

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2023-042**

JEAN PAUL BOUITI

APPELLANT

**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 2024 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated January 17, 2024, 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 14th day of February, 2024.

KENTUCKY PERSONNEL BOARD

Mark A. Sipek
MARK A. SIPEK, SECRETARY

A copy hereof this day emailed and mailed to:

Hon. Valerie Shannon
Hon. Jonathan Gifford
Hon. Rosemary Holbrook (Personnel Cabinet)
Rodney Moore

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2023-042

JEAN PAUL BOUITI

APPELLANT

VS.

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

JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS

APPELLEE

This matter came on for a pre-hearing conference on April 14, 2023, at 2:30 p.m. ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Jean Paul Bouiti, was present and was represented by the Hon. Valerie Shannon. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Jonathan Gifford. Both parties appeared by telephone

The purposes of the pre-hearing conference were to determine the specific penalization alleged by the Appellant, to determine the specific section of KRS Chapter 18A that authorizes this appeal, to determine the relief sought by the Appellant, to define the issues, to address any other matters relating to this appeal, and to discuss the option of mediation.

BACKGROUND AND FINDINGS OF FACT

1. The Appellant filed this appeal on March 24, 2023, purportedly challenging his dismissal from the Roederer Correctional Complex. However, procedurally, the Appellant was actually resigned from his position for being absent without leave or notice, pursuant to 101 KAR 2:102. The Appellant contended that he gave notice to his Captains and the Human Resources Department that he needed time off for medical leave. The Appellant stated that he was told he could provide supporting documentation when he returned to work.

2. On February 14, 2023, Warden Jesse Ferguson issued the Appellant official notice that he was separated from employment by resignation for being absent without leave or notice to his supervisor, effective February 15, 2023. Specifically, the Appellant was alleged to have been absent without leave or notice on January 28, 29, 30, 31, 2023, and February 3, 4, 5, 6, 7, 11, 12, 13, and 14, 2023. A copy of this notice is attached to this **Recommended Order as Attachment A.**

3. Following the initial pre-hearing conference, the parties exchanged discovery.

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4. After the parties had completed discovery, the Appellee filed a “Motion for Judgment Pursuant to KRS 13B.090” and argued it was entitled to judgment as a matter of law. The Appellant filed a response in opposition and the Appellee filed a reply. This matter is now submitted to the Hearing Officer for a ruling on the Appellee’s motion.

5. The Appellant was employed as a Correctional Officer at the Roederer Correctional Complex (RCC).

6. On January 13, 2023, the Appellant spoke to Captain Jeff Hall and stated he was sick and could not report to work for a week or more.

7. On January 18, 2023, the Appellant called RCC staff and stated he needed to be absent for ten (10) days. The Appellant was told he could bring all of his paperwork showing the reasons for his absences when he returned to work. The Appellant also alleged that Captain Joshua Mellick told him “I got you,” which he interpreted as approval of his leave request.

8. The Appellant’s discovery response included the following medical documentation:

- a. After Visit Summary from Norton Community Medical Associates indicating that the Appellant saw Dr. Jonathan Sagum on January 19, 2023, for blood tests and that the Appellant was planning to undergo a radioactive iodine treatment for hyperthyroidism that would require him to quarantine for seven (7) days.
- b. A “Return To Work/School Note” from Norton Community Medical Associates indicating that the Appellant was seen in their offices on January 27, 2023, and was approved to return to work on January 31, 2023.
- c. A note from Elite Smiles of Louisville indicating that the Appellant was seen in their offices on February 8, 2023 (one of the Appellant’s scheduled off days) and could return to work on February 9, 2023.
- d. A note from Elite Smiles of Louisville indicating that the Appellant was seen on February 9, 2023 (one of the Appellant’s scheduled off days) and could return to work on February 10, 2023.
- e. A note from Elite Smiles of Louisville indicating that the Appellant was seen in their offices on February 16, 2023 (one (1) day after his resignation) and could return to work on February 17, 2023.
- f. A note from Elite Smiles of Louisville indicating that the Appellant was seen in their offices on February 21, 2023 (six (6) days after his resignation) and could return to work on February 22, 2023.

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g. A note from Elite Smiles of Louisville indicating the Appellant was seen in their offices on February 23, 2023 (eight (8) days after his resignation) and could return to work on February 24, 2023.

9. After a review of the relevant documents produced by both parties, the Appellant was absent without medical documentation for ten (10) consecutive workdays - January 31, February 3, 4, 5, 6, 7, 11, 12, 13 and 14, 2023.

10. Although there are factual disputes as to what took place during the telephone calls on January 13 and 18, 2023, the Hearing Officer has resolved these disputes in favor of the Appellant (the non-moving party). Therefore, given the evidence of record, the Hearing Officer determines that the Appellant's absences prior to January 30, 2023 were justified and should not be held against the Appellant. Nonetheless, the Appellant had no medical excuse to miss work beginning January 31, 2023. Therefore, the Appellant should have returned to work and turned in his medical excuse for January 27, 29, and 30, 2023. The Appellant failed to do so.

