

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2020-219

JOSHUA GENTRY

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 June 2022 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 6, 2022, 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 13th day of June, 2022.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Jesse Robbins
Joshua Gentry
Hon. Rosemary Holbrook (Personnel Cabinet)
Rodney Moore

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FINDINGS OF FACT, CONCLUSIONS OF LAW
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APPELLEE

This matter came on for evidentiary hearing before the Kentucky Personnel Board on December 1, 2021, and December 15, 2021, at 9:30 a.m. ET, 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Roland Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A. By prior agreement of the parties, the proceedings were conducted via Amazon Chime video teleconferencing.

Appellant, Joshua Gentry, was present and was not represented by legal counsel. Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Jesse Robbins. Also present as Agency representative was Warden Jessie Ferguson.

At issue is Appellant's claims of race and/or color discrimination as the reason for his probationary dismissal. The burden of proof is on Appellant to prove his case by a preponderance of the evidence. KRS Chapter 13B.

The rule separating witnesses was invoked and employed throughout the course of the proceedings. Appellant presented an opening statement. Appellee waived presentation of an opening statement.

Following the close of Appellant's case-in-chief, Appellee presented a Motion for Directed Verdict and gave oral argument that Appellant had failed to prove by a preponderance of the evidence a *prima facie* case of racial or color discrimination as the reason for his probationary dismissal. Appellant stated his objection to the motion and reasons for same. It was determined the motion should be reduced to writing and briefs submitted by each of the parties. That briefing schedule was memorialized by the December 15, 2021 Interim Order. Appellee timely submitted its Memorandum in Support of Motion for Directed Verdict/Motion to Dismiss. Appellant did not file a response. The matter stands submitted on Appellee's Motion.

BACKGROUND

1. The first witness for Appellant was **Aaron Baker**. Baker is currently employed by a trucking company. From May 5, 2020, through June 2021, Baker had been employed at the Roederer Correctional Complex (RCC) as a Correctional Officer. His probationary status ended in October or November 2020, after his first six (6) months of employment. He successfully completed that probationary period.

2. Baker observed an incident between Appellant and Correctional Officer (CO) James Turner. Turner had alleged Appellant had the words "black power" tattooed inside his arms and Turner went around telling everybody. Turner said, "People like that shouldn't be working there," and he labeled Appellant a racist. Turner also stated, "Don't want to have people like that at RCC." Baker believes Turner was suspended a few days due to that incident.

3. Baker testified Turner had treated African American inmates differently. Turner made racially charged jokes at their expense. Baker had not seen any other personnel act in that manner.

4. During his probationary period, Baker had been put on "time and attendance." He was not terminated for time and attendance problems.

5. Baker was involved in an incident. He left his post and went to the Captain's office to advise he was leaving the facility. He did not receive any discipline for leaving his post, but he did receive one-half (1/2) to one (1) "point" for this matter. He believed that if an employee accumulated points for such issues, one could run the risk of being terminated.

6. It was Baker who reported to Captain Sinclair and Trainer Andrew Berg about Turner's statements regarding Appellant's tattoos.

7. Baker had written a Staff Statement on September 21, 2020 (Appellee's Exhibit 1), about an incident involving Appellant and Sergeant Delbert Collins. He had not witnessed that incident but had heard about it through hearsay from Appellant, who told him Collins sent messages to Appellant indicating he wanted to fight him.

8. The statement contained Baker's recollection of what Appellant had told him regarding Collins; Collins told Appellant that if he hadn't been wearing a badge he would "beat his ass." Appellant told Baker he had messaged Collins on Facebook Messenger telling him that if he had something to say to say it to his face.

9. Baker identified Appellant's Exhibit 1 as what appeared to be screen shots of Facebook messages between Appellant and Collins.

10. Appellant also told Baker that while he was doing the walk in Unit 2, another Officer came by, gave him a glance, left the Unit, and then locked the door. Appellant tried to get their attention, but it took ten (10) minutes for the door to be unlocked.

11. The next witness was **Thomas Harper**. Since January 15, 2019, he has been employed as a Major at RCC. During his time, he had observed Appellant to have done his job to the best of his ability. He recalled Appellant having come to him about a problem he had on day shift. Appellant told him he had been speaking with an inmate who caught up to him on the yard and asked him to wake up another inmate who was a kitchen worker. It was reported Appellant woke up that inmate. Appellant told this to the Major. It was previously reported Appellant had gone into the Quarantine Wing without a mask and had no personal protection. The Major looked into that situation and examined the camera footage to discover such allegation was untrue.

12. Appellant told the Major at one point he felt he was "targeted" on second shift. The Major believed Appellant was assigned to Unit 3 at that time. He had never seen anything that would constitute "targeting" of Appellant. He did not see anything that was racially discriminatory against Appellant, or any act taken against him because of the color of his skin. His only recollection was of an incident Appellant had with Turner on day shift.

