

ARIZONA STATE PERSONNEL BOARD

SHAUN HOLLAND,

Complainant,

v.

DEPUTY WARDEN KIMBERLY JOHNSON; DEPARTMENT OF CORRECTIONS, REHABILITATION AND REENTRY, a political entity,

Respondents.

HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS

The above captioned action having come for a regularly scheduled hearing on January 14, 2021, in Phoenix, Arizona, for the purpose of adjudicating the "Whistleblower" complaint by Shaun Holland (Holland) against (1) his immediate supervisor, Deputy Warden Kimberly Johnson, (Johnson) and (2) the Arizona Department of Corrections, Rehabilitation and Reentry, (Department). Holland was represented by the law firm of Bihn & McDaniel, P.L.C. by and through Martin Bihn, Attorney at Law. Respondents Johnson and the Department were represented by Kirstin A. Story, Assistant Attorney General.

Having heard the testimony of all witnesses, having read and considered the exhibits admitted into evidence, the arguments of both parties, the proposed

findings of fact and conclusions of law submitted by the parties and being fully advised in the premises, the undersigned now submits the following findings of fact, conclusions of law, and recommendations to the Arizona State Personnel Board.

FINDINGS OF FACT

1. As of August 11, 2020, Holland was employed by the Department as a Correctional Administrator I. This position is also referred to as an Associate Deputy Warden. Holland was assigned to the Arizona State Prison Complex-Lewis and had been assigned there since December 29, 2018. (Exhibit C-12)

2. On December 2, 2019, Holland signed a letter addressed to Governor Doug Ducey and Department Director Shinn. In his letter, Holland alleged that the repair orders to fix the cell doors were being “closed out” without the necessary repairs being completed. (Exhibit C-2; Testimony of Holland; 38:10-38-19.)

3. Holland sent the December 2, 2019, letter through his chain of command to Department Director Shinn. Holland’s union representative sent the letter to Governor Ducey. (Testimony of Holland; 39:07-39:37.)

4. Warden James Kimble (Kimble), Deputy Warden of Operations David Fajardo, (Fajardo) and Deputy Warden of Operations Christopher Josefowicz, (Josefowicz) were all aware of news stories about the condition of the cell doors at the Arizona State Prison Complex – Lewis in which Holland was featured as a “whistleblower”. None of them testified that they were familiar with Holland’s December 2, 2019, letter, or the allegations stated therein. (Testimony of Kimble; 3:57:00-3:57:15; Testimony of Fajardo; 3:04:50-3:04:57; 3:13:10-3:13:16; Testimony of Josefowicz; 2:34:00-2:34:35.)

5. Employee Relations Manager Erica Waldrige (Waldrige) had no awareness or understanding of Holland’s December 2, 2019, letter or any complaints or allegations alleged by him about repairs to cell doors at Arizona State Prison Complex - Lewis. (Testimony of Waldrige; 4:13:20-4:13:34.)

6. No evidence was presented that Assistant Director Lance Hetmer, (Hetmer) received a copy of the December 2, 2019, letter. No evidence was presented that Hetmer was aware of the letter, or the contents thereof. On June 12, 2020, Holland sent Hetmer an e-mail in which Holland expressed his on-going concern about work orders pertinent to repairing cell

doors being “closed out” even though these cell doors had not been repaired. No one else was copied on the e-mail. On June 15, 2020, Hetmer responded to Holland’s e-mail stating he had read the e-mail and would elevate it for review. (Exhibit C-7.)

