

**CERTIFICATION OF PERSONNEL BOARD RECORDS**

I certify that attached hereto is a true and correct copy of the Findings of Fact, Conclusions of Law, and Recommended Order and Final Order in the case of **ERICA KENNEDY VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2012-237)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 14<sup>th</sup> day of August, 2013.

  
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**MARK A. SIPEK, SECRETARY**  
**KENTUCKY PERSONNEL BOARD**

Copy to Secretary, Personnel Cabinet

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2012-237

ERICA KENNEDY

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  
J. MICHAEL BROWN, APPOINTING AUTHORITY

APPELLEE

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The Board at its regular August 2013 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated June 27, 2013, and being duly advised,

**IT IS HEREBY ORDERED** that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be, and they hereby are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **SUSTAINED**.

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 14<sup>th</sup> day of August, 2013.

KENTUCKY PERSONNEL BOARD

  
MARK A. SIPEK, SECRETARY

A copy mailed this day to:

Hon. Wesley Duke  
Hon. David Leighty  
Hon. Ben Basil  
Stephanie Appel

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2012-237

ERICA KENNEDY

APPELLANT

VS.

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

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

APPELLEE

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This matter came on for an evidentiary hearing on March 12, 2013, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Erica Kennedy, was present and was represented by the Hon. David Leighty and the Hon. Ben Basil. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Wesley Duke. Present as Agency representative was Warden Clark Taylor. Also present for the Appellee was Ann Smith, Paralegal.

**BACKGROUND**

1. Appellant, Erica Kennedy, was dismissed by the Department of Corrections from her position as a Classification and Treatment Officer I (CTO I) by letter dated September 6, 2012. [Attached hereto as **Recommended Order Attachment A.**] The Appellant was dismissed because she was alleged to be in direct violation of CPP 3.1, Code of Ethics, B. Conflicts of Interest, Section III (D), "developing a relationship between staff and offender other than necessary in the normal conduct of business."

2. Appellant filed her appeal with the Personnel Board on October 17, 2012, challenging her dismissal. She stated in part on her Appeal Form, "She unintentionally fraternized with a probationer without knowledge of his probationary status and upon discovering his status ceased contact with him."

3. The Hearing Officer held two pre-hearing conferences, resolved some discovery disputes, and the matter was ready for hearing on March 12, 2013. The burden of proof was placed on the Appellee to establish just cause for the dismissal of the Appellant and to prove that the penalty was neither excessive nor erroneous.

4. At the start of the evidentiary hearing, the Hearing Officer disclosed that he formerly worked for the Department of Corrections for almost ten years and worked with Clark Taylor when he was the Litigation Coordinator at the Kentucky State Reformatory.

5. The Hearing Officer indicated he felt that he could be fair and impartial in hearing the case and it would not affect his ability to hear the case. Both parties stated they had no questions, concerns or objections and that the matter could proceed.

6. Before the start of testimony, counsel for the Appellant objected to the Appellee's supplemental witness list. He stated that witness lists were ordered to be filed by March 1, 2013, and that the Appellee filed a supplemental witness list on March 7, 2013. He stated that the supplement witness list included a new witness, Ms. Amy Robey, and a new exhibit, rosters and logs from Unit A, Dorm 1, from September 2011 to November 2011. After discussion, it was determined that the exhibit was not necessary as the issue was not in question. The Appellee indicated that Ms. Robey would be called as a witness to describe Appellant's duties as a CTO. Counsel for the Appellant objected because he had not been given timely notice and felt that his case would be prejudiced. The Hearing Officer withheld ruling until Ms. Robey would be called in the context of the hearing.

7. Counsel for the Appellee waived opening statement.

8. In his opening, counsel for the Appellant stated that the Appellant did not dispute that she had a relationship with an offender by the name of Clevenger. He stated that she did not know he was an offender at the time the relationship started and that she ended the relationship within a week after she learned he was an offender on parole. He stated that the letter that dismissed his client did not charge her with knowing Clevenger was an offender.

