

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOs. 2021-043, 2021-122 and 2021-147

JONATHAN HARRIS

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 August 2023 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated June 9, 2023, Appellant's emailed Exceptions dated June 9, 2023, and July 10, 2023, 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 appeals are 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 17th day of August, 2023.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

Copies hereof this day sent to:

Jonathan Harris
Hon. Peter Dooley
Hon. Rosemary Holbrook (Personnel Cabinet)
Rodney Moore

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOS. 2021-043, 2021-122, & 2021-147**

JONATHAN HARRIS

APPELLANT

v.

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

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

APPELLEE

* * * * *

This matter came before the Personnel Board for an evidentiary hearing on March 8, 2023, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Jonathan Harris, was present in-person and was not represented by legal counsel. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and was represented by the Hon. Peter Dooley. Also present as Agency representative was Warden Jessie Ferguson.

BACKGROUND

1. The Appellant filed Appeal No. 2021-043 on April 23, 2021, alleging he was discriminated against by the Department of Corrections (DOC) Policies and Procedure (CPP) 3.17, which prohibits male security staff from wearing earrings.

2. The Appellant then filed Appeal No. 2021-122 on October 15, 2021, appealing what he described as a layoff, discrimination, and suspension; however, review of the documentation issued by the Agency indicates that he was actually placed on special leave with pay for purposes of an investigation.

3. Lastly, the Appellant filed Appeal No. 2021-147 on December 7, 2021, from his ultimate dismissal from the DOC.

4. Thus, at issue in this case was whether the termination of the Appellant from his position as a Correctional Lieutenant and the related investigation were the result of discrimination. Also at issue was the Appellant's claim that the Department of Corrections' policy relating to the dress code for Correctional Officers was discriminatory. The Appellant's discrimination claims were based on sex and sexual orientation. The appeals were consolidated and the parties had an opportunity to prove all of their pled claims during the evidentiary hearing.

The burden of proof for the dismissal and related investigation was on the Appellee, while the burden to prove discrimination was on the Appellant.

5. After the presentation of opening statements, the Appellee's first witness was **Durrell St. Clair** who then served as the Internal Affairs Captain at the Roederer Correctional Complex ("RCC") and completed the Internal Affairs (IA) investigation involving the Appellant. He is currently employed as a Unit Administrator at RCC.

6. St. Clair testified that his involvement in this matter began when he was contacted by Internal Affairs at the Kentucky Correctional Institute for Women (KCIW). A phone number associated with the Appellant showed up in a routine review of inmate phone calls in the Securus Phone system. Upon receiving the report, St. Clair stated he interviewed the Appellant, who had recently been promoted to Lieutenant at RCC. The Appellant denied he made any phone calls to inmates. With no other information and the Appellant's denial, St. Clair closed the investigation. The Appellant was informed he was cleared in the investigation.

7. Shortly thereafter, St. Clair received additional information from KCIW that the Appellant had contacted Internal Affairs at KCIW and confronted them as to why he had been reported to RCC Internal Affairs. St. Clair described this development as a "red flag." As a result, St. Clair re-opened the investigation on September 21, 2021.

8. While referencing his report, St. Clair detailed the investigation into the Appellant's policy violations. St. Clair explained that JPay is a messaging service used in correctional facilities that allows family, friends, and others to communicate and send pictures to inmates. DOC policy makes clear that DOC staff are prohibited from contacting inmates using this service. The Appellant was investigated in relation to a particular JPay account, an account that made phone calls and sent JPay messages to male inmates. The JPay account was created with the same phone number as was listed on the Appellant's employment documents and was created under the name of "Ashley Owens." This report was entered into the record as **Appellee's Exhibit 1**.

9. The Appellant initially denied any connection to the JPay account being investigated. However, further investigation revealed that not only was the Appellant's phone number linked to the account, but the account also had the Appellant's exact date of birth, his residential address, and the same email address as was listed in his employment documents. Moreover, as the JPay system charges a fee to send messages, St. Clair also investigated the credit and debit cards associated with the account and found that the three (3) cards used by the account were all owned by the Appellant.

10. Based on these discoveries, St. Clair testified that he reviewed the messages that were sent from the JPay account. The account owner sent messages to twenty-eight (28) different male inmates and the messages included sexually explicit content as well as photographs that clearly showed the Appellant. An "Account Summary" of the messages sent by the investigated JPay account was introduced as **Appellee's Exhibit 2**.