13. He had not supervised Appellant; however, as part of his duties, he did go around the facility to check on and talk with new staff members.

14. When a new employee begins work and up to the time of completion of the academy, they are kept on day shift. When they complete the academy, they stay on day shift about another two (2) weeks and are then assigned to night shift. Appellant went to night shift as a normal part of the transition of probationary employees. While Appellant was on day shift, the Major never received any negative comments or reports about Appellant regarding the performance of his job duties.

15. The next witness was **Amanda Harper**. She has been a Correctional Officer at RCC since 2013. She had worked with Appellant two (2) or three (3) times and was Appellant's Trainer in Unit 1. She observed him on the job at that time. She never heard or saw anything that constituted racial or color discrimination against Appellant.

16. The next witness was **Shakeara Ware**. Ware had been employed as a Correctional Officer at RCC from October 2020 to July 2021. She is currently a Correctional Officer at another facility. She had come to RCC in the class following Appellant's hire. She recalled working when Appellant was there and saw him over three (3) to four (4) months.

17. While at RCC, Ware witnessed racial discrimination. She herself experienced racial discrimination from CO Christopher Wright who called her the N-word. That incident had been documented. She claims the employer did nothing about that incident.

18. Ware had been involved in an incident with a Lieutenant. He spoke a lot about Donald Trump and would talk about shooting people down. It made her feel very uncomfortable. The Major was nice about it when he told her there were people who were never around Black people much and that they were not "used to" Black people; that she will experience racial tension at RCC.

19. On another occasion when she first met and introduced herself to her direct-line supervisor, Sergeant Bradley Herrell, he looked at her and then proceeded to talk to another Officer. She was taken aback and said "Hi" again. Herrell did not speak to her, so she wrote him up.

20. While assigned to Unit 2, Officer Shelby Miller constantly demeaned Ware. One day Miller got a cup of water, walked past Ware, and poured it in her lap. Miller then smirked at Ware and walked away. Ware told her Sergeant about this and was told Miller had probably done that on purpose; that's just how she is.

21. After reporting that incident, Ware was stationed "outside." When she had been at the academy, Ware was warned "they" post people they do not like outside. After she reported the Miller incident, she did not feel safe about reporting anything in the future. She was not allowed to work in close contact with other Officers or inmates. She was assigned a post that they normally assigned to senior Officers.

22. She and Appellant had gone to Deputy Warden Chisholm when Appellant reported his own incident. They both were very clear and felt they had been targeted and discriminated against on the night shift. Ware had similar experiences on day shift. Chisholm told them things would not change.

23. Miller is a white female. Herrell is a white male. Chisholm is a white male. Ware is an African American female.

24. Wright, a white male, admitted he used the N-word and that he stood by what he had previously said. Ware wrote a report about that incident. She did not want to be around these people. She told her supervisor she did not want to work in the same Unit. There were not many employees of color at RCC, maybe three (3) or four (4) who all worked outside. She was stationed outside two and one-half (2.5) to three (3) months. She believed those outside posts were supposed to be assigned to senior Officers who could not get around as easily as younger Officers. She agreed that supervisors can place Officers where they are needed, and that the outside posts were part of the job.

25. Ware identified Appellee's Exhibit 2 as her Staff Statement authored on September 21, 2020. She also witnessed Officer Brittany Frederick having used the N-Word and reported that incident. She believed she (Frederick) was suspended for a time.

26. The next witness was **Arnold Chisholm**. Chisholm has been employed with the Department of Corrections since 2004. He has been the Deputy Warden of Security at RCC since 2018 and works the day shift.

27. He recalled that one employee and Appellant came to him to report the conduct of other employees. Many times, Appellant had expressed to Chisholm a concern of performing to the best of his abilities. There was no negative feedback regarding Appellant's performance. He did his job to the best of his ability.

28. Appellant had brought to Chisholm's attention the Turner incident. Turner made some comments about Appellant's tattoos that said, "black power." Chisholm told Turner that they did not mean anything, and one is allowed to have tattoos. Turner also had similar conversations about the tattoos with other staff members. Turner had spread rumors that could affect the Appellant.

29. Appellant brought the matter to Chisholm's attention and they talked about it. Appellant showed him the tattoos and Chisholm saw he did not have "black power" tattooed on his arms.

30. Chisholm asked Appellant if he would sit down with him, the Captain, and Turner to talk about it. Appellant consented and they all met. Chisholm warned Turner they could not have comments like that about race at the institution. The Warden made the ultimate decision to issue a five (5) - day suspension to Turner. This was after Chisholm had sent the Warden a memo about the incident, which memo he identified as **Appellee's Exhibit 3**, dated June 24, 2020.

