

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2023-080**

JAMES ASHLEY

APPELLANT

VS.

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

JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS

APPELLEE

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

The Board, at its regular February 2025 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated January 16, 2025, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer 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 22nd day of February, 2025.

KENTUCKY PERSONNEL BOARD

Dwight W.

GORDON A. ROWE, JR., SECRETARY

Copies hereof this day emailed and mailed to:

James Ashley
Hon. Peter Dooley
Hon. Rosemary Holbrook (Personnel Cabinet)
Rodney E. Moore

COMMONWEALTH OF KENTUCKY
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**FINDINGS OF FACT, CONCLUSIONS OF LAW
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JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS

APPELLEE

This matter came on for an evidentiary hearing on October 7, 2024 at 9:30 a.m. EDT at 1025 Capital Center Drive, Suite 105, Frankfort, KY, before the Hon. Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, James Ashley, was present without legal representation (pro se). The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present by its agency representative, Rodney Moore, and represented by the Hon. Peter W. Dooley, attorney.

This appeal was filed June 16, 2023. The issue is whether Appellee has proven by a preponderance of the evidence that there was just cause for the dismissal of the Appellant, James Ashley, from duty and pay as a Correctional Officer (CO), effective June 1, 2023, and that such penalty was neither excessive nor erroneous. KRS 13B.090(7).

On October 4, 2024, the parties engaged in a Telephonic Status Conference to discuss the availability of a potential witness: Kevin Mazza, former (now retired) Warden of the Northpoint Training Center. The parties agreed that due to Mr. Mazza's current location and circumstances, his testimony would be taken via ZOOM at a date and time yet to be determined; that the evidentiary hearing would commence as scheduled.¹

¹ See: 10-04-2024 *Interim Order*.

At the evidentiary hearing, the Rule separating witnesses was invoked and employed throughout the course of the proceedings.

The parties had previously tendered (09-27-2024) *Agreed Stipulations of Fact* which shall be set out within the *Findings of Fact* below. Such *Stipulations* also agreed to admission of Joint Exhibits 1 through 6.

The Hearing Officer then discussed the breadth and scope of the 08-24-2023 *Agreed Protective Order*. The parties agreed that such *Order* does not interfere with either the Hearing Officer or the members of the Personnel Board, or its staff, from examining documents or testimony in the case.²

The parties announced they were each ready to proceed. Each party gave an opening statement.

BACKGROUND

1. **Patrick Hawkins** was the first witness called by the Appellee. Since January 2010, Hawkins has been employed by the Justice and Public Safety Cabinet, Department of Corrections. Since February 2019, he has been employed by and is currently a Unit Administrator II at the Northpoint Training Center [09.59.31.679] (T 0:40, 0:50)³

2. Hawkins supervises a specific Unit within the facility: the Segregation Unit, also known as the Special Management Unit (SMU). He is responsible for the Unit's daily operations, programs, security, and any events therein (T 1:25). The Unit houses inmates who present disciplinary issues, safety or security issues, or who are not safe in or around other inmates in the general population (T: 2:27). Some inmates require constant monitoring while others may require regular intermittent observation [10.02.35.477] (T 0:12).

² The 10-07-2024 *Interim Order* included sealing the entirety of the administrative record including exhibits and hearing testimony. As the record is sealed, it was not necessary to redact various portions of either the exhibits or testimony.

³ The video recording from the evidentiary hearing appears on the computer flashdrive as broken down into several 3-minute segments of the proceedings. The information shown in brackets “[]” is the chapter/file number and the information shown in parentheses “()” is the time such statement(s) occur within the identified chapter/file.

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3. The facility staff understand they are to have a level of professionalism and demeanor in dealing with the type of behavioral issues they will face (T 0:45). Officers are trained to deal with inmates who attempt or commit self-harm. Self-harm incidents are "pretty common". Officers are also trained to use their "force tools" in their "force protocol". (T: 1:12, 25).

4. Hawkins identified Joint Exhibit 4, the 5/19/2023 **Memorandum**, as his investigative review and report of the use of force employed by the Appellant, James Ashley, on May 15, 2023, against inmate D'CW. An investigative report is issued in all instances of use of force within the facility (T 2:40). Such reviews and reports are usually performed by the Correctional Major/Shift Captain. Hawkins performs these duties in instances where there exists reason to believe something happened that was outside protocol or policy [10.05.39.196] (T: 0:20).

5. During the investigation, Hawkins spoke with staff and inmates involved in or who witnessed the incident and he reviewed available documentation including camera footage, logs, incident reports. He then determined whether policy and protocol violations occurred (T: 0:50). If he finds an infraction of policy or protocol, he refers the matter to the Deputy Warden and the Warden of the facility (T: 1:35).

6. A few days following the incident, Hawkins spoke with the Appellant and then with Lt. Michael Long. At that time, Hawkins did not believe any protocol or policy infraction had occurred and so he did not press the issue (T: 2:20).