11. The Appellant argued that the Appellee should have offered him Family Medical Leave Act (FMLA). However, the Appellant did not produce any medical justification for leave after January 30, 2023. This is true even following months of discovery.

12. The Appellant also argued that Kentucky Corrections Policies and Procedures, CPP 3.14(5) Absence Without Leave – 101 KAR 2:102, Section 10, provides him with additional rights. The argument is that CPP 3.14(5) provides separate procedures when an employee has an “Absence Without Leave.” The Hearing Officer finds that these procedures only apply to short absences and do not supersede the Personnel Cabinet’s administrative regulation that applies to all classified employees. The Appellant may have been able to utilize these procedures had he returned to work before he had five (5) consecutive workdays without leave or notice to his supervisor.

13. The Hearing Officer finds there is no factual dispute that the Appellant was absent without leave or notice to his supervisor for more than five (5) consecutive workdays and the Appellee was justified in separating the Appellant from employment by resignation.

CONCLUSIONS OF LAW

1. 101 KAR 2:102, Section 10 reads as follows:
 - (1) An employee who is absent from duty without prior approval shall report the reason for the absence to the supervisor immediately.
 - (2) Unauthorized or unreported absence shall:
 - (a) Be considered absence without leave;

- (b) Be treated as leave without pay for an employee covered by the provisions of the Fair Labor Standards Act, 29 U.S.C. Chapter 8; and
- (c) Constitute grounds for disciplinary action.

- (3) An employee who has been absent without leave or notice to the supervisor for a period of five (5) working days shall be deemed resigned.

2. The Hearing Officer finds that the Appellant was absent without leave or notice to his supervisor for more than five (5) consecutive days and that the Appellee was within its rights to separate him from employment by resignation. 101 KAR 2:102, Section 10.

3. The Hearing Officer also finds that the Appellant did not have any FMLA rights during the ten (10) consecutive days he missed from work because he did not have any medical reason to miss work.

4. Kentucky Corrections Policies and Procedures CPP 3.14(5) Absence Without Leave – 101 KAR 2:102, Section 10, reads as follows:

- (a) If an employee is absent from duty without approval and does not report the reason to his supervisor at the beginning of the shift from which he is absent, the Shift Supervisor or Department Head shall discuss the absence with the employee immediately upon the employee's return to work, and request an explanation for the absence. If the supervisor submits a recommendation for leave without pay, he shall state the reasons for the recommendation through the chain of command.
- (b) A copy of the recommendation shall be forwarded to the designated personnel who shall notify the employee in writing if pay is to be deducted. A copy shall be placed in the employee's file.
- (c) If the action is challenged and the leave without pay retracted, the employee shall be notified in writing.

5. CPP 3.14(5) does not create rights for the Appellant or other Department of Corrections employees beyond those in 101 KAR 2:102, Section 10.

6. There are no genuine issues of material fact, and this matter can be resolved through dispositive motion practice. KRS 13B.090(2) and 18A.095(18)(a).

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7. Because all the events underlying this Appeal occurred before the effective date of Senate Bill 153, all references to KRS Chapter 18A are to the sections in effect at the time of the events associated with this Appeal.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **JEAN PAUL BOUITI VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2023-042)** 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 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).

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.

SO ORDERED at the direction of the Hearing Officer this 17 day of January, 2024.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day emailed and mailed to:

Hon. Valerie Shannon
Hon. Jonathan Gifford
Hon. Rosemary Holbrook (Personnel Cabinet)



Andy Beshear
GOVERNOR

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

Kerry Harvey
SECRETARY

Cookie Crews
COMMISSIONER

P.O. Box 69
LaGrange, Kentucky 40031
Phone: (502) 222-0170 or 0173
Fax: (502) 225-0084

February 14, 2023

Jean Bouiti

[REDACTED]

Dear Mr. Bouiti:

This is official notice that pursuant to 101 KAR 2:102, Section 10, Absence Without Leave, you are separated from state employment by resignation effective **February 15, 2023**.

Your supervisor has advised me, and attendance records verify, that you have been absent from employment as a Correctional Officer with the Department of Corrections, Roederer Correctional Complex, since **January 26, 2023** without leave or notice to your supervisor. The days that you have been absent are as follows; **January 28, January 29, January 30, January 31, February 3, February 4, February 5, February 6, February 7, February 11, February 12, February 13, and February 14, 2023**. According to 101 KAR 2:102, Section 10, an employee who has been absent without leave or notice to his supervisor for a period of five (5) working days shall be considered to have resigned his employment.

You will also need to turn in all uniforms, radio, radio charger, your identification ID, and State issued Correctional Officer Badge. Failure to return these items will result in you being responsible for the cost of such items, this reimbursement can be deducted from your balances payouts once you are processed.

Pursuant to KRS 18A.095, you may have the right to appeal to the Personnel Board if you believe that you were penalized by this action. If you wish to exercise this right, submit the attached appeal form to the Personnel Board within sixty (60) days of receipt of this notice.

Sincerely,

Jessie Ferguson
Jessie Ferguson
Warden

Attachment: Appeal Form

cc: Cookie Crews – Commissioner

**TEAM
KENTUCKY**

**Recommended Order
Attachment A**