

CERTIFICATION OF PERSONNEL BOARD RECORDS

I certify that attached hereto is a true and correct copy of the Findings of Fact, Conclusions of Law and Recommended Order and Final Order in the case of **KEVIN BAILEY VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF JUVENILE JUSTICE (APPEAL NO. 2014-030)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 15th day of October, 2014.



MARK A. SIPEK, SECRETARY
KENTUCKY PERSONNEL BOARD

Copy to Secretary, Personnel Cabinet

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-030

KEVIN BAILEY

APPELLANT

VS.

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

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

APPELLEE

** ** ** ** **

This matter came on for an evidentiary hearing on August 11, 2014, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before R. Hanson Williams, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Kevin Bailey, was present at the hearing and was not represented by legal counsel. Appellee, Justice and Public Safety Cabinet, Department of Juvenile Justice, was present and was represented by the Hon. Adam Adkins. Appearing as Agency representative was Mary Caldwell.

BACKGROUND

1. This matter involves a three-day suspension given to the Appellant by letter dated February 13, 2014. A copy of which is attached hereto as **Recommended Order Attachment A**.
2. The Appellee was assigned the burden of proof by a preponderance of the evidence to show that the suspension was neither excessive nor erroneous and was appropriate under all surrounding circumstances.
3. Prior to the taking of testimony, the Appellant announced he was not contesting the findings of the Internal Investigative Branch (IIB) that he had violated certain policies. Rather, the sole issue preserved by the Appellant was the severity of the three-day suspension imposed and whether it was appropriate.

4. The Appellee's first witness was **Mary Caldwell**. She has been the Personnel Administrator with the Agency for the past seven years. A part of her duties include the handling of disciplinary actions.

5. She explained that a typical process in deciding how to mete out discipline is, in this case, an IIB unit conducts an investigation and submits a report ultimately to the Commissioner for the Agency. As part of the process, the report is sent to the Regional Manager and then the Facility Manager of the affected facility, a disciplinary packet is then prepared and sent up through the chain of command to the DJJ Personnel Branch for the witness's review. It is also reviewed by the legal staff and the ultimate recommendation is then sent back up the chain of command to be ultimately ruled upon by the Commissioner.

6. In this case, the witness recommended the three-day suspension which was approved.

7. The witness testified that she reviewed the IIB report along with the complete personnel file of the Appellant. The witness stated that the report herein determined that the force used by the Appellant had been unwarranted and could have resulted in an injury from the incident which occurred October 25, 2013.

8. In summary, the witness testified that DJJ Training Branch Instructor, Suzanne Fisher, reviewed a surveillance video tape of the entire incident and also determined that excessive use of force with an unwarranted restraint was used by the Appellant. These actions were deemed to have resulted in violations of DJJ Policy #102, "Employee Ethics," I., IV.(B); DJJ Policy #104, "Employee Code of Conduct," I., IV.(B), (F), (P), (Q), (R), and (S); DJJ Policy #208, "Youth Rights," IV.(H); and DJJ Policy #318, "Behavior Management," I., IV.(C)(1), (H) and (K).

9. The Hearing Officer will not go into detail surrounding these policies, as the Appellant has admitted he accepts his actions constituted violation of them.

10. The witness was then questioned as to what options the Agency had in deciding upon the punishment to impose. She answered that options might be: (1) implementation of a Performance Improvement Plan for the employee; (2) a written reprimand; (3) various levels of suspension; and (4) a demotion and (5) all the way up to a dismissal.

11. In considering certain factors in deciding upon a recommended course of action, the witness testified that she considers in the case of force or restraint, (1) was it necessary?; (2) was the technique appropriate?; (3) did any injury result?; and (4) the prior disciplinary action of the offender, except in cases where the incident itself is considered egregious.

12. The witness went on to explain that in examining the Appellant's personnel file, she had found he had suffered no prior disciplinary action in his career with the Agency, which was in excess of fourteen years. In this case, she felt the three-day suspension was appropriate because the primary mission of the Agency is to protect youth and keep them safe.

13. With this testimony, the Agency closed.

14. The Appellant, **Kevin Bailey**, called himself as his only witness. At the time of this incident, Appellant had been employed at the Green River Youth Development Center (YDC) as a Youth Worker III for approximately fourteen years. He testified that he now serves at that facility as a Mechanical Maintenance and Operations Technician III.

15. The Appellant testified generally that he felt the suspension was too severe, and that he has seen other employees receive progressive discipline for certain violations. However, he was unable to state whether the violations he spoke of were ones involving excessive force and inappropriate restraints or whether some other type of underlying violation.

16. He testified that he was running the shift on October 25, 2013, when the incident occurred. He stated that the youth in question had gone from a timeout to being placed in intensive supervision. As a result, policy called for the removal of his cap, as the workers must be able to see the youth's face. In this case, the youth was also pulling up his sweatshirt over his face and it was decided by the Appellant and his coworker that this must also be removed. The removal of these items was a precursor to the youth being placed in isolation. The Appellant stated that at that time, that was the YDC policy on how to treat youths in isolation.

17. Appellant also remarked that following his being written-up and this matter referred for discipline, that his supervisor at the Agency told him he would expect no more than a written reprimand. The Appellant then disclosed that in 2002, 2004, and 2006, he had had supervisor conferences with his supervisor to discuss minor problems.

18. Appellant then introduced his annual performance evaluations for the years 2011, 2012, and 2013. The evaluations show that the Appellant was rated as "Highly Effective" in all three years. The Appellant further clarified that he believes his actions on October 25, 2013, were done in a manner like he had been taught and had been performing for fourteen years. He stated that the youth on the day was restrained no longer than absolutely necessary.