7. Hawkins subsequently spoke with several staff members and inmates (T: 3:00). He then reviewed the incident reports and did not see anything that was "outside of policy"..."It looked pretty standard by protocol" [10.08.42.889] (T: 0:01). However, determining after the discussions with additional staff and inmates that their statements did not line up with the original reports from Ashley and Long, Hawkins decided to view footage from the wall cameras (T: 0:05).

8. Any use of force is a "critical incident" and all staff are required to report it. All staff involved must submit information reports. Those reports are reviewed by the

Shift Commander who compiles the reports in an Incident Report, or "IRT" which includes any photographs and medical assessments (T: 0:44,58).

9. Before force is used, and depending on the situation, staff is required to determine the type of warning to issue and the steps to be taken. If there is a planned use of force the following must occur: give the inmate a warning; bring someone in who is trained in de-escalation to communicate with the inmate; check with medical staff to determine whether OC spray⁴ will result in any adverse reaction from the inmate/whether the inmate has any cardio issues or a pacemaker in the event a taser is used (T: 2:28), [10.14.50.395] (T: 0:03). A seven (7) man use-of-force team is assembled who are briefed on the situation and the de-escalation attempt which, if deemed ineffective, mobilizes the team. The inmate is then given an additional warning before force is used (T: 0:18).

10. In the event staff has not taken immediate steps and the inmate's actions are deemed to continue or will get worse, then "reactive force" is utilized (T: 0:45). The beginning of the instant event with the inmate was a "reactive force" situation as the inmate made comments of committing acts of self-harm; immediate action was required. (T: 1:05). Immediately before force is employed, staff should issue an order to the inmate to cease the behavior (T: 2:15).

11. At this point during the hearing, counsel for the Appellee replayed portions of the video "wall footage" (Joint Exhibit 5). Portions shown were of the walkway where the subject incident occurred on the date and same time as the incident [10.17.54.157] [10.20.57.897] (T:3:03) [10.24.01.645]. Footage was taken from a stationary (fixed position) camera. Hawkins used the GoPro video camera to record the stationary camera footage off the computer [10.24.01.645] (T: 0.01). Sgt. Collins is shown at this point holding the GoPro camera. The inmate has already been sprayed with OC by Lt. Long. The witness concluded the inmate would not stop ripping at his colostomy bag;

⁴ Oleoresin Capsicum. (Joint Exhibit 4).

Lt. Long had left the walk to contact the Shift Captain and coordinate the de-escalation and use-of-force team (T: 0:44, 01:22).

Officer James Ashley comes into view on the walk next to Sgt. Conley [10.27.05.408] (T: 01:00). The inmate has turned away from the door. When using OC spray, the “primary target” includes the eyes, nose and mouth. At this point, the “primary target” was not presented. Ashley stated, “He’s wasting my time,” then left the cell door and posted up against the wall, hiding from the inmate. Once the inmate let his guard down, Sgt. Conley nonverbally cued Ashley with a head nod (T: 02:16).

Following the head nod, Officer Ashley comes back around Conley, opened the staged tray slot, which was not locked as it is supposed to be. Ashley opened the tray slot with one hand and deployed the OC into the cell with his other hand [10.30.09.196] (T: 0:01). Ashley obtained the Mark 9 OC spray from Conley. The Mark 9 OC spray comes out in a cone shape. The spray from the Mark 4 OC comes out in a stream. This was the second deployment of OC by Ashley (T: 0:46, 01:56, 02:12).

This was a situation where a verbal warning was required before spraying the OC. Spraying through the door tray slot is acceptable policy. Without audio on this footage the witness could not conclude whether Ashley did or did not give the inmate the required prior warning (T: 02:30, 02:37, 02:57).

12. Anytime a situation leads one to believe force may be utilized, a staff member posts with a hand-held GoPro for documentation as it captures both audio and video. The camera should be focused on the inmate at all times. [10.33.12.849] (T: 0:48, 01:10).

The inmate is shown blowing his nose, wiping his face, and administering self-care from the first administration of OC. The inmate goes to his desk and looks at some papers. At that instant, the tray slot is opened and OC deployed onto the inmate (T: 02:18, 02:57).

13. While viewing this video, Hawkins did not hear any warning given prior to deployment of the OC spray. In this instance deployment of the OC was not justified. The inmate was not committing any act of self-harm. Had the inmate engaged in self-

harm behavior, there should first have been a warning to cease the behavior [10.36.16.512] (T: 0:13, 0:33, 0:50).

14. After an incident warranting use of force subsides, and there is a subsequent incident, the procedural process starts again in order to justify use of force for the second incident. What happened in the video was a “reactive use of force” while the inmate did not demonstrate an act of self-harm. [10.39.20.241] (T: 0:45, 01:40). It was known that this particular inmate had in the past made “numerous” statements of self harm. (T: 02:00).