31. When an employee is on probation, they can be terminated for any reason except discrimination. Normally when an employee is terminated, they are called into the office and the termination letter is read to them. If termination involves a probationary employee, such letter does not have to give any reason for the termination. In this instance, a termination letter was read to Appellant.

32. If an employee calls in four (4) times, they are normally placed on "Time and Attendance" and are informed that if the employee continues to have such problems, and if such problems are medical, they must bring in a doctor's statement. This is usually performed with non-probationary employees. However, if they see this type of problem with someone on probation, they are normally given a warning ahead of time to let them know it is an area of concern and they should try to work to correct the situation. A probationary employee may also be terminated for violation of policy, or if that person does not fit well with the institution.

33. Chisholm was not aware of the assignment of any employee to an outside post as punishment. He has had Officers express how it was punishment if they were taken off the outside post. He testified that some Officers love those posts. There are times after an incident occurs that they will separate employees from posts just to separate the people involved in the incident.

34. In his meeting with Ware and Appellant, Chisholm had been advised other Officers were being racist or discriminatory against them. Chisholm checked into that. After looking into it, he concluded it appeared to be more of a personality conflict. Ware reported Wright had used the N-word. Chisholm investigated it and found it was true and issued discipline to that Officer.

35. Appellant told Chisholm he had been locked in one of the Wings. Chisholm reviewed the camera footage and confirmed Appellant was in the Wing. Miller had made rounds there and left. She could easily have not seen Appellant at that point when she closed the door. Most people, including Chisholm, have been locked accidentally in the Wings at times.

36. Chisholm testified there had been an internal affairs investigation conducted regarding allegations against Appellant. Chisholm, himself, had no input, knowledge of, or participation in the termination process of Appellant. The Warden had told him they were going to terminate Appellant.

37. He identified **Appellee's Exhibit 4** as a copy of Kentucky Corrections Policies and Procedures, Policy Number 3.1, Code of Ethics/Social Media Use, effective March 30, 2017. He read into the record Section A.(1), General Standards of Conduct, as well as Section F, Social Media, Introduction and paragraphs 1, 2, 3, and 6.

38. He identified **Appellee's Exhibit 5** as a copy of Kentucky Corrections Policies and Procedures, Policy Number 3.23, Internal Affairs Investigations, effective January 4, 2019. He read into the record the definition of "Misconduct." If any employee perceives another employee having conducted a violation, the employee has a duty to report it. Appellant was never accused of or performed any type of criminal act.

39. He identified Appellee's Exhibit 6 as Roederer Correctional Complex, Policies and Procedures, Policy Number RCC 03-01-01, General Guidelines For Employees, effective September 11, 2020. He read into evidence Section C, Annual and Compensatory Leave. (1010 KAR 2:102, Section 1).

40. The Warden had not terminated Appellant for his race or color of his skin, nor any inappropriate reason regarding same. Chisholm only knew of "bits and pieces" as to why Appellant had been terminated.

41. Time and attendance is not a disciplinary action. Their goal was not to dismiss Officers but to help people succeed. They tried to correct minor difficulties to help new employees succeed.

42. He had received many complaints from Officers of many races telling him that Herrell ignored them. Chisholm met with Herrell several times and asked him to be more engaged with the new Officers.

43. During the Covid-19 quarantine, inmates in quarantine were locked in their cells and they could not mingle with other inmates. There were times that television (TV) watching was allowed in the Wings and inmates sat at their doors to watch TV. Chisholm gave the order whether they could watch TV and if so, when TVs were to be turned off. That time could be different for different Wings. One Wing, for example, had extended their quarantine "over and over and over again." The stress level was up in that Wing. He allowed them to have TV longer than the other Wings because they had been in quarantine the longest. He gave the orders of the times the TVs could be on and turned off in each of the Wings. Because of all factors being considered, that is how it was decided which TVs would be on, and when they would be turned off. The Captain's Office would have relayed these orders to the supervisors.

44. Chisholm had been advised Appellant got upset because some TVs were on, and one was turned off. Those directives had come from Chisholm. He does not remember any documentation presented to him about this incident. The use of the TV is not guided by an Officer's behavior. He never directed a TV be turned off because of Appellant. He always based that matter on the situation pertaining to the inmates. Chisholm himself never knew specifically what Officers would be assigned to a particular Wing.

45. The first witness on the second day of hearing was **Thomas Bach**. Bach has been employed as a Lieutenant by the Department of Corrections since 2017. From what he remembered, Appellant "did a pretty decent job" at work. He could not recall witnessing any type of racial discrimination at RCC. He is aware Turner had been involved in incidents in the past but could not recall ever witnessing anything.

46. He recalled Appellant having come to him about a problem on night shift. Appellant said they accused him of making statements to another supervisor and threatening that night shift supervisor through Facebook. Bach had worked with Appellant on day shift but not for very long.