7. On April 25, 2020, Holland was reassigned to the Buckley Unit at Arizona State Prison Complex – Lewis. Since Holland, as an Associate Deputy Warden, is a Grade 21-level employee, his notice of administrative transfer was issued by the Department’s Central Office consistent with standard procedure. Kimble, who at the time was Deputy Warden of Operations, provided Holland with the notice of administrative transfer. He told Holland he believed the agency had underutilized Holland’s expertise with regard to the security issue he had identified. Further, because Holland had been successful and gained the respect of the staff, he believed Holland could help change the direction of the Buckley Unit. Lt. Mark Hasz (Hasz) testified that he was transferred to the Buckley unit an hour after Holland’s transfer. It was Hasz’s understanding that they were being transferred to this unit to improve the security of the unit. (Exhibit C-6, Testimony of Kimble; 3:11:05-11, 3:11:50-3:12:40; 3:17:40-52; Testimony of Hasz; 1:53:40-1:54:02.)

8. Johnson was Deputy Warden over the Buckley Unit from January 11, 2020 until to August 31, 2020. (Testimony of Johnson; 1:56:45-1:57:11.) Johnson became Holland's immediate supervisor upon his transfer to the Buckley Unit. (Testimony of Johnson; 1:56:45-1:57:51; Testimony of Josefowicz; 2:21:47-2:21:59; Testimony of Fajardo; 2:50:15-2:51:02; Testimony of Kimble; 3:20:50-3:21:19)

9. On July 10, 2020, Johnson was on paid sick leave. While on sick leave, Johnson continued to exercise supervisory authority over her unit. (Testimony of Kimberly Johnson, Hearing Recording at 1:59:50-2:00:16; 2:04:47-2:04:58.)

10. On the morning of July 10, 2020, Captain Robert Hamilton (Hamilton), sent an e-mail to recipients including Holland and Johnson about a Correctional Officer III assigned to the Buckley Unit who had performed a urinalysis incorrectly. (Exhibit R- 14.)

11. Johnson at 10:08 a.m. forwarded Captain Hamilton's e-mail to Holland, stating:

I specifically assigned the resolution to this. Please advise me your actions that will be taken. I want to know how you will prevent it from happening in the

future. Which should be a heavy focus. Never received the written action plan on this as requested. Obviously one is still needed as Mazon made these errors.

I want a detailed action plan by COB on July 15, 2020.

(Exhibit R-14.)

12. Approximately seven (7) minutes later, Holland sent the following response to his supervisor Johnson:

You need to stop... completely stop. Your massive micromanaging when on sick leave is causing more stress than the bullshit at the unit.

The issue over the UA's was already redirected by me, and the major.

The staff and inmates lives and immediate impact of my responsibilities are vitally more important than e-mailing u [sic] for permission every 10 minutes.

I am paid to act in your stead. Vicarious responsibility is bullshit in this case. U [sic] are not allowed to return. Everything happening falls on me. We are navigating situations that you have zero ability to impact while at home.

(Exhibit R-14.)

13. Holland admitted that use of the term “bullshit” is not professional. (Testimony of Holland; 1:24:55-1:25:00.)

14. After receiving Holland’s response, Johnson almost immediately sent the e-mail string to Josefowicz, requesting him “to have a discussion with my ADW.” Johnson did not request, nor did she intend for disciplinary action to be initiated, or taken against Holland. She stated in her e-mail to Josefowicz “...I need you to put him in the proper mindset. He is not acting in my stead he is just the point of contact. Additionally he cannot act in my stead if he is not acting with how I have directed him to.” (Exhibit R-14; Testimony of Johnson; 2:05:32-2:06:02.)

15. Upon receiving the e-mail from Johnson, Josefowicz, after reviewing Holland’s e-mail, believed further action was necessary due to the unprofessional content of the e-mail. Josefowicz forwarded the e-mail string to Kimble. (Testimony Josefowicz; 2:20:50-2:23:03.)

16. Kimble reviewed Holland’s July 10, 2020, e-mail and determined that it was insubordinate and unprofessional. Kimble testified that Holland is required to comply with all lawful and legal directives from his supervisor. Instead, Holland sent Johnson an e-mail that was not compliant with her

directive and that the e-mail was both disrespectful and discourteous. As a result, Kimble directed Josefowicz to initiate corrective action. (Testimony of Kimble; 3:19:33-3:22:20.)