9. The Appellee called Sergeant **Arvin Brown** as its first witness. Sergeant Brown has worked at the Kentucky State Reformatory (KSR) for three years and has been an Internal Affairs Investigator for one year.

10. He stated that the investigation regarding Erica Kennedy was initiated following a phone call on August 10, 2012, from an individual claiming to be Jason Howard. He stated that Sergeant Taylor took the phone call and identified an offender by the name of Aubert Clevenger had a relationship with a KSR employee named Erica Kennedy.

11. Sergeant Brown stated that he checked the Kentucky Offender Management System or KOMS and learned that Clevenger was on parole. Based on information obtained from the caller, Sergeant Brown testified that they checked Facebook and saw a picture that appeared to be taken at a Steak-n-Shake of Ms. Kennedy and Mr. Clevenger. There was also a picture posted of Ms. Kennedy with forest or mountains in the background.

12. On Monday, August 13, Sergeant Brown and Lieutenant Williams interviewed Ms. Kennedy. Ms. Kennedy told them that early in June she was shopping at a hardware store on Bardstown Road when she met Mr. Clevenger. He helped her find some items she needed and they exchanged phone numbers. She gave him a call to come over to the house and work on some of the repairs. According to Sergeant Brown, Ms. Kennedy admitted that she and Clevenger spoke on the phone frequently and began dating. She admitted that the picture from Steak-n-Shake was from a visit she and Clevenger made to Indiana to see Clevenger's sister. She stated that the other picture was taken at Natural Bridge when she and Clevenger visited there.

13. Sergeant Brown testified that after awhile Ms. Kennedy noticed that Clevenger had a tattoo which looked like an institutional number. When she went back to work she checked KOMS and discovered that Clevenger was an offender. When asked if she broke off the relationship right then, she stated she was scared and nervous as to what Clevenger might do. She stated that she was scared because Clevenger was "clingy." Approximately five days later she told him and broke off the relationship.

14. According to Sergeant Brown, Ms. Kennedy was asked why she did not report this to Internal Affairs, he stated that she responded by stating, "she was scared and felt like she would be telling on herself."

15. From his investigation, Sergeant Brown testified that they learned Clevenger was an inmate at KSR from August 9, 2011, until he was paroled in February 2012. He stated that Clevenger was assigned to Unit A, Dorm 1, from September 2011 through November 2011. He stated that during that period of time Ms. Kennedy was the Unit A Secretary.

16. During the investigation, Sergeant Brown asked Ms. Kennedy if she remembered Clevenger and she stated "no." She stated it was possible that Clevenger remembered her. Ms. Kennedy told Sergeant Brown she had no idea that Clevenger had been a resident at KSR.

17. Upon further investigation, Sergeant Brown found paperwork that Ms. Kennedy had scanned into KOMS in performing her job duties. He specifically mentioned a write-up of inmate Clevenger on August 22, 2011, that was scanned into the system by Ms. Kennedy.

18. Counsel for the Appellant objected to the introduction of evidence regarding Ms. Kennedy knowing Clevenger from KSR. He argued that the dismissal letter did not charge Ms. Kennedy with knowing Clevenger was an offender. Counsel for the Appellee replied by stating that a violation of the policy implied that she knew he was an offender. The Hearing Officer overruled the objection and allowed the testimony, stating that the dismissal letter had not yet been introduced into evidence and the Appellant could continue to argue that this was conduct that had not been charged, if that is what the evidence proved.

19. Sergeant Brown testified that Ms. Kennedy had been employed at KSR for five years. He stated that Ms. Kennedy admitted that she knew it was wrong to have a relationship with an offender.

20. Sergeant Brown testified that all employees when they go through basic academy are informed about CPP 3.1 which tells them they should not be involved with an offender or an offender's family. He stated that employees also sign a statement saying they have read and understood this policy.

21. Introduced as Appellee's Exhibit 1 during Sergeant Brown's testimony was the Internal Affairs Report of Investigation.

22. On cross-examination, Sergeant Brown admitted that they contacted Jason Howard a second time; however, he refused to talk and did not want to get further involved.