47. He identified **Appellee's Exhibit 7** as the RCC Occurrence Report he had authored on September 28, 2020, regarding Appellant's night shift conflict. This Occurrence Report was given to Internal Affairs (I.A.) by the witness. Appellant had just come out of a meeting with Internal Affairs, had signed a confidentiality form, and then began speaking about his I.A. discussions. Bach felt that was a violation of policy, so he reported it.

48. He never witnessed anything discriminatory, or anything derogatory directed at Appellant. He had supervised Unit 2 at that time.

49. The next witness was Appellant, **Joshua Gentry**. Appellant had been employed as a Correctional Officer on probationary status at RCC from May 26, 2020, to October 3, 2020. Appellant is of African American descent.

50. Due to the Covid-19, he was on day shift four (4) to five (5) months. He was thereafter assigned to night shift for about three (3) to four (4) weeks. He completed all computer training and firearms training. Appellant enjoyed his job and tried to do his best. He had a rapport with inmates and was able to diffuse problems easier than other Officers. He never had any issues with inmates.

51. Turner started the rumor that Appellant had "black power" tattoos on the inside of his arms. This was false. Appellant has "strength" and "power" on the inside of his arms. It is not against policy to have tattoos as long as they are covered up. "The supervisors and superiors handled it accordingly." He reported that he sat down with Officer Turner in a mediation and the matter was resolved and "good enough for me." Turner and Appellant shook hands. Thereafter, Chisholm apologized to Appellant, and they shook hands.

Chisholm then asked Appellant if he wanted to file an EEO report. Appellant declined and stated he did not feel it had to escalate; the conversation held during the mediation was good enough for him. Chisholm, however, on his own, pursued a suspension of Turner.

52. While working on day shift things were relatively smooth; he had no issues with inmates or Officers, and everyone did their job right. It was during night shift where he encountered multiple problems.

53. A supervisor, Sergeant Brent Bond, got into it with an inmate about using a washer and dryer in the kitchen. Appellant saw that incident. Bond wrote up the inmate. Appellant believed the inmate was wrong for washing clothes in the kitchen. Bond confiscated the inmate's laundry and the inmate walked away.

54. Later that week, Lieutenant Nickolas Messer, who was involved in the investigation, read the report to Appellant. Appellant felt Bond's report misstated what had happened. Bond implied the inmate was confrontational, when in fact he was not. It became public that Bond had made a false report, and that Appellant would not co-sign the report.

55. Appellant went to his assignment in Unit 2. On two (2) occasions on the same day he was locked into that Wing. At the first incident, Miller looked at him, left the Unit and closed him in. He wrote it off as a mistake. However, when it happened to him a second time, when CO Dana Satterfield walked in, walked by him, asked him if he was "good over here" and he said "yes," she walked out and closed the door. It then took eight (8) to ten (10) minutes before Appellant was let out of the Wing. He reported both incidents to the Internal Affairs office. Investigators looked at the camera and confirmed it had happened. Appellant also told him about the personal relationships among the individuals involved and that both incidents were not coincidental.

56. Thereafter, Appellant was moved from Unit 2 to Unit 3. Appellant testified Messer and another Officer were using the N-Word but not in a derogatory matter in that incident. They were talking about the history of the word. Their discussion was not directed towards or against Appellant.

57. He testified about another incident during which he had been working in the Quarantine Wing. Another Officer told him the "No TV" signs had been taken down in the Wings and the TVs could be turned on. Appellant turned the TV on in his Wing. Except for occasional break times, the Officers are also locked down for twelve (12) hours in those Wings.

58. About one (1) hour later, Herrell told Appellant he could not have the TV on in his Wing. He told Herrell the "No TV" signs had been removed and TVs were on in all the Wings. Herrell said he did not care, and the Appellant needed to turn the TV off. Appellant followed his order.

59. Appellant then asked Herrell if he could go on a break. That request was denied, but Herrell granted another Officer, who was of a different race than Appellant, a break. After that

Officer returned, Appellant took his break and went to the Captain's Office to report the situation. Messer, having heard the complaint, and as a result of that meeting, ordered that all TVs were to be turned off.

60. On another occasion, Appellant was on his way back to the Quarantine Wing after the end of his break. An inmate stopped to ask him to wake up another inmate who was a cook on kitchen duty so that the inmate would not get into trouble. Appellant went to the inmate's door, knocked, and woke him up. Later, Appellant was chewed out by Major Harper, who accused him of leaving the Quarantine Wing to wake up an inmate. Appellant told him he was returning from a break when he did this. The Major said he would look at the cameras. Subsequently, the Major apologized to Appellant and told him he would try to put him on day shift at Appellant's request. That transfer occurred.