17. On July 15, 2020, Josefowicz served Holland with an administrative inquiry which described Holland's e-mail as unprofessional in that it contained profane and insulting language. Holland's entire July 10, 2020, e-mail was included in the synopsis of the administrative inquiry. Holland was given 5 workdays to provide a response. (Exhibit R-15.)

18. Both Josefowicz and Kimble testified that their decision to initiate the investigation and inquiry process was in order to provide Holland with an opportunity to explain the reason for the content of his July 10, 2020 e-mail; that there was no other reason for initiating the administrative investigation. (Testimony of Josefowicz; 2:24:20-2:24:40; Testimony of Kimble; 3:23:46-3:24:17.)

19. On July 22, 2020, Holland submitted a lengthy response to the inquiry. In his response, Holland did not deny sending the e-mail. Holland did not deny any of the contents of his July 10, 2020, e-mail and he failed to express any remorse. Further, he did not include an apology. Rather, Holland choose to argue that he was the victim of reverse gender discrimination and

micromanagement. To support this claim, Holland argued that Johnson had been disrespectful to him in an e-mail. Holland attached the e-mail to his response. Holland took objection to Johnson use of the word “Ya” in her statement “Ya great job Shaun.” Holland argued that Johnson’s use of the word “Ya” is as equally insulting as his use of the word “bullshit”. (Exhibit R- 17.)

20. On July 22, 2020, Josefowicz reviewed Holland’s response to the administrative inquiry and determined that it was deflective, appeared to be passing the blame and did not provide any reason why disciplinary action should not be passed. Josefowicz sustained a violation of charge 6.c, Discourteous Treatment of the Public (to include inmates, offenders and employees) for use of abusive, profane, or insulting language, which is a class 3 offense under Department policy. Josefowicz reviewed Holland’s prior disciplinary history, which included two (2) prior letters of reprimand for a charge 6.c violation. In light of the offense and Holland’s prior disciplines, and consistent with the matrix for disciplinary action set forth in Department policy, Josefowicz recommended an 80-hour suspension. (Exhibit C-13; Testimony of Josefowicz; 2:24:52-2:31:25-30.)

21. Josefowicz' s recommendation of an 80-hour suspension was based solely on Holland's July 10, 2020, e-mail, his prior disciplinary history, and the Department's matrix concerning disciplinary action. (Testimony of Josefowicz; 2:30:50-2:32:35; 2:40:40-2:40:48; 2:41:25-2:43:23.)

22. On July 22, 2020, Fajardo reviewed the administrative inquiry, including Holland's response. **Fajardo was acting as supervisor in Johnson's stead to ensure objectivity since Johnson was the target of the behavior at issue.** (Exhibits C-13; R-16; R-17; Testimony of Kimble; 3:29:00-3:29:45; Testimony Fajardo; 3:07:37-3:08:05.)

23. Fajardo found Holland's response to the administrative inquiry condescending and demeaning toward Johnson. He described Holland's response as "over the top" and lacking in any attempt to explain the disrespectful and discourteous behavior at issue. Fajardo concurred with the recommendation for an 80-hour suspension. His concurrence in the 80-hour suspension, was based solely on Holland's July 10, 2020, e-mail, the administrative inquiry packet, Holland's prior disciplinary history and the Department's disciplinary matrix. (Exhibits C-13; R-16; R-17 Testimony of Fajardo; 2:52:42-2:53:39; 2:56:00-2:58:38)

24. The recommendation of an 80-hour suspension was provided to Kimble, along with the administrative inquiry and Holland's response. Kimble determined that Holland's response was deflative, did not answer or try to explain his use of profane and insubordinate language in the e-mail to Johnson and appeared to point away from himself to justify his behavior. After reviewing the administrative inquiry and Holland's response, along with Holland's prior disciplinary history, Kimble sustained the 6.c charge and determined that an 80-hour suspension was appropriate. (Exhibits C-13; R-16; R-17; Testimony of Kimble; 3:25:44-3:30:45.)