11. St. Clair stated that, while he was on vacation, a recorded interview with the Appellant was conducted on September 23, 2021, by other IA investigators. The IA investigators discussed the Ashley Owens JPay account with the Appellant and, at 11:04 a.m., the Appellant admitted that the Ashley Owens JPay account was his. Specifically, during the interview, the Appellant was asked, “did you ever have this JPay Account?” The Appellant responded, “You know what, it was me, it was mine. I didn’t want that part of my life to come out.” **Importantly, the Appellant then attempted to retract this admission later during the interview.**

12. Upon St. Clair’s return from vacation, between October 1 and October 15, 2021, he had several phone call interviews with the Appellant. The Appellant stated that some of the JPay messages were sent while he was on shift at KCIW and he would not have had access to his phone or a computer on those days. He also stated that he would provide a police report showing that his phone was stolen. **Despite having these additional weeks to provide any documentation to show that the account was not his, the Appellant never provided a police report, bank statements, or any other documents supporting his contention that the JPay account was not his.** The Appellant also stated that he admitted the messages were his during the Internal Affairs interview because he wanted to get out of there. St. Clair testified that he had to obtain the police report to which the Appellant referred on his own. The police report was filed months after the JPay account was created and the messages were sent. The Appellant’s police report included no mention whatsoever of a stolen phone. The police report obtained by St. Clair was admitted into evidence as **Appellee’s Exhibit 4**. He further testified that he contacted Major Denham at KCIW and learned that Correctional Officers at KCIW were allowed to leave their phones in a locker on the property and regularly accessed their phones on breaks, contrary to the Appellant’s statements.

13. During his investigation, St. Clair testified that he obtained the Appellant’s Kentucky Offender Management System (KOMS) logs from the time period in which the messages were sent. Upon review, he explained the KOMS logs showed that the Appellant had accessed the profiles of male inmates. St. Clair noted that the Appellant did not have any reason to search KOMS for male inmates as he was employed with KCIW at the time and his job duties did not involve male inmates. Reading the KOMS logs alongside the JPay records further revealed that the investigated JPay account largely sent messages to the same individual inmates whom the Appellant had searched in KOMS. In fact, the messages were mainly sent on the same day or in the next few days following the Appellant’s searches of those inmates. As KOMS access is secured and can only be accessed by employees at work, St. Clair testified that there was no way that someone inside or outside of the DOC could have had access to the Appellant’s KOMS account without his knowledge. There was nothing to explain why the Appellant searched for the male inmates that subsequently received messages from the JPay account. A printout of the Appellant’s KOMS activity from April 20, 2020, through July 14, 2020, was admitted as **Appellee’s Exhibit 3**. St. Clair’s report noted that the Appellant accessed twenty-six (26) of the twenty-eight (28) inmates in KOMS.

14. The next witness for the Appellee was **Warden Sarah Ferguson**, the Warden at RCC. Warden Ferguson testified that it is her job as Warden to review any investigation,

including IA investigations, and to make decisions regarding discipline for any policy violations. She testified that she reviewed the Appellant's investigation and determined that discipline was appropriate. She further testified that the Appellant received proper notice of the discipline he was issued and was given more than ample opportunity to provide evidence on his behalf. She noted that the Appellant did not provide any such evidence. Based on all the available evidence supporting the fact that the Appellant violated multiple policies as outlined in the Intent to Dismiss letter, she made the decision to dismiss the Appellant. The Intent to Dismiss letter was admitted into evidence as **Appellee's Exhibit 5** and the Dismissal letter was admitted as **Appellee's Exhibit 6**. Also admitted into evidence were the DOC Policies and Procedures (CPPs) that the Appellant was alleged to have violated:

- a) CPP 3.1, Code of Ethics/Social Media Use (**Appellee's Exhibit 8**);
- b) CPP 3.22, Staff Sexual Offenses (**Appellee's Exhibit 9**).

15. Warden Ferguson testified that she had no issues with the Appellant prior to the investigation; his sexuality was not discussed, nor was it ever taken into consideration, and she strictly made her decision based on the available information.