23. Sergeant Brown stated that Ms. Kennedy broke up with Clevenger a few weeks before the interview. He did not dispute that the date was August 2, 2012. He acknowledged that Mr. Clevenger posted the pictures on Facebook on August 5. He also acknowledged they received a phone call from Jason Howard on August 10. Sergeant Brown acknowledged that in his report he did not put the dates that Clevenger was in Unit A only that it was September through November 2011.

24. During Sergeant Brown's testimony, CPP 3.1, Code of Ethics, was introduced into evidence. Sergeant Brown acknowledged that this policy does not require the report. He stated that there were other policies that required the reporting of incidents involving offenders. He stated he had them with him, but never disclosed what they were during his testimony.

25. Sergeant Brown stated that there are six to seven hundred inmates in Unit A. He stated that the types of forms Ms. Kennedy scanned into KOMS did not require a face-to-face meeting.

26. Sergeant Brown acknowledged that Ms. Kennedy told him that she did not remember Clevenger during the investigation. He also acknowledged that he stated in his report that she was cooperative and very forthcoming. He did not charge her with making a false statement or that she lied during the investigation.

27. Sergeant Brown testified that Ms. Kennedy should have reported when she was suspicious that Clevenger had "jail-like tattoos." He also felt that she had a duty to report when Clevenger was threatening to tell someone at KSR if she broke up with him. He also stated that she had a duty to report incidents of vandalism, such as slashing tires. He acknowledged that Ms. Kennedy stated she could not prove that Clevenger had done the vandalism.

28. Sergeant Brown acknowledged that he could have checked the date that Erica Kennedy discovered Clevenger on KOMS. He stated that he did not do so.

29. On redirect, Sergeant Brown testified that the unit secretary is located in Dorm 1, not in Dorm 3. He described it as an office-type environment.

30. The Appellee attempted to call **Amy Robey** as its next witness. Counsel for the Appellant renewed an objection to Ms. Robey's testifying stating that she was not identified as a witness until a supplemental witness list was filed on March 7 in violation of a previous Interim Order which stated that, "... witness and exhibit lists, or any supplements thereto, are due on March 1, 2013, ..." Counsel for the Appellant stated he was prejudiced by this late notice, had no idea who Ms. Robey was or what she might testify to. Counsel for the Appellee stated that Ms. Robey would testify regarding the Appellant's job responsibilities at the time of the incident. The Hearing Officer **SUSTAINED** the objection to the witness being called at that time and stated that the Appellee could call the witness later after counsel for the Appellant had an opportunity to interview the witness, perhaps during the lunch break.

31. After a brief recess, the Appellee called **Clark Taylor** as its next witness. He identified himself as the Warden at KSR and has held that position since June 1, 2012. He stated that he made the decision to dismiss Erica Kennedy based on an investigation which established that she violated CPP 3.1 by becoming involved in a romantic relationship with an offender.

32. Introduced into evidence as Appellee's Exhibit 2 was an intent to dismiss letter delivered to the Appellant and dated September 6, 2012. Warden Taylor testified that he conducted a pre-termination conference on September 19, 2012, and went over the intent to dismiss letter including the factual allegations and the policy violation which led to the proposed action. He stated that his usual practice is to give the Appellant an opportunity to provide their side of the story. He testified that Ms. Kennedy appeared at the pre-termination conference with counsel.

33. Warden Taylor stated that Kennedy stated that she became aware that Clevenger might be an offender when weeks into the relationship she discovered suspicious looking tattoos. At that point she looked him up in KOMS and confirmed that he was an offender. Warden Taylor did not recall the specific date. He testified that it was his understanding that Ms. Kennedy only had access to KOMS while at work. Warden Taylor stated that Kennedy said she did not go to Internal Affairs because she was fearful and hoped the situation would go away.

34. Upon discovering that Clevenger was an offender, Kennedy admitted that she did not immediately end the relationship because she was fearful of his reaction. According to Warden Taylor, Kennedy stated it was about a week or so before she ended the relationship.