25. Kimble directed the preparation of a notice of suspension. The draft notice of suspension states that the factual basis for Holland's suspension is:

On July 10, 2020, at 10:15 a.m., you sent an e-mail to Deputy Warden K.J. responding to direction she e-mailed to you a few minutes earlier. In your e-mail you wrote "You need to stop... completely stop. Your massive micromanaging when on sick leave is causing more stress than the bullshit at the unit." You also wrote "The staff and inmates lives and immediate impact of my responsibilities are vitally more important than e-mailing u for permission every 10 minutes. I am paid to act in your stead. Vicarious

responsibility is bullshit in this case. U are not allowed to return. Everything happening falls on me. We are navigating situations that you have zero ability to impact while at home.” Your comments were unprofessional and derogatory in nature. Your actions constitute Discourteous Treatment of the Public (to include inmates, offenders and employees) for use of abusive, profane and/or insulting language, Class 3.

The draft notice of suspension also states that, in issuing the notice of suspension, consideration was given to Holland’s prior disciplinary actions, which are listed in the draft notice of suspension. (Exhibit R-18; Testimony of Kimble; 3:33:00-3:33:15.)

26. Warden Kimble’s decision that Holland should receive an 80-hour suspension was based solely on Holland’s July 10, 2020 e-mail, his prior disciplinary history, and the Department’s disciplinary matrix. (Exhibit R-13; Testimony of Kimble; 3:25:44-3:30:45; 3:35:19-3:36:20.)

27. On July 24, 2020, Holland signed a letter dated July 23, 2020, which was addressed to Governor Ducey and Director Shinn. According to the letter, Holland was “reporting what I reasonably believe to be an abuse of authority, mismanagement, and unethical behavior directed at me and Lt.

Hasz by the Lewis Complex Administration, to include Warden James Kimble and the Deputy Warden of Buckley Unit, Kimberly Johnson.” The letter went on to allege “heightened and unjustified scrutiny to include multiple 601 investigations,” and “being singled out for an investigation concerning a lawful and justified use of force. DW Johnson also abused her authority by threatening us with criminal charges arising out of this same lawful use of force.” No evidence was presented by Holland that this letter complied with Arizona’s Whistleblower statutes, A.R.S. § 38-532 et seq. (Exhibit C-9.)

28. The draft notice of suspension, along with the administrative inquiry, and Holland’s response to the administrative inquiry, were all forwarded to the Department’s Central Office for review by Hetmer. (Testimony of Erica Waldrige, Hearing Recording at 4:01:00-4:02:30.) Waldrige also received the documentation and prepared a summary and review worksheet. Additionally, she submitted the summary and worksheet, along with the draft notice of suspension to Hetmer on August 4, 2020, for review and discussion at a meeting the following day. (Exhibit R-19; Testimony of Waldrige; 4:01:00-4:02:30; 4:03:30-4:03:44; 4:05:00-4:05:25.)

29. At the time Waldrige prepared the summary and worksheet for review by Hetmer, Waldrige was unaware of any allegations of whistleblowing or retaliation by Holland. (Testimony of Waldrige; 4:06:55-4:07:00.)

30. The summary, worksheet, and draft notice of discipline Waldrige provided to Hetmer restated the contents of Holland's July 10, 2020, e-mail to Johnson, and included summaries of Holland's disciplinary history. The review worksheet also includes brief information pertaining to Holland's date of hire, time in current position, his training, and indicates that Holland had no FMLA or ADA related issues and no reports of discrimination, harassment or retaliation. No other records or information were provided to Hetmer in connection with this disciplinary review. (Exhibit R-19; Testimony of Waldrige; 4:05:00-4:05:25.)