16. Following the completion of Warden Ferguson's testimony, the Appellee rested its case.

17. The **Appellant, Jonathan Harris**, testified as his only witness.

18. The Appellant testified that he is currently employed in the Loss Prevention Department at Walmart.

19. The Appellant criticized the investigation conducted by St. Clair and the other IA investigators at RCC. The Appellant's criticism included the following:

- a) The Appellant stated that the initial investigation was not thorough enough and he blamed St. Clair for closing the investigation without checking JPay or KOMS. He stated he felt St. Clair had conducted a "two-part investigation." He stated it was unethical, discriminatory, and malicious to re-open the investigation.
- b) The Appellant stated he felt justified in contacting KCIW after he was told he had been cleared. He felt he had been "thrown under the bus" by KCIW. The Appellant stated he was being targeted as a gay male employed at a men's prison (RCC).
- c) When confronted with JPay messages and pictures, the Appellant stated that he admitted it was him because he wanted to get out of

the interview. He also stated that he only admitted that the pictures were of him, not that he sent the JPay messages.

- d) The Appellant criticized St. Clair for not accessing KHRIS to obtain all his personal information (phone number, email addresses, etc.). The Appellant never explained how this would have aided the investigation.
- e) The Appellant criticized St. Clair for taking Major Denham's word that officers at KCIW were allowed to take breaks. He said St. Clair should have reviewed the rosters to see if the Appellant actually took a break on any given day. He did not believe the investigation ruled out his defense that he could not have sent some of the JPay messages because he was working on post without access to his phone or other device. The Appellant admitted into evidence the KCIW rosters from April 1, 2020, through September 30, 2020, as **Appellant's Exhibit 1**.
- f) The Appellant accused St. Clair and Warden Ferguson of conspiring to manufacture the KOMS report. The Appellant stated they did that to cover up their "mistake" in the investigation. In other words, the Appellant alleged that, during the investigation, Warden Ferguson and St. Clair falsified documentation to connect him to the JPay account and messages. The Appellant made these accusations without evidence. He also admitted he was not a KOMS expert.
- g) The Appellant also stated the name associated with the KOMS searches was not his log-in information.

20. The Appellant testified that, because at least some of the messages were sent while he was on shift at KCIW, he could not have sent all the messages.

21. The Appellant stated that he believed that someone made the JPay account with his information and pictures to frame him. He stated that an ex-roommate "Skylar" could have stolen his phone, set-up the JPay account, and sent the messages and pictures. He stated that, before his phone was reported stolen on August 6, 2021, Skylar could have taken his phone and sent the messages. The Appellant stated his credit card information was pre-loaded in his phone. He also stated that the JPay messages started on April 20, 2020, the day he and Skylar had a "spat."

22. The Appellant additionally stated that it was not unusual for him to not have realized that someone was frequently using his phone without his permission and for him to not have noticed numerous transactions from JPay on his credit cards. He stated the transaction amounts were too small for him to have noticed.

23. The Appellant testified that he was a hardworking and honest employee and there was no reason that he should have been fired.

24. When asked about whether he read and signed a KOMS policy that prohibited the use of KOMS for any non-work purpose as well as the DOC's Communications and Social Media Policy, the Appellant acknowledged that he did.

25. The Appellant was also questioned about his allegations of discrimination. He stated that he did not have any direct evidence of discrimination, nor was he subjected to discriminatory or inappropriate comments. He recalled that someone unassociated with the investigation may have used a homosexual slur in his presence prior to the time of the investigation, but no other instances of potential discriminatory behavior relevant to his claims were noted. The Appellant reiterated that, while he did not have any specific evidence of discrimination to which he was subjected, the alleged flaws in the investigation supported his discrimination claim.

26. The Appellant was asked about his current email address and he stated that it was ashowenXXXX@gmail.com; he created it years ago before his employment with DOC. He stated that it was named after his deceased sister, Ashante, and he admitted that the same name was used by the JPay account. He had no explanation for how any person could have stolen this information to frame him or could have known of his sister.

27. The Appellant testified that he was not allowed to bring his phone into his pre-termination meeting with Warden Ferguson, therefore, he could not show her his supporting documents. These documents were admitted during the evidentiary hearing as **Appellant's Exhibits 2, 3, and 4.**

28. In his appeal, Appellant testified that CPP 3.17 was unfair and discriminatory as it allowed female officers to wear small stud earrings but did not allow male officers to wear any earrings. While he worked at KCIW, he was asked by a supervisor if he was a woman now because he was wearing an earring. He removed the earring and worked his shift.

29. On rebuttal, **St. Clair** admitted into evidence a copy of the recording of the Appellant's September 23, 2021 Internal Affairs video as **Appellee's Exhibit 11.**

30. On rebuttal, **Warden Ferguson** reiterated that her decision to terminate the Appellant had nothing to do with the Appellant's sexuality and that nothing she heard during the evidentiary hearing would have made her decision any different. She also noted that it is general policy to not allow any cell phones into the institution, but she would have reviewed any documents that the Appellant could have emailed or brought into the pre-termination hearing. Warden Ferguson affirmed her decision was appropriate and the dismissal was justified when considering all available information.