15. After reviewing Appellant’s Exhibits 1 and 2, the witness testified the inmate was not using his colostomy bag for its intended purpose. [10.42.23.952] (T: 01:45).⁵

16. Mr. Hawkins reviews incident reports on a level to determine if the operations of the Unit by his officers are compliant with policy. Such review is not a part of a Shift Supervisor’s review that occurs under CPP 15.2, the policy cited by the Appellant. A supervisor’s review determines if a report needs to be sent back for a re-write or re-investigation. The instant review by Hawkins was not a Supervisor’s review. (T: 02:19, 02:57).

17. The Appellant presented a replay of part of the walk video. The witness stated it showed the Appellant talking to the inmate but there was no way to determine from the video whether or not he was giving the inmate a warning. [10.45.27.643] (T: 01:58). A telephone is located at the end of the walk to contact the Captain’s Office. [10.48.31.356] (T: 0:020). Hawkins stated he saw Sgt. Conley motion to somebody; on the GoPro one hears him say, “I ain’t got no keys.” (T:02:49). Hawkins heard Conley state, “he’s messing with his bag.” [10.51.35.173] (T: 0:07). At that point, Sgt. Conley is seen to be observing the inmate while holding the GoPro. Earlier in the video, one can see the inmate face away from the camera and that the Sgt. believed the inmate was fooling with his colostomy bag. Conley gave the inmate an order to stop and turn

⁵ Appellant’s Exhibits 1 and 2 were admitted.

around. The inmate did not comply (T: 01:50). Conley then motioned for somebody to come from the walk. (T: 02:16). Hawkins could not say Conley had engaged in de-escalation at that point (T: 02:29).

When one zooms in on the video, one can see Conley give a clear head nod. [10.54.38.971} (T: 0:50).

18. Once a plan use of force is authorized it comes under a different policy: CPP 9.17. Either the Compliance Team or the Use of Force Team will apply restraints on the inmate. In this instance, neither team did that. Only a single officer applied the restraints. (T: 02:05).

19. Certain steps are to be followed after the use of OC (force): the incident is to be reported; the inmate will be removed from the cell if compliant, with appropriate restraints; the inmate is given the option of de-contamination, and then assessed by medical staff. Depending on the situation, the inmate would be placed on behavior watch or mental health watch (T: 0:20).

20. Hawkins opined that the Appellant's supervisor did not issue an order to apply the OC spray. [10.57.42.758] (T: 0:10). The head nod by Conley signified "the primary target area is exposed." (T: 0:17). Exposure of the primary target area is necessary to accomplish the purpose of spraying OC (T: 0:22). At this time, Conley's officer rank was higher than Ashley's. He was not Ashley's supervisor. Lt. Long was the Appellant's supervisor (T: 0:32). Ashley was a permanent SMU officer; Sgt. Conley was a yard supervisor. "So, that was Officer Ashley's house, not Sgt. Conley's house." (T: 01:25).

21. Hawkins opined that Ashley was waiting for the head nod to simply determine if the inmate was able to be sprayed. He did not think Ashley was looking to Conley for a directive or instruction (T: 0:54, 01:15). Ashley is a well-trained officer and does not need to look to Sgt. Conley to be told or directed to deploy or not deploy force in a use of force situation. (T: 01:40). In his written incident report, Ashley failed to report his second deployment of OC (T: 01:52).

22. When the Appellant was off the walk, Conley, by his head nod, was asking for assistance. By the time Ashley arrived at the cell, the self-harm had ceased. [11.00.46.396] (T: 0:01). The inmate was at the back of the cell looking at paperwork. He was not causing any self-harm when Ashley came around, opened the tray slot, and sprayed the OC. (T: 0:32).

23. In Hawkins' examination of Joint Exhibit 4, his 05-19-2023 Memorandum to Deputy Warden Daniel Napier, he read into the record the last sentence of his summary of findings on page 4:

Officer Ashley then upon getting a visual cue from Sgt. Conley rushes to the tray slot and without verbal orders or even time to determine if IM (redacted) was still causing self-harm, blindly deploys OC onto IM (redacted)" (T: 02:25).

There was no way for the Appellant to see what was going on in the cell before his deployment of OC; he had no view of the cell. (T: 02:55).

24. After Conley's head nod, the proper procedure for the Appellant would have been to leave the walk. No immediate use of force was needed and no self-harm was occurring. A team of de-escalators was en route to the Unit. [11.03.50.134] (T: 01:45). He should have allowed the de-escalators to arrive on scene and communicate with the inmate to gain compliance. If this was not successful, then the cell entry team would give the inmate directions to physically get down and face away from the door. The team would then enter the cell and apply restraints, remove the inmate from the cell, decontaminate the inmate of OC, and potentially have him undergo medical assessment. The inmate would then potentially be placed in an emergency restraint chair. (T: 02:10).

25. During his investigation Hawkins did not interview anyone on the assembled team. (T: 03:02).

26. Although Sgt. Conley was a yard supervisor, he was the only supervisor on the walk at the time of the incident. [11.06.53.911] (T: 0:50). He did not give a directive to Ashley. Nothing was stated to the Appellant to deploy OC. The Appellant

took that action on his own without any instruction from Sgt. Conley. (T: 01:00). Conley informed Ashley of the inmate's behavior; he did not give him a directive (T: 02:02).