61. On another day, an inmate was in the process of being removed from a Wing. A separate inmate in a wheelchair needed a bottom bunk. They woke up the first inmate, told him to pack up his gear and move. That inmate got upset. It was explained to that inmate in the hallway and the inmate caused a scene. Appellant approached the inmate and calmed him down while the move was accomplished.

62. Subsequently, Collins approached Appellant and told him that he had to understand the institutional need in that situation. An hour and one-half (1.5) later he was called into the Captain's office and was told they heard Appellant had questioned Collins' authority and had been insubordinate. Appellant told them the situation, and that there was nothing but stress on this job for him because of the treatment from coworkers and being harassed and targeted. There was no adverse result from the meeting with the Captain. The Captain, however, presented Appellant with a "KEAP" pamphlet. Appellant's request to move to Unit 3 was granted.

63. Appellant had been questioned about his Facebook message to a coworker. He responded that it was his intent to let that individual know that if he had any problems with Appellant to come to him face to face.

64. Appellant testified that any time he reported a situation he was placed on an outside post for a few days. This prevented him from being able to perform the full duties of his employment just because he had been harassed by a certain group of individuals.

65. When asked about the relief he sought by this appeal, he stated that he had already found employment that paid more than his former employment without the added stress. His reemployment would not change the system. If he received monetary compensation and/or promotions that he should have had if he were owed something that would be fine. He testified it is not fair to other employees who go through this day in and day out, and he wanted to bring this action to institute change.

66. He identified **Appellee's Exhibit 8** as a copy of the September 28, 2020 Facebook Messenger exchange he had with Delbert Collins.

67. The day shift clocks in a 6:53 a.m. and out at 6:53 p.m. The hours during training sessions were 8:00 a.m. until 4:00 p.m. The night shift ran from 7:00 p.m. to 7:00 a.m. When Appellant had been returned to day shift from night shift, he worked about two (2) to three (3) days prior to his termination.

68. Appellant presented no further witnesses for his Case-in-Chief. Appellee presented an Oral Motion for Directed Verdict and stated grounds for the motion. Appellant then responded to the motion. The parties were given the opportunity to provide their arguments in writing by motion and briefs.

FINDINGS OF FACT

1. Appellant, Joshua Gentry, is of African American descent and had been employed as a Correctional Officer on probationary status at Roederer Correctional Complex (RCC) from May 26, 2020, to his termination date, October 3, 2020.

2. On June 23, 2020, Officer James Turner, an employee at RCC, went to the Captain's Office and reported to Captain Josh Canupp and Deputy Warden Arnold Chisholm that Appellant had tattoos on his biceps that said "black power." Chisholm explained to Turner that staff could have tattoos and would not be judged about a tattoo they might have. Turner said he understood and left. (Appellee's Exhibit 3).

3. Appellant then came to the Captain's Office about forty-five (45) minutes later. He reported to Chisholm that another staff employee told him Turner had been making statements that Appellant had "black power" tattoos on his arms. Appellant then showed Chisholm his tattoos, which said "strength" and "power" on separate arms. Chisholm told Appellant he had already heard about the matter from Turner and had told Turner that staff are allowed to have tattoos and not be judged. (Appellee's Exhibit 3).

4. Turner had apparently made derogatory statements about Appellant to then-Correctional Officer Aaron Baker. Baker testified Turner called Appellant a racist and said, "People like that shouldn't be working" here; that he (Turner) said, "People like that shouldn't be working at RCC."

5. Baker also testified Turner treated African American inmates differently and that he made racially charged jokes at their expense.

6. At the end of the meeting Appellant had with Chisholm, a meeting was offered with Turner, Captain Canupp, Chisholm, and himself to discuss the issue. Appellant accepted and the parties subsequently met. Turner apologized to Appellant. They shook hands and the meeting ended.

7. Chisholm then spoke to Appellant and asked if he wanted to file an EEO complaint. Appellant declined and stated he did not feel the matter should be escalated. He was satisfied.

8. Of his own volition, Chisholm pursued disciplinary action against Turner. Chisholm sent a memo about the incident to the Warden. (Appellee's Exhibit 3). The Warden issued Turner a five (5) - day suspension.

9. Appellant testified, "The supervisors and superiors handled [it] accordingly;" the matter had been resolved "good enough for me."

10. Sergeant Brent Bond, an employee and supervisor at RCC, wrote a report on an inmate after confronting the inmate for using a kitchen washer and dryer for his laundry. Appellant had observed the incident.

11. Subsequently, Lieutenant Messer, involved in the investigation of the incident, read Bond's report to Appellant. Appellant told Messer he thought Bond altered what had happened, implying the inmate had been confrontational when, in fact, he was not. Appellant testified it became widely known at RCC that Bond had submitted a false report which Appellant had declined to co-sign.