19. He completed his testimony by stating that he and coworker Johnson were the ones removing the youth's cap and shirt on that day. However, it was necessary for him and three other workers to remove the youth's pants, socks, and boots that day. He testified that coworker Johnson also got a three-day suspension.

20. With that the Appellant closed.

FINDINGS OF FACT

1. The Appellant admitted he violated the policies listed in his suspension letter.
2. The Appellant is an employee with fourteen years of service as a Youth Worker. He has no prior disciplinary actions.
3. The Appellant was rated "Highly Effective" on his Annual Performance Evaluations for the years 2011, 2012, and 2013. The Hearing Officer notes the incident in question occurred October 25, 2013, yet does not seem to have been a negative influence on his 2013 performance rating.
4. The Appellant's actions on October 25, 2013, did not result in any injury to the youth involved herein.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law the Appellee failed to carry its burden of proof to show that a three-day suspension was appropriate under all the surrounding circumstances.
2. Given Mary Caldwell's testimony as to the available options in deciding upon the appropriate discipline, considering there was no injury to the youth and the Appellant had suffered no previous disciplinary actions, the Hearing Officer recommends the Appellant's suspension be reduced from three days to one day.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **KEVIN BAILEY VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF JUVENILE JUSTICE (APPEAL NO. 2014-030)** be **SUSTAINED to the extent** the three-day suspension be reduced to a one-day suspension; that he be awarded two days' back pay; to reimburse Appellant for any leave time he used attending the hearing and any pre-hearing conferences at the Board; and that he otherwise be made whole. **[KRS 18A.105, 18A.095(25), and 200 KAR 12:030.]**

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).

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

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 R. Hanson Williams** this 10th day of September, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof mailed this date to:

Hon. Adam Adkins
Kevin Bailey



JUSTICE AND PUBLIC SAFETY CABINET

Steven L. Beshear
Governor

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J. Michael Brown
Secretary

A. Hasan Davis
Commissioner

February 13, 2014

Mr. Kevin Bailey

VIA HAND-DELIVERY

Dear Mr. Bailey:

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 three (3) working days, effective beginning February 27, 2014, continuing on February 28, and again on March 1, 2014.

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

Poor Work Performance and Misconduct, i.e., as reported by Green River Youth Development Center Juvenile Facility Superintendent II Gene Wade, you demonstrated poor work performance and misconduct by use of excessive force with the unwarranted restraint of a resident. An investigation was conducted by the Justice and Public Safety Cabinet, Internal Investigations Branch (IIB), and the allegation of your restraint of a resident using excessive force was substantiated. The findings are contained in the investigative report IIB #2504-13, dated December 2, 2013.

For the investigation, IIB Investigators Ed Jewell and James Gabbard reviewed the facility surveillance videotape of the restraint of Youth*, still photographs of your restraint of Youth*, Isolation/Incident Report Form and Isolation/Incident Report Form Addenda. Investigator Jewell conducted interviews with Youth Services Program Supervisor Leonard Renfrow, Youth Worker II Michael Johnston, Youth Worker Supervisor Rick Coats, Youth* and you. From the investigation, it was determined that at approximately 7:00 a.m. on October 25, 2013, you and Mr. Johnston entered Youth*'s isolation cell and repeatedly instructed Youth* to remove his sock cap and sweatshirt. When Youth* ignored the directive, you and Mr. Johnston removed Youth*'s sock cap. When you attempted to touch Youth*'s sweatshirt, while Youth* was lying on his back on the bench, he swung twice at you, which resulted in Mr. Johnston

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and you wrestling Youth* to the floor. You and Mr. Johnston then restrained Youth*, with Youth* face down on the floor, with you controlling Youth*'s left arm and Mr. Johnston securing Youth*'s right arm in an Aikido Control 1 hold. Both you and Mr. Johnston admitted to investigators that you used force to remove Youth*'s sweatshirt. According to Superintendent Wade, you and Mr. Johnston were justified in removing Youth*'s stocking cap, since staff must be able to see a resident's face. However, Superintendent Wade advised that neither departmental policy nor facility procedure support initiating a restraint of a resident in order to remove any clothing while placed in isolation or intensive supervision, as Youth* was at the time of your and Mr. Johnston's inappropriate restraint.

The facility surveillance videotape of Youth*'s restraint performed by you and Mr. Johnston on October 25, 2013, was assessed by Department of Juvenile Justice Training Branch Corrections Training Instructor/Coordinator II Suzanne Fisher, who determined that the techniques used by you and Mr. Johnston were incorrect and not approved for use by the Department. Staff are instructed to avoid taking residents to the floor with both arms controlled, allowing one of the resident's arms to be free to allow the resident to catch themselves as they fall to the floor. Therefore, the allegation of your excessive use of force with an unwarranted restraint was substantiated by IIB Investigators Ed Jewell and James Gabbard.

Your poor work performance and misconduct, demonstrated by performing an unwarranted restraint of a resident using excessive force, constitute violations of 505 KAR 1:100; 505 KAR 1:110; Department of Juvenile Justice Policy #102, "Employee Code of Ethics", I, IV.(B.); Department of Juvenile Justice Policy #104, "Employee Code of Conduct", I, IV.(B., F., P., Q., R. and S.); Department of Juvenile Justice Policy #208, "Youth Rights", IV.(H.); and Department of Juvenile Justice Policy #318, "Behavior Management", I, IV.(C.)(1), IV.(H. and K.).

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).

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*To keep confidential the identity of the youth as required by law, the name of the youth referred to is transmitted by the attached list marked "CONFIDENTIAL", which is not to be disclosed without proper authorization.

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
Barney Kinman, Internal Investigations Branch
Diana McGuire
Joslyn Olinger Glover
Mark Cook
Teresa Morgan
Gene Wade
Kimberly Whitley
DJJ Legal
DJJ Payroll
Personnel File