27. **Rodney Moore** was the next witness for the Appellee. For the past two (2) years Moore has been employed by the Justice and Public Safety Cabinet as its Executive Director of Human Resources. [11.15.39.607] (T: 0:40). He is responsible for all human relations matters in all departments of the Cabinet. He reviews all Cabinet discipline matters for consistency and gives recommendations to the Warden. He has been reviewing DOC discipline since 2016 (T: 01:15, 01:50).

28. He examined Joint Exhibit 2 and identified it as the May 31, 2023 dismissal letter issued by Warden Kevin R. Mazza to James Ashley. Mazza, as Warden of the facility, was the appointing authority in this case who made the final decision on the Appellant's discipline. The letter was approved and signed by Warden Mazza. [11.18.43.054] (T: 01:55, 02:18). Prior to issuance of a dismissal letter, an employee is issued an intent to dismiss letter and provided the opportunity to have a pretermination hearing (T: 02:48).

29. In a termination matter, Moore examines the severity of the incident, whether the employee has any prior disciplinary history, whether correct policy has been cited in the letter, and how the agency handled past use of force cases [11.21.46.780] (T: 0:12). If information is missing, he advises the Warden about that. If Moore disagreed with the Warden's recommendation, he so advises and gives the Warden his own recommendation based on consistency with past similar cases (T: 01:09). Moore also considers whether an employee's past discipline was for a similar offense; how forthcoming the employee was about the incident, and several other factors that may be relevant to a dismissal (T: 02:25). He stated it is a rare occasion when he has disagreed with the level of discipline recommended by an appointing authority unless he feels such recommendation was unlawful or totally against policy. [11.24.50.421] (T: 0:10).

30. Use of force incidents could lead to allegations of possible civil rights violations. The Department is "littered" in litigation with use of force issues and it is

"important that we get those issues right." (T: 01:24). Moore did not see any issues with the Warden's citation of the policies used in the instant dismissal pursuant to statute. (T: 02:55). Dismissal is usually a reasonable response in an incident of unauthorized use of force [11.27.54.0764] (T: 025). He opined dismissal in this case was not excessive (T: 0:35); that the video reaffirms the reasonableness of the level of discipline. (T: 01:02).

31. The progressive discipline policy includes: verbal reprimand or a performance improvement plan, written reprimand, suspension, demotion, or dismissal (T: 01:55). Each case is reviewed independently. A case may be severe enough to justify skipping progressive steps of discipline and issuance of a dismissal (T: 02:40).

32. Moore was not sure how long the Appellant had been a Correctional Officer or had worked at the facility (T: 03:02), [11.30.57.808] (T: 0:04).

33. Moore had reviewed whether the Appellant had a prior disciplinary history. He did not remember if Ashley had any such history. (T: 0:35). He stated that a written reprimand is not considered prior disciplinary action; that it is corrective action. Corrective action is never included in a dismissal letter. (T: 0:42). He opined that the Appellant had violated CPP 9.1, II POLICY and PROCEDURE, A.4 which states:

4. Only the minimum amount of force necessary shall be used to accomplish the purpose for which the use of force was required." Joint Exhibit 1. (T: 02:40).

He also stated there was nothing in the policy that mandated dismissal; issuance of a dismissal was within the discretion of the Warden [11.34.01.489] (T: 02:16).

34. The Hearing Officer noted the dismissal letter also cited policy NTC 9.10.01(1) in detail and requested that counsel for the Appellee provide a copy of that policy. Counsel did obtain and provide a copy of the policy and it was marked by the Hearing Officer and admitted as Hearing Officer Exhibit 1.

35. **James Ashley**, the Appellant, was the next witness called to testify for the Appellee. Prior to his termination, Ashley had been employed for two (2) years and four

(4) months, beginning February 14, 2021, as a Correctional Officer (CO) by the Kentucky Department of Corrections at the Northpoint Training Center [11.37.05.275] (T: 02:20). He completed basic training and AIC training in corrections through the U.S. Army over 9 months (T: 02:40). He then completed the Department of Corrections orientation training [11.40.08.961] (T: 0:40). Through such orientation he received possession of all policies and procedures applicable to his employment (T: 0:50). He identified Appellee's Exhibit 1 as the Orientation Program for New Institutional Staff which he had initialed and signed signifying receipt of the documents and information listed. (T: 01:25, 02:21).⁶

36. Ashley's duties as a CO in the SMU were to ensure the safety and security of the institution. He had been placed in the SMU from time to time to assist with inmates housed there due to their disciplinary problems or for having engaged in hunger strikes. This was his assigned post at the date of his employment termination. (T: 02:28).