35. Warden Taylor testified that he believed it was a coincidence that Clevenger was housed at KSR in the very unit where Ms. Kennedy previously worked. He thought that it was unlikely that it took Kennedy several weeks to discover that Clevenger was an inmate and Warden Taylor stated that he believed that she remembered him from the institution. He stated he believed this because they were in the same unit and she processed paperwork involving a name which Warden Taylor stated was especially unique, Aubert Clevenger. For this reason, he did not believe that Kennedy was completely forthcoming during the pre-termination conference.

36. Warden Taylor stated that he believed the most serious violation was not immediately ending the relationship once she discovered that Clevenger was an offender.

37. Warden Taylor also stated that Unit A consists of Dorm 1 with approximately 145 inmates, Dorm 3 with 175 inmates, Dorm 10 with 90 inmates and the Nursing Care Facility with 67 inmates.

38. On cross-examination, Warden Taylor stated that he did not charge Kennedy with prior knowledge that Clevenger was an offender in the termination letter and acknowledged that was not the reason we were here today for the hearing.

39. Warden Taylor testified he could have determined when Ms. Kennedy found the information in KOMS by contacting the Commonwealth Office of Technology (COT) within six months. He testified the significance of determining that she discovered this information at work was that he would have expected her to walk right down to Internal Affairs, inform them of the relationship and tell them that she would end it immediately.

40. The dismissal letter was introduced as Appellee's Exhibit 3 during Warden Taylor's testimony. Warden Taylor acknowledged that the dismissal letter was prepared after the pre-termination conference and after it was discovered that Ms. Kennedy did not walk down to Internal Affairs after she discovered Clevenger was an offender. Warden Taylor acknowledged that was not in the letter, she is not charged with that and that was not the reason we were here at the hearing either.

41. The Appellee called the Appellant, **Erica Kennedy**, as its next witness. She testified that she started the relationship with Aubert Clevenger in early June of 2012. She stated that she discovered that he was an offender in KOMS on approximately July 26, 2012. On the date she discovered he was an offender she did not see the immediate need to report this matter to Internal Affairs and stated that she knew she had to take care of it. She testified that when she discovered this information, she was planning to go on vacation on July 28 and did not feel comfortable breaking off the relationship with Clevenger when he knew her house would be



unoccupied. She stated she believed that he had a history of burglary and assault from her review of KOMS.

42. She testified that she was gone from July 28 and returned late in the evening on August 1. She stated she ended the relationship with Clevenger on the morning of August 2. She stated that the conversation that day took place on her front porch in the daytime. She described that she has watchful neighbors and felt safe under those circumstances. She stated thereafter she started receiving threats from Clevenger. After the second vandalism incident, she reported it to the police department. She also contacted Clevenger's parole officer. She testified that she was the Unit Secretary for approximately one year. She was familiar with the Code of Ethics from her initial training and from annual training.

43. Appellant's counsel had no questions at that time and the Appellee rested its case.

44. The Appellant, **Erica Kennedy**, called herself as her only witness. She testified that at the time of her dismissal she was a CTO, a position that she has held for approximately seven months. She had been the secretary for Unit A immediately prior to that.

45. The Appellant testified that she met Mr. Clevenger at a hardware store while she was looking for some home repair items. He helped her find the items she was looking for and they had a friendly conversation. They exchanged phone numbers and discussed the fact that he would do some home repairs for Ms. Kennedy.

46. Thereafter, they had phone conversations and exchanged text messages. Eventually Clevenger came to the Appellant's home and fixed an outside motion light. On that occasion he did not come inside the home.

47. Thereafter, they exchanged further phone calls and text messages. On one occasion the Appellant went to Indiana with Clevenger to help his sister move. She stated that while they were in Indiana they went to Steak-n-Shake where the picture was taken. She testified this was the only time they went out to eat together. She stated the other picture was taken at Natural Bridge. Ms. Kennedy described Clevenger as very nice and respectful.

48. In July of 2012, the Appellant planned to take her seven year old son to the beach in Florida. In mid-July she made an official request to take days off at the end of July and the beginning of August. She testified these vacation plans did not include Clevenger.