31. In regard to CPP 3.17, Warden Ferguson stated that she understood the Appellant's issue with DOC allowing women, but not men, to wear earrings. However, she explained she has no power to create or modify DOC policy and Wardens such as herself could only follow the policies just like all other employees. This policy was admitted into evidence as **Appellee's Exhibit 12**.

32. Thirteen (13) JPay messages alleged to have been sent by the Appellant were admitted into evidence as **Hearing Officer's Exhibit 1**.

FINDINGS OF FACT

1. The Appellant was hired as a Correctional Officer at KCIW on July 8, 2019. He was promoted to Sergeant on November 1, 2020. On August 16, 2021, he was promoted to Lieutenant at RCC. (Testimony of the Appellant and the Appellee's Exhibits 1, 5, and 6)

2. On September 13, 2021, KCIW Internal Affairs contacted RCC Internal Affairs Captain Durrell St. Clair and reported that a phone number associated with the Appellant was found in a review of the Securus Phone System accounts. This information indicated the Appellant had been in contact with inmates from May 2020 through September 2020. The phone number in the Securus Phone system was registered to Ashley Owens. When questioned by St. Clair during the initial investigation, the Appellant stated that he had not been on the phone with inmates, that the phone number had been his, but his phone had been stolen. Thereafter, the Appellant received a message from Warden Jesse Ferguson that "everything is good." (Testimony of the Appellant, St. Clair, Appellee's Exhibit 1, and Appellant's Exhibit 4)

3. Thereafter, the Appellant had contacted employees at KCIW thinking that he had been "targeted" for the investigation. When St. Clair learned of these contacts, he considered them a "red flag" and re-opened the original investigation. (Testimony of the Appellant and St. Clair)

4. On September 21, 2021, upon further investigation, St. Clair learned that the Appellant's former address was linked to the Ashley Owens Securus Phone System account, another communication system used by the DOC. He then found a JPay account in Ashley Owens' name that included an address, date of birth, and email address that were the same as the Appellant submitted to the DOC on his application for employment. Further, three (3) credit cards belonging to the Appellant had been used to make purchases on the Ashley Owens JPay account. (Testimony of St. Clair and Appellee's Exhibits 1, 2, 5, and 6)

5. St. Clair's investigation revealed that the "Ashley Owens" JPay account indicated that hundreds of messages were sent to twenty-eight (28) different male inmates between April 20, 2020, and January 27, 2021, some of which included pictures of the Appellant. Some of the messages were sexually explicit and the pictures were of the Appellant dressed as a woman. (Testimony of the Appellant, St. Clair, and the Appellee's Exhibits 1, 2, 5, 6, and 10, and the Hearing Officer's Exhibit 1)

6. On September 23, 2021, the Appellant was interviewed at RCC by Internal Affairs Lieutenant Geisler and Unit Administrator Hayes. After first denying that he had sent the JPay messages, the Appellant later admitted to sending the messages stating, “you know what, it was me, it was mine. I didn’t want that part of my life to come out.” In the same interview, he later recanted saying he had only admitted to sending the JPay messages so he could get out of the interview. The Appellant testified at the evidentiary hearing that he was only admitting the pictures were of him. (Testimony of St. Clair, the Appellant, and Appellee’s Exhibits 1, 2, 5, and 6)

7. The Appellant testified at the evidentiary hearing that he did not send the JPay messages. He stated that he was working at KCIW when several of the JPay messages were sent, he only had access to his phone when he was on break, and he had not taken breaks when many of the messages were sent. He stated he would not have access to his phone or any other device to send the messages. The Appellant also claimed that his phone and his credit cards were stolen. During the IA investigation, the Appellant failed to produce any bank or credit card statements, phone records, or any police reports indicating a stolen phone or credit cards. Similarly, during the evidentiary hearing, the Appellant failed to produce any evidence of a stolen phone or credit cards. The only police report relevant to this matter was produced by St. Clair and it did not show a stolen phone or credit cards. Also, the date of the alleged theft was August 6, 2021. The JPay messages were sent beginning on April 20, 2021. (Testimony of St. Clair, the Appellant, and Appellee’s Exhibits 1, 4, 5, and 6)