12. Aaron Baker had been employed as a Correctional Officer at RCC during the time of Appellant's employment. On September 21, 2022, Baker wrote a report about Appellant having related to him an incident involving Sergeant Collins. (Appellee's Exhibit 1). Appellant alleged Collins stated that if Appellant did not have a badge on, he would "beat his ass." Appellant messaged Sergeant Collins on Facebook Messenger advising Collins that, if he had something to say, to say it to his face. Baker identified **Appellant's Exhibit 1** as screenshots of messages between Appellant and Collins.

13. Major Thomas Harper was employed at RCC during the time of Appellant's employment. He observed Appellant to have done his job to the best of his ability. Although Appellant told Harper he felt he was being "targeted" on second shift, Harper never saw anything that constituted "targeting" or "racial discrimination" against Appellant, or any act taken against him because of the color of his skin.

14. Shakeara Ware, an African American female, had been employed as a Correctional Officer at RCC during the time of Appellant's employment. She testified that she, herself, had experienced racial discrimination, particularly from Correctional Officer Wright, a white female who called her the N-Word, and Correctional Officer Miller, a white female who demeaned Ware and purposely spilled a cup of water in Ware's lap. Ware testified further that, although she documented the incident with Wright, nothing was done about either incident. However, Deputy Warden Chisholm testified he investigated that matter and had issued discipline against CO Wright. When Ware reported the last incident with Miller, Ware was assigned a new post on the outside of the facility.

15. When incidents occurred between employees, RCC determined whether the employees involved required separation. On occasion, an employee, such as Ware, was transferred to a post located on the outside of RCC's building. Evidence showed employees regularly assigned "outside" posts were more senior employees who could not get around as quickly as younger

employees and who welcomed working such posts. Ware is correct in having stated that assignment to such a post removed an employee from close contact with Officers and inmates. However, the evidence did not show that a temporary assignment to such post was a "punishment."

16. Appellant testified "things were relatively smooth" when he worked on day shift, and he had no issues with Officers and inmates. He stated that it was on night shift where he experienced conflicts.

17. When Appellant requested placement back on day shift from night shift, Major Harper approved that request. On another occasion, when Appellant requested to be moved to Unit 3, that request was also granted.

18. During the time of Appellant's employment, the following were in full force and effect:

- Kentucky Corrections Policies and Procedures, Policy No. 3.1, Code of Ethics/Social Media Use (Appellee's Exhibit 4);
- Kentucky Corrections Policies and Procedures, Policy No. 3.23, Internal Affairs Investigations (Appellee's Exhibit 5); and
- Roederer Correctional Complex Policies and Procedures, RCC 03-01-01, General Guidelines for Employees (Appellee's Exhibit 6).

19. An employee serving an initial probationary period of employment may be terminated for any reason except discrimination. KRS 18A.111(1), KRS 18A.005(19), KRS 18A.095(14)(a).

20. Appellant was terminated from the position of Correctional Officer at Roederer Correctional Complex pursuant to KRS 18A.111, effective October 2, 2020. As Appellant was serving an initial probationary period at the time of his termination, he did not have the right to appeal his termination to the Kentucky Personnel Board. However, he could file a claim of discrimination with the Board, if he believed the action was based on unlawful discrimination. KRS 18A.111 and KRS 18A.095.

21. Appellant timely filed his appeal of termination with the Kentucky Personnel Board alleging discrimination based on race and color.

CONCLUSIONS OF LAW

1. Throughout his employment as a Correctional Officer at Roederer Correctional Complex from May 26, 2020, Appellant, Joshua Gentry, was a probationary employee without status. An employee may be separated from their position during this initial probationary period and shall not have a right to appeal to the Kentucky Personnel Board except as provided by KRS 18A.095(14)(a). KRS 18A.111(1)(8).

2. Any employee who believes they have been discriminated against may appeal to the Kentucky Personnel Board. KRS 18A.095(12)(14)(a) and KRS 18A.140(1).

3. Federal Law prohibits certain discriminatory employment practices:

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or natural origin...42 U.S. Code § 2000e-2(a).

4. Likewise, in Kentucky, it is an unlawful practice for an employer to discharge any individual or otherwise to discriminate against such individual because of an individual's race, color, religion, natural origin, sex, or age forty (40) or over. KRS 344.040(1).

5. In order to establish violation of the Kentucky Civil Rights Act, a party must prove the same elements as required for a *prima facie* case of discrimination, under Title VII of Federal Law. *Talley v. Bravo Pitino Restaurant, LTD*, 61 F.3d 1241 (6th Cir. 1995).

6. In order to establish a *prima facie* case of discrimination under Title VII, a party must demonstrate:

- 1) He was a member of a protected class;
- 2) He was subject to an adverse employment action;
- 3) He was qualified for the job;
- 4) He was replaced by a person outside of the protected class; or, in disparate treatment cases, this element may be replaced with the requirement that the Plaintiff show he was treated differently from similarly situated individuals. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Policastro v. Northwest Airlines, Inc.*, 297 F.3d 535 (6th Cir. 2002); *Perry v. McGinnis* 209 F.3d 597, 601 (6th 2000).