31. During the meeting to discuss Holland's suspension, Hetmer did not discuss any matters, other than what was contained in the materials Waldrige provided to him. Hetmer did not reference or discuss any letter addressed to Director Shinn or Governor Ducey. Hetmer approved the 80-hour suspension. (Exhibit C-13; Testimony of Waldrige; 4:07:42-4:07:55.)

32. After the meeting with Hetmer, Waldrige again reviewed the draft notice of suspension and determined that, in addition to charge 6.c, Discourteous Treatment of the Public (to include inmates, offenders and employees) because of use of abusive, profane, or insulting language, Holland's behavior reflected charge 5.I, Insubordination for violation of the Standards of Conduct for State Employees, a class 6 offense under Department policy. Waldrige proposed adding the charge to the notice of suspension and Hetmer agreed to this addition. Waldrige added the 5.I charge into the Notice of Suspension and returned it to the Arizona State Prison Complex – Lewis staff to finalize and serve. (Exhibit R- 20; Testimony of Waldrige; 4:08:40-4:10:25.)

33. Fajardo signed the final notice of suspension indicating that he was doing so "for" Johnson. The Notice of Suspension was served on Holland on August 11, 2020. (Exhibit C- 12; Testimony of Fajardo; 3:06:00-3:06:30.)

34. Johnson testified that she had no input into the recommendation or the decision to give Holland an 80-hour suspension. She was not involved in the drafting of the Notice of Suspension and she did not sign the Notice of Suspension letter. She did not see Notice of Suspension letter prior to

Fajardo giving it to Holland on August 11, 2020. (Exhibit 12; Testimony of Johnson; 2:06:21-2:08:02.)

CONCLUSIONS OF LAW

1. Holland's August 11, 2020, suspension is within the jurisdiction of the Arizona State Personnel Board pursuant to Arizona Revised Statutes, § 38-531, et seq. and Rule R2-5.1-104 of the Arizona Administrative Code.

2. Holland's complaint was timely filed on August 12, 2020. A.R.S. 38-352(h) and 41-782(B).

3. Holland has the burden of proof that Respondents took "reprisal against [Holland] for a disclosure of information considered a matter of public concern by [Holland] to a public body that [Holland] reasonably believes evidences... [a] violation of any law [,] ...[m]ismanagement, a gross waste of moneys or an abuse of authority." A.R.S. § 38-532(A); A.A.C. R2-5.1-104(J).

4. Holland's August 11, 2020, 80-hour suspension is a "personnel action" that may constitute a "reprisal," if the remaining requirements of Section 38-532(A) are met. A.R.S. § 38-531(4) & (6).

5. Johnson did not take any personnel action against Holland that is recognized within A.R.S. 38-531 (6) and, as such, Johnson must be

dismissed from Holland's "Whistleblower" complaint as an improper Respondent to the Complaint.

6. Holland has the burden of (1) proving "a disclosure of information of a matter of public concern by (Holland) to a public body" as required by A.R.S. §38-532(A); and, (2) that the disclosure was made "by the employee to a public body" as defined in A.R.S. §38-531(5). Holland has met this burden.

7. The December 2, 2019, letter to Governor Doug Ducey and Department Director Shinn concerned allegations that the failing cell doors were not being adequately repaired since "hundreds of repair orders" were being "closed out without completing any repairs." (Exhibit C-2.) This letter satisfies the requirement that the matter disclosed is of a public concern and the matter can reasonably believe to be a violation of law, mismanagement, a gross waste of monies or an abuse of authority. The failing of cell doors in a state prison and the allegations that they are not being properly repaired is a matter of public concern. Furthermore, it is reasonable for an employee of the Department to believe that documenting cell doors have been repaired on the Departments official repair orders, when in fact the cell doors have

not been repaired, is evidence of a violation of law, mismanagement, gross waste of monies or an abuse of authority.