8. On October 20, 2021, RCC Internal Affairs received a record of the Appellant’s KOMS access history. After reading the KOMS logs alongside the JPay records already in his possession, the Appellee determined that the Appellant had searched twenty-six (26) of the twenty-eight (28) male inmates who were subsequently sent JPay messages by the Ashley Owens account. Evidence of the Appellant’s KOMS searches of seventeen (17) of these inmates was introduced during the evidentiary hearing. The Appellant conducted these KOMS searches while he was employed at KCIW, a women’s prison. He had no work-related reason to be conducting KOMS searches on male inmates. (Testimony of St. Clair and Appellee’s Exhibits 1, 3, 5, and 6)

9. The Appellant was dismissed effective November 9, 2021, by letter from Warden Jesse Ferguson. (Testimony of Warden Ferguson and Appellee’s Exhibit 6)

10. In the dismissal letter, the Appellant was accused of using state time, facilities, equipment, or supplies for private purposes in violation of CPP 3.1. The Hearing Officer finds the Appellee proved this allegation by a preponderance of the evidence. The Appellee’s Exhibit 3 demonstrates the Appellant conducted numerous KOMS searches of male inmates while employed as a Correctional Officer at KCIW. The Hearing Officer finds no work-related purposes for these activities. Further, the Hearing Officer does not find credible the Appellant’s allegation that these records were fabricated by St. Clair or Warden Ferguson. The Appellant provided no proof of fabrication. He also failed to present any credible evidence that such fabrication was possible. Lastly, the Hearing Officer finds no evidence that St. Clair or Warden Ferguson had any motive to falsify records in order to fire the Appellant, who had recently been promoted and transferred

to RCC. (Testimony of the Appellant, St. Clair, Warden Ferguson, and Appellee's Exhibits 3 and 8)

11. The Appellant was also accused of providing false information during the course of an investigation in violation of CPP 3.1. The Hearing Officer finds that the Appellee proved this allegation by a preponderance of the evidence. The Hearing Officer so finds based on the overwhelming evidence of JPay messages associated with the Ashley Owens account and the Appellant's KOMS access history. The Hearing Officer also is persuaded by the connections between the Appellant's application for employment submitted to the DOC and the JPay account registered to Ashley Owens, including the same phone number, email address, street address, and birthdate being identical in addition to pictures of the Appellant and three (3) credit cards belonging to the Appellant being associated with the Ashley Owens JPay account. The Appellant's denial that the Ashley Owens JPay account belonged to him was less than credible given this overwhelming evidence and his inability to produce any documentation or witness to support his denial. (Testimony of the Appellant, St. Clair, Warden Ferguson, and Appellee's Exhibits 1, 2, 3, 4, 5, 6, and 8)

12. The Appellee also proved by a preponderance of the evidence that the Appellant developed relationships with offenders "other than that necessary in the normal conduct of business" in violation of CPP 3.1. The fact that the Appellant researched these inmates on KOMS and then sent them messages establishes this violation. Once again, the Hearing Officer finds the Appellant's denial not credible, especially considering the overwhelming evidence against him. (Testimony of the Appellant, St. Clair, Warden Ferguson, Appellee's Exhibits 1, 2, 3, 4, 5, 6, and 8, and Hearing Officer's Exhibit 1)

13. The Appellee proved that the Appellant sexually harassed male inmates when he sent them messages of sexual nature in violation of CPP 3.22. (Testimony of St. Clair, Appellee's Exhibits 1, 5, 6, and 9, and Hearing Officer's Exhibit 1, Bate-Stamped pages 59, 63, 67, and 68)

14. The Hearing Officer finds that the documentation submitted into evidence does not support the Appellant's position that he could not have sent the JPay messages at issue because he was on post and did not take a break. Review of the evidence entered into evidence establishes the dates and times for only thirteen (13) of the hundreds of JPay messages alleged. Of these, only two (2) were sent on a date the Appellant was working and did not take a break - the messages that were sent September 16, 2020, at 3:00 a.m. and 3:01 a.m. Nine (9) of the thirteen (13) messages were sent at times the Appellant was not working. One (1) message was sent on a day the Appellant was working and took a break. The last date, January 5, 2021, there is no information about. (Testimony of the Appellant and St. Clair, Appellee's Exhibit 2, Appellant's Exhibit 1, and Hearing Officer's Exhibit 1)

15. The Hearing Officer finds that the Appellant's actions constituted misconduct pursuant to 101 KAR 1:345 and justified disciplinary action. The Appellee established just cause for the dismissal of the Appellant and that penalty was neither excessive nor erroneous.