49. The Appellant stated that shortly before she went on vacation Clevenger started acting strangely. She described him as suspicious of who she was talking to and that he was engaging in some unusual phone conversations himself. He also described family circumstances that she thought were unfortunate, but caused her to be suspicious. When she confronted Clevenger that he was acting differently, he stated that he had stopped taking medicine for vertigo. It was around this time that the Appellant stated that she noticed that Clevenger, who had a number of tattoos, had a specific small tattoo on his arm of a series of numbers.

50. The Appellant testified that when she went to work she looked Clevenger up on KOMS. She did not write down the number or remember the number. When she looked him up on KOMS, she discovered that he was active on parole. She stated that his record included a robbery or burglary and an assault. When she discovered this information, the Appellant stated she knew immediately she had to end the relationship with Clevenger.

51. The Appellant stated that she did not confront Clevenger immediately for fear of how he might react. She stated that his unusual behavior in the week leading up to that caused her concern, as well as the fact that she felt he had become quite attached to her. She described it as a potentially volatile situation and she wanted to be careful how she let him know. She stated that she did not have any further contact with Clevenger from when she found out he was an offender to when she left on vacation.

52. While on vacation in Florida, the Appellant stated that she had very little contact with Clevenger, a few phone calls or a text. She stated she was gone from July 28 through to late on August 1.

53. The Appellant testified that on August 2 when she confronted Clevenger and told him that the relationship had to end, he at first tried to dissuade her. She stated that eventually he seemed to understand and accept it.

54. The Appellant testified that the very next day, August 3, 2012, threats began to come from Mr. Clevenger. She stated that at first they were general. The first threat was "Let the games begin." She stated that Clevenger insisted that they have another meeting to discuss the situation. She stated Clevenger threatened to tell her work about the relationship. She stated she received these threats as text messages. She eventually had her phone number changed.

55. The Appellant stated that Clevenger drove a maroon pickup truck. She stated she saw it drive by her house many times. She stated she was not aware she was under any obligation to report these threats to anyone at work. She has never been pointed to any specific policy that requires such a report.

56. In describing her job duties as a secretary in Unit A, the Appellant stated she handled a multitude of paperwork concerning inmates. She stated she did not familiarize herself with the names of all inmates. She stated that she might encounter a hundred or two hundred inmates on any given day.

57. The Appellant testified that she did not remember Aubert Clevenger as an inmate from KSR. She stated that until she looked him up on KOMS, she did not know that he was an offender.

58. The Appellant introduced her 2011 evaluation with a rating of "Highly Effective" as her second exhibit. Appellant introduced into evidence a decision in her favor from the Division of Unemployment Insurance as Appellant's Exhibit 3.

59. That ended the testimony. The parties entered simultaneous briefs on April 9, 2013.

### **FINDINGS OF FACT**

1. The Appellant, Erica Kennedy, was employed at the Kentucky State Reformatory (KSR) for approximately five years. She was initially employed as a secretary in Unit A and later employed as a Classification and Treatment Officer (CTO). She was dismissed from her position as a CTO effective September 20, 2012. [Testimony of Sergeant Arvin Brown, Warden Clark Taylor, Appellant and Appellee's Exhibit 3.]

2. In June of 2012 the Appellant was shopping at a hardware store in Louisville when she was assisted by an employee by the name of Aubert Clevenger. Clevenger assisted the Appellant in finding the items she needed and offered to help to assist her with some home repairs. The Appellant agreed and they exchanged telephone numbers. The Appellant had never met Clevenger before this occasion. [Testimony of Appellant, Sergeant Arvin Brown and Appellee's Exhibit 1.]

3. Clevenger assisted the Appellant with home repairs following an exchange of phone calls and text messages. Thereafter, they began dating. The Appellant accompanied Clevenger to Indiana to assist his sister while moving. While there they visited a restaurant. Clevenger and the Appellant made a separate trip to Natural Bridge State Park. [Testimony of Appellant, Sergeant Arvin Brown and Appellee's Exhibit 1.]