37. At the time of the subject incident, Lt. Michael Long was Ashley's supervisor. Long took his orders from Unit Administrator Patrick Hawkins. [11.43.12.839] (T: 01:19). Lt. Long had been the first to deploy OC against the subject inmate on the day in question. He then ordered the Appellant to stay and watch the inmate while he (the Lt.) left the walk to retrieve the GoPro camera, as the inmate had already exhibited self-harm attempts (T: 01:19). After the Lt. left, Ashley observed the inmate show signs of the same behavior he had exhibited that resulted in the Lt. having sprayed him with OC; he was tearing at his colostomy bag. (T: 01:40). Ashley warned the inmate to stop his actions. The inmate did not comply (T: 02:01).

Ashley deployed his OC spray to stop the inmate from committing self-harm. The Appellant then stepped away from the inmate's door to avoid further escalation (T: 02:15, 02:50).

⁶ Appellee's Exhibit 1 was admitted.

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38. Sgt. Conley, who was conducting rounds and was on the walk, did not have keys to the inmate's cell door. Ashley stayed on the walk so the Sgt. would not be without keys or other equipment. At that time, Ashley was aware the Captain was assembling a team to come to the scene. [11.46.16.521] (T: 0:04, 0:35).

39. Although Ashley did not see specifically what the inmate was doing, he did hear the inmate's voice threaten self-harm by stating, "Have you ever seen guts before?" (T:01:04). Ashley stepped away. Conley then gave the Appellant a head nod. The Appellant stated that the head nod was "my acknowledgment" the inmate was doing it again. Conley then stated the inmate was messing with his colostomy bag again. To Ashley, that was his cue to deploy the OC and follow Conley's directive (T: 01:20). He also heard the inmate say, "If Officer Ashley sprays me, then I'm gonna rip this m----f—er out". Ashley stated he took no action until he was given the cue by Sgt. Conley. (T: 02:02).

40. If an inmate commits self-harm, it is within the officer's discretion to employ reactive use of force. Prior to having first employed OC against the inmate, Ashley had seen the inmate commit self-harm, immediately after Lt. Long left the walk. When Ashley first deployed OC, the inmate blocked the tray slot with a smock or blanket. [11.49.20.259] (T: 0:02, 0:40, 01:01). The Appellant believed this first deployment constituted a least amount of force level as the inmate had blocked the cell tray slot and the spray did not make contact with the inmate. [12.01.35.173] (T: 02:20). When he left the walk and made the call to the Captain's office, he had no intent to return to the walk until he was told to come back by Sgt. Conley [12.10.46.299] (T: 02:30).

41. When there is cause for use of reasonable force, such established cause is not sufficient to carry over time to justify subsequent use of force. [11.49.20.259] (T:01:27).

42. Although the officers do not take statements threatening self-harm lightly, statements alone are not sufficient to deploy OC. Ashley stated that, however, at the

time they were trying to remove the inmate from the cell. The inmate was not compliant. (T:01:27, 02:30).

43. Sgt. Conley was in the cell window recording the inmate with the GoPro. Ashley stated he followed Conley's order to deploy OC without seeing anything inside the cell [11.52.23.955] (T: 0:10). He had asked for and Sgt. Conley gave Ashley his MK9 OC spray. MK9 fans the spray out and is easier to use through the tray slot, whereas the MK4 sprays in a stream. [12.01.35.173] (T: 02:30).

44. After Ashley's 2nd deployment of the OC spray, he placed mechanical restraints on the inmate because the inmate agreed to be "cuffed up". He placed him in restraints to prevent him from making additional self-harm attempts [11.58.31.429] (T: 02:50). Ashley then notified the Captain's office and the supervisor in charge of the Cell Extraction Team. Ashley left the walk to write his report when the CET arrived and took over. (T: 01:30).

45. The Appellant was asked to review Joint Exhibit 3-Incident Report Summary. Ashley acknowledged it was a summary of the entire incident with reports from the Cell Extraction Team, reports on the use of OC (force), and reports from officers involved in the incident (T: 01:12). The Appellant had typed his own report as well as the report of Lt. Long. The Information Report appearing at page 8 is the Appellant's report. (T: 01:12, 01:55, 02:40).

Ashley acknowledged every use of force with OC would be required to be included in his report. However, due to a "big use of force and high stress situation" following the incident, he claimed he made a mistake by forgetting to add his 2nd deployment of OC in his report. [11.55.27.694] (T: 02:10). The Appellant contended, however, that policy requires every report submitted is to be reviewed by the Captain's Office before it is sent to the Warden; that if anything is missing, such as in this matter, it is supposed to be sent back to him to make corrections. Ashley's report was not sent back to him. [11.58.31.429] (T: 0:30).

46. Ashley further stated Sgt. Conley was still his supervisor on the scene and he (Ashley) took him (Conley) at his word. The Appellant, having heard the inmate say

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"Have you seen guts before?" and Sgt. Conley having given him a cue by his head nod, warranted the 2nd use of force. [12.04.38.922] (T: 02:40).

47. The Appellant acknowledged that, prior to his 2nd deployment of OC, he was required to tell the inmate to stop, prior to using the spray and that he failed to do this [12.13.50.039] (T: 0:55).