16. The Appellant alleged that his dismissal discriminated against him based on his sex and his sexual orientation. The Hearing Officer finds that Warden Ferguson had legitimate, non-discriminatory reasons to dismiss the Appellant. The Hearing Officer finds Warden Ferguson's testimony credible and specifically finds that she was not motivated in any way to take action against the Appellant based on his sex or sexual orientation.

17. Because the Appellant's dismissal was justified, he was not entitled to a COVID bonus.

18. The Appellant also claimed he was discriminated against by enforcement of CPP 3.17, the Uniformed Employee Dress Code. He specifically felt discriminated against by the provision that allows female staff to "wear one pair of stud type earrings" while male staff are not allowed any earrings. The evidence establishes the policy is not discriminatory and was applied fairly to all employees.

CONCLUSIONS OF LAW

1. As demonstrated in the Findings of Fact, the Appellee carried its burden of proof to establish just cause for the dismissal of the Appellant. Further, the evidence established that this penalty was neither excessive nor erroneous. KRS 13B.090(7), KRS 18A.095(1) and (22), and 101 KAR 1:345.

2. The Appellee carried its burden of proof that the Appellant violated CPP 3.1 and 3.22. These two (2) policies have been adopted as administrative regulations and are incorporated by reference in 501 KAR 6:020.

3. Through the filings of his appeal and alleging discrimination based on sex or sexual orientation, the Appellant properly invoked the jurisdiction of the Personnel Board. KRS 18A.095(12) and (14)(a).

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

5. The Appellee articulated legitimate, nondiscriminatory reasons for the Appellant's dismissal. The Appellant's sole argument presented in opposition can be described only as "baseless" thinking. In other words, the Appellant has basically argued "what else could it be besides discrimination" despite pointing to no inference of any such discrimination. The Supreme Court has established the following analysis for discrimination claims: (1), a claimant must establish a *prima facie* case of discrimination; (2), if the claimant carries this burden, the burden shifts to the defendant to articulate some legitimate reason for the challenged workplace decision; and (3), if the defendant carries this burden, the claimant has an opportunity to prove that the legitimate reasons offered were merely a pretext for discrimination. Kentucky law mirrors this federal standard adopted by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S.

792, 93 S.Ct. 1817 36 L.Ed.2d 668. *See Jefferson Count, Kentucky v. Zaring*, 91 S.W.3d 583 (Ky. 2002). Even assuming the Appellant presented a *prima facie* case of discrimination, the Appellee articulated legitimate non-discriminatory reasons for the Appellant's dismissal. The Appellant did not produce any credible evidence that the legitimate reasons offered for his dismissal were a pretext for discrimination. As such, the Appellant failed to carry his burden of proof that his dismissal was the result of illegal discrimination. *Id.* and KRS 13B.090(7).

6. Regarding the Appellant's dress code claim, the Personnel Board, and all other administrative bodies, have no power or authority to take any action to modify, expand upon, or limit a statute or administrative regulation. KRS 13A.130. CPP 3.17 is at the heart of the Appellant's initial appeal and was promulgated by the power of the Secretary of the Justice and Public Safety Cabinet through their authority delegated by law and the legislature. KRS 196.035. As the Personnel Board has no authority to order that any action be taken to modify CPP 3.17, the only possible recourse related to this claim is in the hands of the legislature. While testimony showed that steps are being taken to change the policy through the appropriate channels and the Appellant has requested no relief, the Personnel Board can take no action nor provide any relief under the circumstances. KRS 13A.130. CPP 3.17 has been adopted as an administrative regulation and is incorporated by reference in 501 KAR 6:020.

7. The Hearing Officer concludes that St. Clair's testimony that the Appellant admitted during an interview with Internal Affairs that the JPay account was his is hearsay evidence admissible pursuant to KRS 13B.090(1). A statement memorialized by Internal Affairs as part of an official investigation is the "type of evidence that reasonable and prudent persons would rely on in their daily affairs." Additionally, this evidence is supported by non-hearsay evidence, including the Appellant's testimony at the evidentiary hearing that he made this admission during his Internal Affairs interview.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeals of **JONATHAN HARRIS V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NOS. 2021-043, 2021-122, and 2021-147)**, 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).


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 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 discretion of the Hearing Officer this 9 day of June, 2023.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day emailed and mailed to:

Jonathan Harris
Hon. Peter Dooley
Rosemary Holbrook (Personnel Cabinet)