7. As an African American, Appellant, Joshua Gentry, is a member of a protected class for purposes of Title VII. This is undisputed and was conceded to by Appellee for purposes of its motion. (See Appellee's Memorandum in Support of Motion for Directed Verdict/Motion to Dismiss, page 4).

8. Also undisputed, Appellant, having been terminated from his employment as a Correctional Officer, was subject to an adverse employment action.

9. Having been initially hired to the position of Correctional Officer by the Appellee, Appellant was, at the time of hire, qualified for the job. (Appellee concedes this solely for the purpose of its motion. *Id.* at page 4).

10. There was no evidence presented that Appellant was replaced by any person or by a person outside the protected class.

11. We are left to examine whether Appellant was treated differently from similarly situated individuals. (Sometimes referred to as "comparators"). Such analysis must consider whether Appellant and another individual were similarly situated in *all* relevant aspects. *Board of Regents of Northern Kentucky University v Weickgenannt*, 485 S.W.3rd 299, 308 (Ky. 2016). In the disciplinary context such as presented in the instant case, there must be an independent determination as to the relevancy of the particular aspect of Appellant's employer status with that of Aaron Baker. *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 709 (6th Cir. 2006). Important factors to consider include whether both individuals had the same supervisor or were subject to the same standards (id); whether they were engaged in the same conduct without different or mitigating circumstances distinguishing their conduct, or the employer's treatment of them for it. Id.

12. **Aaron Baker**

Appellant called Aaron Baker to testify in support of his proposition that he was treated differently from Baker. Baker had been a Corrections Officer at Roederer Correctional Complex having begun employment on May 5, 2020. He served during an initial six (6) month probationary period. He testified about two (2) separate incidents.

1) The first incident occurred when Baker left his post one evening to work out an issue with his wife. He left his post before his shift ended due to such personal issue. By his own testimony, his mind was not one hundred percent (100%) committed to his work because he had panicked about the marital issues. He reported to his Supervisor, Captain Mellick, he would be leaving but would call and let them know when and if he would return. Around 3 or 4 a.m., Baker returned to RCC and explained to his supervisors why he left. He told them he would figure it out and come back to work the next day. Those present in the Captain's Office seemed to understand his reasoning. Although there was no evidence he was written up for this particular incident, he testified he had further attendance issues regarding his daughter's daycare when his Captain warned him about his attendance. He testified he was able to "smooth it out" concerning his time and attendance matters.

2) Baker testified he had been in the hospital with COVID-19 and almost died. When he returned to work, he feared being responsible for the prisoner Quarantine Wings because of the potential of contracting the virus again. Baker told his Supervisor, Captain Mellick, he was not comfortable working in those wings. Mellick yelled at him that he was going to write Baker up for insubordination and that Baker had an attitude with the Captain. Baker did not leave but went to his assigned post and worked there as ordered. Both parties eventually apologized and "hashed it out."

Baker was not written up and received no discipline.

13. Appellant testified about the following events that occurred during his employment alleging they were grounds for discrimination resulting in his termination.

a) Tattoo Incident

He identified the incident Correctional Officer James Turner, an employee at RCC, claimed Appellant had a "black power" tattoo. As a result of that incident, Appellant testified he felt his superiors handled the incident appropriately. While Appellant did not request disciplinary action against Turner, Deputy Warren Chisholm pursued a suspension of Turner. When this allegation of racism against Turner was reported, RCC investigated it, found it was substantiated, and issued appropriate disciplinary action against Turner. No action was taken whatsoever against Appellant.

b) Sergeant Bond and the Laundry Room

While Appellant was working the night shift, Sergeant Brent Bond wrote up an inmate for using the kitchen to do his laundry. Appellant was present during that incident. When presented with the Occurrence Report authored by Bond, Appellant stated Bond had written a false report and refused to support Bond's report by signing off on it. He reported this matter to Internal Affairs. Appellant argues that because of certain personal relationships among others involved, and because he himself did not support Bond in submission of the laundry incident report, Appellant became a target. There is no direct or circumstantial evidence that Sergeant Bond targeted Appellant because of Appellant's race or color.

c) Appellant being locked in the cell wing

Appellant testified that, while working Unit 2, he was allegedly intentionally locked in the Wings by Officer Miller on one occasion and Officer Satterfield on another. He testified that when Officer Miller left him in a cell, Appellant initially wrote it off as an accident. But shortly after that, Officer Satterfield walked in, spoke to him, she then walked across the cell, and Appellant said she locked him in. Eventually another Officer came by the Wing and opened it. Appellant reported the incident to Internal Affairs. He requested he be able to leave the Unit and that request was granted. Neither Miller's nor Satterfield's actions are considered proof of direct or circumstantial evidence of discrimination.