4. In mid-July of 2012, the Appellant requested vacation time to take her son to Florida. The leave request was approved beginning on July 28, 2012. Clevenger was not involved in the Appellant's vacation plans. [Testimony of Appellant.]

5. In late July of 2012, the Appellant noticed a change in Clevenger's behavior. Before that occasion she described him as very nice and respectful. Thereafter she noticed that Clevenger was becoming more attached to her and suspicious of her. He wanted to know where she was and who she was talking to on the telephone. She also stated she heard Clevenger involved in unusual phone calls. She stated that Clevenger had unusual stories to tell about his family. Lastly, the Appellant noticed for some time that Clevenger had a number of tattoos; noticed a particular tattoo on the Appellant's forearm which she thought looked like a prison tattoo which consisted of a series of numbers. She did not write down the numbers or remember the numbers. [Testimony of Appellant.]

6. The next time she was at work, the Appellant did a search by name of Aubert Clevenger in the Kentucky Offender Management System (KOMS). The Appellant determined that Clevenger was on active parole. She believed he had convictions for burglary or robbery and assault. The Appellant determined that she needed to end the relationship with Clevenger because he was an offender. [Testimony of the Appellant.]

7. The Appellant decided not to tell Clevenger they needed to break off the relationship until she got back from her vacation. She stated that she made this decision based on the fact that Clevenger had been to her house, was familiar with her house and had become more attached to her. She was afraid how Clevenger might react when she broke off the relationship. As a result, she decided to tell him the relationship was over when she returned from her vacation. The Appellant did not have any contact with Clevenger after she discovered he was an offender in KOMS before she left on vacation. [Testimony of Appellant.]

8. While on vacation, the Appellant stated she had very little contact with Clevenger only a few phone calls or text messages. She left for vacation on July 28, 2012, and returned late in the evening on August 1, 2012. [Testimony of Appellant.]

9. The Appellant met with Clevenger the morning of August 2, 2012, and told Clevenger that their relationship would have to end because of her job and his status as an offender. The Appellant stated that Clevenger tried to talk her out of it; however, he eventually agreed and stated he understood. [Testimony of Appellant.]

10. The following day, August 3, 2012, Clevenger left a threatening text message for the Appellant, "Let the games begin." She believes that Clevenger vandalized her property including slashing tires and other acts. She stated that she saw his truck drive down her street a number of times. After the second act of vandalism, she contacted her local police department. The Appellant also contacted Clevenger's Probation and Parole Officer. She stated that Clevenger threatened to reveal their previous relationship to KSR. [Testimony of Appellant.]

11. On August 5, 2012, Clevenger posted pictures of the Appellant on his Facebook page. The first was a picture of himself and the Appellant at a restaurant in Indiana. The other was a picture of the Appellant alone at Natural Bridge. [Testimony of Appellant, Sergeant Arvin Brown and Appellee's Exhibit 1.]

12. On August 10, 2012, the Internal Affairs Office at KSR received a telephone call from an individual who identified himself as Jason Howard, stating he was concerned about Aubert Clevenger and did not want to see him get his parole revoked because he was involved in a relationship with a Department of Corrections' employee. The telephone call led to an internal affairs investigation of the Appellant, including an interview with the Appellant on August 13, 2012. The reporting officers from Internal Affairs described the Appellant as "very cooperative with investigators and very forthcoming." [Testimony of Sergeant Arvin Brown and Appellee's Exhibit 1.]

13. During her interview, the Appellant told the investigators that she did not end the relationship immediately with Clevenger when she discovered he was an offender because she was scared and nervous and knew that Clevenger would not take the news well because he had become attached. When questioned why the Appellant did not report this to Internal Affairs when she realized Clevenger was under supervision the Appellant stated she was scared because it would be like telling on herself and she was hoping it would just go away. [Testimony of Sergeant Arvin Brown and Appellee's Exhibit 1.]