48. Counsel for the Appellee stated that they had no additional witnesses today; that former Warden Mazza would testify at a future date by Zoom. After discussion, the parties both decided neither would call Mazza as a witness. The Appellee closed its case-in-chief. [12.13.50.039], [12.16.53.748].

49. The first and sole witness for the Appellant was the Appellant, **James Ashley**. He testified he had been given a directive by Lt. Long to stay at the inmate's cell door as the inmate made self-harm attempts. While Lt. Long was away from the walk, the inmate continued self-harm attempts by tearing at his colostomy bag. [12.31.44.863] (T:01:15). Ashley gave the inmate a full directive to stop his behavior. (T: 01:20). The inmate did not comply. Ashley attempted to deploy OC spray through the food slot in the door. The OC deployment was unsuccessful because the inmate had blocked the door slot with a smock (T: 01:35). Such force was a "reactive" use of force [12.34.48.357] (T: 0:04).

50. The Appellant then notified his supervisor, Lt. Long, of the OC deployment. (T: 01:52). Sgt. Conley arrived on the scene with the GoPro camera. Ashley left the walk to notify the Captain's office and to wash his hands of OC. While outside the walk, Ashley heard the inmate say, "Have you ever seen guts?" (T: 01:57, 02:07).

51. Sgt. Conley notified Ashley to return to the walk and then told the Appellant "He's messing with his bag." (T: 02:10). The Appellant asked Conley for his MK 9 spray because Ashley's MK 4 had not been strong enough to reach the inmate on that first deployment (T: 02:17).

52. The inmate did not make self-harm threats at that point and Ashley stepped away so the matter would not escalate. Sgt. Conley then coughed to get

Ashley's attention and gave him a head nod that the inmate was making another attempt. (T: 02:22). The Appellant stated he followed the directive given to him and he deployed the MK 9 against the inmate (T: 02:37).

53. After that deployment, Ashley handed the MK 9 back to Conley. He then placed wrist restraints on the inmate and notified his supervisor the inmate was now in restraints. (T: 02:47). The Appellant then left the walk to type up his report and left the situation to the Cell Extraction Team. (T: 03:00).

54. The Appellant believes his termination from employment was excessive. Prior to that date, he had only received a written reprimand through the course of his two (2) years and four (4) months' employment. He believes he exercised a justified use of force. [12.40.55.832] (T: 0:29, 0:44). He also believes the written report he sent to the Captain's office, once reviewed there, should have been sent back to him for a re-write if something was missing from his report; that it was the supervisor's duty to do so and, in this instance, it had not been done (T: 01:20). He then read from Appellant's Exhibit 3⁷, KCCP Policy Number 15.6, Adjustment Procedures and Programs, [12.43.59.584] (T:01:37). He believed if something was missing from his report, he should have been so advised by his supervisor before it was sent to the Warden [12.47.03.404] (T: 0:35).

55. The Appellant called no other witnesses and closed his case. The Appellee called no witnesses in rebuttal. The parties reserved their closing arguments for their respective briefs and set brief submission dates with the Hearing Officer.⁸ The entire administrative record was sealed. The Hearing Officer discussed a briefing schedule and requested their respective arguments and citations of authority in support of their positions. It was agreed the parties would submit their briefs on or before

⁷ Admitted into evidence.

⁸ See: 10-07-2024 *Interim Order*.

November 6, 2024, with no responsive briefs.⁹ The Appellant timely submitted his brief. The Appellee did not submit a brief.

FINDINGS OF FACT

1. James Ashley, the Appellant, was a classified employee with status. He had been employed two (2) years and four (4) months, beginning February 14, 2021, by the Justice and Public Safety Cabinet, Department of Corrections (the Appellee). At all times he worked at Northpoint Training Center as a Correctional Officer (CO). The Appellant held the position of Correctional Officer at the time of the underlying incidents and prior to the relevant discipline.

2. The date of the incident that resulted in Ashley's termination occurred on May 15, 2023, in the Special Management Unit (SMU). His duties included ensuring the safety and security of the institution and assisting with inmates housed in the SMU due to their disciplinary problems or having engaged in hunger strikes. At that time, Lt. Michael Long was the Appellant's supervisor.

3. On May 15, 2023, Lt. Long had deployed OC spray against inmate D'CW (hereafter, the "inmate") because the inmate made self-harm threats and had pulled at his colostomy bag.¹⁰ After the OC deployment, Lt. Long ordered Ashley to stay at the inmate's cell door while Long left the walk to retrieve the GoPro camera.

4. Once Long left, the Appellant observed the inmate tearing at his colostomy bag. Ashley warned the inmate to stop his actions. The inmate did not comply. Ashley then deployed his MK 4 OC spray through the open slot in the inmate's cell door. The inmate blocked the spray with his smock or a blanket. Such a use of force was a "reactive" use of force by the Appellant. Ashley then stepped away from the inmate's cell.

⁹ See: 10-07-2024 *Interim Order*.

¹⁰ Oleoresin Capsicum (Joint Exhibit 4).