Appellant advised Deputy Warden Chisholm about being locked in the Wings, and, in particular, that Officer Miller acted in a discriminatory manner against Correctional Officer Ware, an African American female Correctional Officer. Chisholm reviewed the Wing video concerning

Officer Miller and concluded Miller had not intentionally locked Appellant in the Wing. Chisholm's investigation found no evidence of discrimination.

**d) Use of the "N" word, Sergeant Harrell,
and the television incident**

Appellant's request to move from Unit 2 was granted and he was placed in Unit 3. While in that Unit, Lieutenant Messer and another Officer were discussing the "N" word in his presence. Appellant never reported it because it was not directed towards Appellant or anyone else in a negative way. Appellant testified that they had been talking about the history of the word.

Appellant reported an incident involving Sergeant Harrell. Appellant testified that, while working on one of the Quarantine Wings, Sergeant Harrell ordered him to turn off the television for that Wing. Appellant also claimed that Harrell made him take his break after everyone else took theirs. Appellant reported the incident to Lieutenant Messer and explained to them that Harrell was being unfair in ordering him to turn off the television while other televisions were left on in the other Wings. Lieutenant Messer agreed and had all the televisions in all the wings turned off. Appellant received no discipline and no adverse action.

e) Sergeant Collins

An inmate had been required to relinquish his bottom bunk for use by a disabled inmate. The inmate was upset, and Appellant tried to calm him down. Appellant and Sergeant Collins had a disagreement about how to handle the inmate and discussed the incident.

Subsequently, Appellant was called to the Captain's Office as Collins reported that Appellant had questioned his authority and was insubordinate. At the conclusion of the meeting, Appellant was provided a KEAP pamphlet. No discipline resulted from that incident. Appellant's request to be removed from Unit 2 was granted.

Appellant engaged in Facebook messaging with Sergeant Collins beginning September 14, 2020. Appellant asked a question of Collins, who responded, "What's that?" Appellant thereafter replied, "Honestly I don't even care anymore. You gone do what you do but next time you want to exercise your testosterone, you can say it to me directly, you know just in case you have any questions." Appellant admitted to sending his message from his Facebook account.

f) Major Harper

When Appellant was returning from a break and before he got to his post, an inmate asked Appellant to wake up another inmate who was a cook. The

inmate was worried the inmate cook would not wake up in time to report to his early kitchen shift. Appellant went into the cell of inmate cook and woke him up.

Major Harper found out about this matter and apparently chewed out Appellant for violating rules. Appellant testified Harper later apologized because Harper thought Appellant had left his Quarantine Wing and had failed to don Personal Protective Equipment (PPE). Harper, in his testimony, said someone told him Appellant was not using proper PPE in the Quarantine Wings. Harper properly reviewed the camera footage and saw Appellant had the appropriate PPE. He testified he never checked into the incident with the inmate cook.

14. Appellant failed to prove by a preponderance of the evidence that Aaron Baker and he were similarly situated. Baker's main issue pertained to time and attendance. Appellant never reported or had a time and attendance problem. He also testified that he was never written up for any time and attendance violations.

15. On one occasion, Baker left his post after telling Captain Mellick and then returned thereafter to explain the situation. According to testimony, Appellant never abandoned or left his post before the end of any shift.

16. Baker had what appears to be two (2) incidents, time and attendance and a disagreement with his Captain. Appellant on the other hand, had six (6) incidents between multiple individuals. The number of incidents is a relevant difference between the two (2) individuals. Deputy Warden Chisholm investigated many of the incidents and found they were personality conflicts rather than discriminatory actions. When he determined that the actions of Turner constituted inappropriate racist or discriminatory behavior, he appropriately sought out discipline for Turner, who was suspended. Baker, on the other hand, was never involved with personality conflict situations.

17. While Ware testified pertaining to incidents, she herself experienced, she did not offer testimony of any racial statements, actions, or inferences directed at Appellant.

18. Appellant has failed to prove by a preponderance of the evidence that he was treated differently than similarly situated non-protected employees, or that his situation was nearly identical to those of Baker or Ware.

19. Appellant has failed to prove, by a preponderance of the evidence, all elements required to show a *prima facie* case of discrimination based on race and/or color.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Personnel Board that the appeal of **JOSHUA GENTRY VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2020-219)**, be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

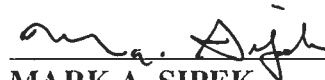
Any document filed with the Personnel Board shall be served on the opposing party.

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

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

ISSUED at the direction of **Hearing Officer Roland Merkel** this 6 day of May, 2022.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day emailed and mailed to:

Hon. Jesse Robbins
Joshua Gentry
Hon. Rosemary Holbrook (Personnel Cabinet)