14. During the investigation, Sergeant Brown learned that Clevenger was housed at KSR from August 9, 2011, until he was paroled February 15, 2012. During his incarceration at KSR, Clevenger was housed in Unit A, Dorm 1, from September 2011 to November 2011. During that timeframe, the Appellant was a Unit A Administrative Secretary and her office was located in Dorm 3. Appellant told the investigators that she did not remember Clevenger prior to meeting him at the hardware store in early June 2012. Sergeant Brown discovered three documents the Appellant had scanned into KOMS which concerned Clevenger. These documents were a disciplinary report, a Work Assignment Form, and a Protective Custody Form. Appellant would not have needed to have face-to-face contact with the Appellant in order to scan these documents in KOMS. [Testimony of Appellant, Sergeant Arvin Brown and Appellee's Exhibit 1.]

15. Clark Taylor, the Warden at KSR and the Appointing Authority, reviewed the Internal Affairs report and issued an intent to dismiss letter to the Appellant. The Appellant requested a pre-termination meeting which Warden Taylor conducted himself. The Appellant relayed the same information to the Warden at the pre-termination conference as she had to Sergeant Brown during the investigation and very similar to her testimony at the evidentiary hearing. Warden Taylor dismissed the Appellant citing a violation of CPP 3.1 by developing a relationship with an offender. [Testimony of Warden Clark Taylor and Appellee's Exhibits 2 and 3.]

16. Warden Taylor suspected the Appellant remembered Clevenger from Unit A at KSR; however, he specifically did not charge her with this knowledge in the letter dismissing her. He acknowledged this was not an issue at the hearing. Likewise, he acknowledged that he did not specifically charge the Appellant with failure to notify Internal Affairs when she became aware of Clevenger's status as an offender. He acknowledged that this was not an issue at the evidentiary hearing. [Testimony of Warden Clark Taylor and Appellee's Exhibit 3.]

17. The Appellant received initial training regarding Corrections Policy and Procedure 3.1, Code of Ethics, and annual refreshers regarding this policy. [Testimony of Sergeant Arvin Brown and Appellant.]

18. Sergeant Brown mentioned during his testimony that there are other policies which require the Appellant to notify Internal Affairs regarding her contact with an offender. He did not identify these policies, they were not introduced into evidence, and they were not cited in the Appellant's dismissal letter. [Testimony of Sergeant Arvin Brown and Appellee's Exhibit 3.]

19. Because the Appellant did not know that Aubert Clevenger was an offender when she developed a relationship with him, she did not violate Corrections Policy and Procedure 3.1 and there was not just cause for her dismissal. In addition, the action of dismissal was excessive and erroneous under all the surrounding circumstances. These circumstances include the fact that the Appellant did not know Clevenger was an offender at the time the relationship began and that she took reasonable steps to end the relationship when she learned he was an offender. The Appellee did not prove that the Appellant acted unreasonably when she waited until her return from vacation to end the relationship with Clevenger.

20. CPP 3.1 gives no guidance to an employee about reporting a relationship to Internal Affairs or anyone else once a relationship with an offender has developed. The Hearing Officer does not disagree with the testimony of Warden Clark Taylor or Sergeant Arvin Brown that such a step would have been reasonable under the circumstances; however, dismissing an employee for failure to report this relationship under the circumstances of this case is completely unjust and excessive.

### **CONCLUSIONS OF LAW**

1. Because the Appellee failed to prove that just cause existed for the dismissal of the Appellant and the action of dismissal was excessive and erroneous, the Hearing Officer concludes the Appellant should be reinstated to her position as a Classification and Treatment Officer with back pay and appropriate benefits. KRS 18A.095(2) and (22)(b) and (c).

2. As a classified employee with status, the Appellant was entitled to due process when the Appellee dismissed her from her position. The essence of due process is notice of the charges against her and an opportunity to be heard. Because the Appellant was not notified that she was being fired for knowing Clevenger was an offender before the relationship developed or failing to report after she learned of the investigation, it would be a violation of due process to uphold the dismissal because of these allegations. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) and KRS 18A.095(2)(3)(4)(5)(6) and (7).

