, 2014.

In accordance with 101 KAR 1:345, Section 1, you are being suspended from your position as Youth Worker II, at Woodsbend Youth Development Center, for the following reasons:

Poor Work Performance and Misconduct, i.e., as reported by Frenchburg Group Home Juvenile Facility Superintendent I Mitch Adams, you demonstrated poor work performance and misconduct by sleeping on duty and failing to provide adequate supervision of residents. On February 11, 2014, at about 3:40 p.m., while assigned supervision of residents on the second floor living area, Youth Worker Supervisor Scott Castle, Youth Worker II Justin McKenzie, Youth Worker II Kelly Tufono and Youth Worker II Todd Trimble found you sleeping while four (4) residents watched television. Mr. Tufano notified Youth Worker Supervisor Castle when he observed you asleep on duty. After Superintendent Adams was informed of your behavior by Mr. Castle, Superintendent Adams confirmed the incident by observing you sound asleep, while the residents laughed at your loud snoring. Your sleeping on duty was also confirmed in the Isolation/Incident Report Form and Addendum, dated February 12 and February 14, 2014, and completed by Mr. McKenzie and Mr. Trimble. When Superintendent Adams discussed the incident with you on February 11, 2014, you admitted that you had fallen asleep. You admitted that you were carrying several unidentified prescription medications in your coat pockets on February 11, 2014, which would have been accessible by the residents while you were asleep. The misuse of prescription drugs on state property during working hours is strictly prohibited. Additionally, you were unable to provide the residents with appropriate direct supervision during the time which you were asleep, and therefore could not visually monitor and account for the whereabouts of residents at all times per departmental policy.

Your poor work performance and misconduct, demonstrated by sleeping on duty and failing to provide adequate supervision of residents, constitute violation of 505 KAR 1:110; Department of Juvenile Justice Policy #102, "Employee Code of Conduct", I., IV.(O.); Department of Juvenile Justice Policy #104, "Employee Code of Conduct", I., IV.(B., M., P. and S.); Department of

Juvenile Justice Policy # 110, "General Security Guidelines", I.; and Frenchburg Group Home Standard Operating Procedure #104, "Employee Code of Conduct", *Procedures* (2., 4., 9., 12. and 15.).

Furthermore, you received a voluntary demotion to Youth Worker II and voluntary transfer to Woodsbend Youth Development Center by letter dated February 20, 2014, for poor work performance (failure to deliver and document required social services to residents); a seven (7) day suspension by letters dated November 5 and November 13, 2013, for poor work performance (failure to document required resident social services in a timely and accurate manner); a three (3) day suspension by letter dated September 16, 2013, for poor work performance (failure to complete assigned American Correctional Association files in a timely manner); a five (5) day suspension by letter dated April 29, 2013, for poor work performance and misconduct (failure to document required resident counseling services and misconduct by failure to provide a written statement pursuant to a supervisory directive); a two (2) day suspension by letter dated May 4, 2012, for poor work performance (excessive use of force, inadequate supervision provided and inappropriate language directed toward residents); and a written reprimand on March 29, 2012, for poor work performance (failure to make JORI entries in a timely manner).

For your information, the Kentucky Employee Assistance Program (KEAP) is a voluntary and confidential assessment and referral service for state employees. This service may help you with any personal problems that may be affecting your job performance. KEAP can be reached at (800) 445-5327 or (502) 564-5788.

A copy of this notice is being furnished to the Personnel Cabinet in accordance with personnel rules. As an employee with status, you may appeal this action to the Personnel Board within sixty (60) days after receipt of this notice, excluding the day of receipt. Appeals must be made by completing the attached form and directing it to the address indicated on the form. (See KRS 18A.095 and 101 KAR 1:365, Appeal and Hearing Procedures).

Sincerely,

Hasan Davis
Commissioner

HD/msc/sc

Attachments: Acknowledgement Form
Personnel Board Appeal Form

C: Hon. Timothy Longmeyer, Secretary, Personnel Cabinet
Hon. Mark A. Sipek, Executive Director, Personnel Board

Diana McGuire	Mitch Adams
Joslyn Olinger Glover	Kimberly Whitley
Kris Mann	DJJ Legal
Chris Gillum	DJJ Payroll
Brad Lawson	Personnel File

CONFIRMATION SHEET

This is to acknowledge receipt of a letter dated *March 26, 2014,* and addressed to *Alan Reid Salyer,* from the Commissioner, Department of Juvenile Justice, regarding a ten (10) day suspension.

Signed (Employee): _____

Delivered by: _____ on 3/28/14
Date

(In the event employee refuses to sign):

Witnessed by: _____ on _____
Date