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5. Sgt. Joseph Conley, who was a yard Sgt., came on to the walk while conducting his rounds. Ashley was aware at that time that the Captain was in the process of assembling a team to come to the scene. While Ashley left the walk to contact the Captain's office and wash his hands, he heard the inmate state, "Have you ever seen guts before?"

6. Sgt. Conley directed Ashley to return to the walk. Sgt. Conley remained at the inmate's cell and recorded audio/video through the cell window with a GoPro camera. Conley told the Appellant "He's messing with his bag." Ashley requested and received from Conley the Sgt's MK 9 OC spray. MK 9 fans out the spray pattern of OC whereas MK 4 streams the spray of OC. Ashley stood out of the inmate's sight, behind Sgt. Conley. When Conley gave Ashley a head nod, Ashley interpreted that to be a signal that the inmate's "target area" of eyes, nose and mouth was exposed, and as a directive to deploy the OC. Ashley deployed the OC through the tray slot of the inmate's cell door, which spray hit the inmate.

7. The Appellant admitted in testimony that, prior to his 2nd deployment of OC, (a) he was required to tell the inmate to stop his behavior, and (b) he (Ashley) had failed to do so.

8. The inmate thereafter consented to being placed in mechanical hand restraints. Ashley placed the inmate in hand restraints when the inmate placed his hands through the cell door tray slot.

9. The Cell Extraction Team arrived and removed the inmate from his cell.

10. The Appellant left the walk and typed up his report of the incident (Joint Exhibit 3, p 8). He also typed up Lt. Long's report.

11. The Appellant acknowledged that every use of force with OC would be required to have been included in his written report. He admitted, however, that he "made a mistake" by forgetting to include his 2nd deployment of OC in the report due to a "big use of force and high stress situation".

12. Warden Kevin R. Mazza, after having reviewed all pertinent documents, including the report of the investigation of the May 15, 2023 incident (Joint Exhibit 3)

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and having considered the statements made by Appellant at his May 25, 2023 pre-termination hearing,¹¹ decided to dismiss Appellant:

...I have determined that the clear weight of the evidence establishes that you committed the charges as outlined in my letter to you dated May 22, 2023.

Therefore, based on the authority of KRS 18A.095, you are hereby notified that you are officially dismissed from duty and pay effective June 1, 2023."

"You are being dismissed from your position for violation of 101 KAR 1:345, Section 1 (poor work performance), for the specific reasons outlined in my letter to you dated May 22, 2023, and these reasons are again indicated as follows:

On May 15, 2023, you were involved in a Use of Force Extraordinary Occurrent Report (EOR) involving Inmate (redacted by Hearing Officer), Department of Corrections number (redacted by HO).

The letter also states that the Appellant:

...failed to report an attempt of force onto Inmate (redacted by HO)...when you were observed spraying OC through the door crack and tray slot of cell 301...at no time in any video review was (sic) you heard to give Inmate (redacted by HO) any orders to stop...Inmate (redacted by HO) was not causing self-harm or doing anything else that would warrant use of force...You then dropped the tray slot...you partially closed the tray slot and walked away from the cell, which appears to be an attempt to lull Inmate (redacted by HO) into a position where OC could be sprayed onto him. You then, upon getting a visual cue from Sergeant Joseph Conley, rush to the tray slot, and without verbal orders or even time to determine if IM (redacted by HO) was still causing self-harm, blindly deploy OC onto Inmate (redacted by HO).

¹¹ A pretermination letter or memo to Appellant was not produced in evidence at the hearing.

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It appears from the letter that the Warden agreed the Appellant received a “visual cue” from Sgt. Conley to proceed.

13. The Warden cited the following policy provision violations: CPP 9.1, II. POLICY and PROCEDURE-Use of Force and Mechanical Restraints and Northpoint Training Center Policy and Procedure 9.10.01 (see Joint Exhibit 1 and Hearing Officer Exhibit 1, respectively).

14. The policies at issue and listed in the May 31, 2023 dismissal letter were in full force and effect at the time of the incident and subsequent issuance of the dismissal letter. The parties stipulated the dates of the letters are accurate.

15. The parties agreed to admission of the following Joint Exhibits which were admitted, examined and considered by the Hearing Officer:

JE 1: CPP 9.1-Use of Force and Mechanical Restraints

JE 2: May 31, 2023 dismissal letter signed by Kevin R. Mazza, Warden, Northpoint Training Center

JE 3: Extraordinary Occurrence Report No. IRTR161-12

JE 4: May 19, 2023 Memorandum of Use of Force Review by Patrick Hawkins

JE 5: Security camera footage of the underlying incident (on a flash drive)

JE 6: The Appeal Form filed by the Appellant with the Kentucky Personnel Board on June 16, 2023.