8. The December 2, 2019, letter is addressed to Governor Ducey and Director Shinn. Holland testified that he sent the letter by e-mail up through his chain of command to Director Shinn and his union representative forwarded the letter to Governor Ducey. Receipt by either addressee will satisfy the requirement of disclosure to a public body. The definition of a “public body” includes the Governor or an agency director. A.R.S. § 38-531(5). There was no evidence presented that the December 2, 2019, letter failed to reach either of the intended recipients. There is nothing in the statute that requires the employee hand-deliver the document and/or that the employee personally mail the document. Even though the letter was not sent directly to Director Shinn, the submission through Holland’s chain of command, made the letter reasonably susceptible to being reviewed by the Director Shinn. Additionally, it is reasonable to conclude that the December 2, 2019, letter reached Governor Doug Ducey based on Holland’s testimony his union representative forwarded the letter to Governor Doug Ducey. As such, the December 2, 2019, letter is accepted as having been submitted to a public body as required by A.R.S. §38-351 and §38-532.

9. Holland has failed to meet his burden of proof that the August 11, 2020, 80-hour suspension was issued because of his December 2, 2019 letter to Director Shinn, or Governor Doug Ducey. The overwhelming evidence supports the fact that at every level of review, the recommendations and decision to issue an 80-hour suspension to Holland was based solely on (1) the July 10, 2010 e-mail he sent to his supervisor, (2) his prior discipline and the application of the department's disciplinary matrix to someone with Holland's disciplinary record.

10. There was no evidence presented that the discipline imposed on August 11, 2020, was disparate to any other Associate Deputy Warden who e-mailed their supervisor a similar e-mail to the one Holland sent on July 10, 2020. In fact, there was no evidence presented of any similar behavior by any other Associate Deputy Warden.

11. The June 12, 2020, e-mail from Holland to Hetmer did not comply with the service requirements on a "public body" as defined in A. R.S. §38-531(5). Furthermore, no evidence was presented that the June 12, 2020, e-mail was a factor of consideration by any person who recommended or decided to issue Holland an 80-hour suspension. For these reasons, Holland

has failed to meet his burden that the June 10, e-mail to Hetmer complied with Arizona's Whistleblower statute.

12. There was no evidence presented about whether Holland's July 24, 2020, letter to Governor Doug Ducey and Director Shinn is a "Whistleblower" letter as defined by Arizona Statute. This letter does not appear to address a matter of public concern but rather focuses on Holland's personnel grievances with management. Matters of public concern do not include matters of personal interest. *Desrochers v. City of San Bernardino*, 572 F.3d 703, 709 (9th Cir. 2009). During closing arguments, Holland through his attorney, conceded that the July 24, 2020 was not an issue in this proceeding. To that end, there was no evidence presented that the July 24, 2020 letter was a factor of consideration in the decision to issue an 80-hour suspension on August 11, 2020. The decision to issue an 80-hour suspension had already been made prior to the date Holland signed the letter on July 24, 2020. The disciplinary worksheet authorizing the 80-hour suspension was signed by Kimble on July 22, 2020. (Exhibit C-13) The only thing left to do was to draft the Notice of Suspension and have the draft reviewed by Waldrige, Kimble and then signed by Fajardo. During the drafting of the Notice of Suspension, the level of discipline did not change. No evidence was presented that anyone involved in recommending and

approving the 80-hour suspension was even aware the July 24, 2020 letter even existed. For these reasons, Holland has failed to meet his burden of proof that the July 24, letter complies with the requirements set forth in Arizona's Whistleblower statutes.

12. No competent evidence exists in the record on which to conclude that any reprisal or retaliation was taken against Holland because of his December 2, 2019 letter to Governor Doug Ducey or Director Shinn. Holland's 80-hour suspension was solely the result of his decision to send an e-mail to his supervisor that was both insubordinate and discourteous. This was not a prohibited personnel action and did not violate Arizona's Whistleblower laws.