16. The following additional Exhibits were admitted, examined and considered by the Hearing Officer:

Appellee's Exhibit 1: Orientation Program for New Institutional Staff, signed and dated by Appellant on 2-5-21

Appellant's Exhibit 1: Disciplinary Report Form (with attachments) dated April 27, 2023 signed by Jordan Ratliff

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Appellant's Exhibit 2: Disciplinary Report Form (with attachments) dated April 5, 2023 signed by James Ashley

Appellant's Exhibit 3: CPP 15.6-Adjustment Procedures and Programs

Hearing Officer Exhibit 1: Northpoint Training Center Policy Number 09-10-01-Use of Force: Prohibiting Personal Abuse and Corporal Punishment

17. The Hearing Officer finds the following witnesses who testified at the evidentiary hearing to be credible: Patrick Hawkins, Rodney Moore, and for the most part, James Ashley. While the evidence showed the subject incident was in the midst of encounters with the Inmate and a previous self-harm attempt, the Hearing Officer does not agree Ashley had no alternative to "obeying" the "visual cue" from Sgt. Conley. Also, Ashley's admissions at hearing (noted above) show he failed to properly follow procedures.

18. The parties' 09-27-2024 *Agreed Stipulations of Fact* is incorporated by reference herein in its entirety.

19. The Appellant timely filed his appeal with the Kentucky Personnel Board on June 16, 2023.

CONCLUSIONS OF LAW

1. A classified employee with status shall not be dismissed, demoted, suspended or otherwise penalized except for cause. KRS 18A.095(1).¹² Appointing authorities may discipline employees for lack of good behavior or the unsatisfactory performance of duties. 101 KAR 1:345, Section 1. At the time of his termination from employment, the Appellant, James Ashley, was a classified employee with status.

2. On May 31, 2023 (Joint Exhibit 2), Kevin R. Mazza, Warden of Northpoint Training Center, issued a letter to James Ashley, the Appellant, advising the Appellant

¹² This is the version of the statute that was in effect on the effective date of the Appellant's termination: June 1, 2023. The newer version of the statute became effective June 29, 2023 which eliminated the language "...or otherwise penalized..." and added the language "...without pay, or involuntarily transferred...".

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he was, by authority of KRS 18A.095, dismissed from duty and pay effective June 1, 2023 for violation of 101 KAR 1:345, Section 1 (poor work performance) "for the specific reasons outlined in my letter to you dated May 22, 2023..." which reasons were reiterated in the dismissal letter pertaining to the May 15, 2023 use of force incident:

You failed to report an attempt of force onto Inmate *** on the 300 walk SMU camera at TS-12:38:45 and 12:38:50 when you were observed spraying OC through the door crack and tray slot of cell 301."..."When you arrived at cell 310¹³, Inmate *** was not causing self-harm or doing anything else that would warrant use of force. You then dropped the tray slot, but since Inmate *** covered his tray slot with his blanket, preventing you from spraying Inmate ***, you partially closed the tray slot and walked away from the cell, which appears to be an attempt to lull Inmate *** into a position where OC could be sprayed onto him. You then, upon getting a visual cue from Sergeant Joseph Conley, rush to the tray slot, and without verbal orders or even time to determine if IM *** was still causing self-harm, blindly deploy OC onto Inmate ***.

3. The preponderance of evidence shows the Appellant, James Ashley, by his actions taken against an inmate on May 15, 2023, were in violation of CPP 9.1, II. POLICY and PROCEDURE-Use of Force and Mechanical Restraints and Northpoint Training Center Policy and Procedure 9.10.01; that such acts constituted violation of 101 KAR 1:345, Section 1 (poor work performance and per the authority of KRS 18A.095, the Appellant was properly notified of his dismissal from duty and pay effective June 1, 2023.

4. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, has proven by a preponderance of the evidence (KRS 13B.090(7)) that there was just cause for the dismissal of the Appellant, James Ashley, from duty and pay as a Correctional Officer (CO) effective June 1, 2023, and that such penalty was neither excessive nor erroneous.

¹³ It is noted an error was made in the identity of the inmate's cell. However, actions taken by the Appellant may be seen on the camera video (Joint Exhibit 5).

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **JAMES ASHLEY V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL No. 2023-080)** be **DISMISSED**. In accordance with the 10-07-2024 *Interim Order* the entirety of the administrative record, including pleadings, exhibits, briefs, orders, and video recording of the evidentiary hearing shall be sealed in the record.

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 fifteen (15) 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 Kentucky Personnel Board shall be served on the opposing party.

The Kentucky 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 Kentucky Personnel Board. 101 KAR 1:365, Section 8(2).

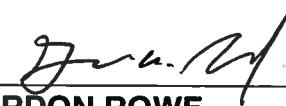
The parties are strongly encouraged to send any exceptions and/or requests for oral argument by email to: PersonnelBoard@ky.gov.

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

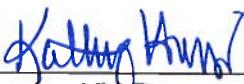
ISSUED at the direction of the Hearing Officer Roland Merkel this 16th day of January, 2025.

KENTUCKY PERSONNEL BOARD


GORDON ROWE
EXECUTIVE DIRECTOR

A copy hereof this 16th day of January, 2025 was mailed to:

James Ashley
Hon. Peter W. Dooley
Hon. Rosemary Holbrook (Personnel Cabinet)


for the KY Personnel Board