3. Corrections Policy and Procedure 3.1 has been adopted as a Kentucky Administrative Regulation at 501 KAR 6:020. As such, the Personnel Board must accept this Administrative Regulation as valid. KRS 13A.140. In addition, the Appellee cannot by internal policy memorandum or other form of action modify the regulation. KRS 13A.130.

**RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **ERICA KENNEDY VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2012-237)** be **SUSTAINED** and that she be reinstated to her previous position or one with like pay and status with full back pay and benefits from the date of her dismissal and that she otherwise be made whole. **[KRS 18A.105 and 200 KAR 12:030.]**

**NOTICE OF EXCEPTION AND APPEAL RIGHTS**

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

**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.

**SO ORDERED** at the direction of **Hearing Officer Mark A. Sipek** this 27<sup>th</sup> day of June, 2013.

**KENTUCKY PERSONNEL BOARD**

  
**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Wesley Duke  
Hon. David Leighty  
Hon. Ben Basil



## DEPARTMENT OF CORRECTIONS

**LaDonna H. Thompson**  
Commissioner

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LaGrange, Kentucky 40032  
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[www.kentucky.gov](http://www.kentucky.gov)

**Clark Taylor**  
Warden

September 6, 2012

Erica Kennedy

Dear Ms. Kennedy

After careful consideration of the statements made on your behalf at your pre-termination hearing, held in my office on September 19, 2012, with your attorney Houston Parrish, I have determined that the clear weight of evidence establishes that you did commit the charges as outlined in the letter of Intent to Dismiss dated September 6, 2012. Therefore, based on the authority of KRS 18A.095, you are hereby notified of my decision to dismiss you from your position of Classification and Treatment Officer I with the Department of Corrections, Kentucky State Reformatory. This action is effective September 20, 2012.

Pursuant to 101 KAR 1:345, I find probable cause to believe that your dismissal is justified based on the following specific reason:

**Misconduct**, i.e., as reported by Lieutenant Michael Williams, Internal Affairs, on Friday August 10, 2012, a male by the name of Jason Howard called the Kentucky State Reformatory and spoke with Internal Affairs Investigator Sergeant Dorothy Taylor about Aubert Clevenger #172751, who is currently under active supervision by District 16 Probation and Parole. Mr. Howard stated that Mr. Clevenger has been involved with an employee of the Dept of Corrections and gave Sgt. Taylor information that they are pictured together on Facebook.

Internal affairs investigators, Sgt Taylor and Sgt. Arvin Brown began an investigation into the allegations. Sgt Taylor and Sgt Brown logged into Facebook to confirm what the caller had stated and there was a picture of you with Mr. Clevenger at what appeared to be a steak-n-shake restaurant. Furthermore, there was a picture of you by yourself in what appeared to be a wooded area.

On August 13, 2012, Lt Michael Williams and Sgt Brown interviewed you in the internal affairs office. You stated that in June 2012, you were going through some rough times. You stated you met Mr. Clevenger at a hardware store on Bardstown Rd in Louisville, KY while



you were there shopping for some items for home repair. You stated that through conversation and exchange of phone numbers, you agreed to allow Mr. Clevenger to come to your home and make the proper repairs. You stated a few weeks passed during which time you and Mr. Clevenger spoke many times by phone and spent time together dating. You also stated that you went to Indiana with Mr. Clevenger to help his sister move. You admitted the pictures of yourself and Mr. Clevenger were at a steak-n-shake in Indiana taken by Mr. Clevenger's sister. Furthermore, you admitted the other picture of you was taken at the wooded area at Natural Bridge State Park where you and Mr. Clevenger took a trip together.

You stated that during the time you and Mr. Clevenger were dating, you began to become suspicious of Mr. Clevenger. You stated he had "Jail house like tattoos" and his institutional number was tattooed on his arm. You stated you looked up Mr. Clevenger in KOMS and that is when you first found out that Mr. Clevenger was under supervision by probation and parole. When you were asked by Lt Williams if you ended the relationship, you stated, "No, I was scared and nervous so I delayed talking to Aubert for approximately 5 days or so before I told him it had to stop." You stated Mr. Clevenger acted as though he understood the circumstances as to why the relationship had to end; however, you felt he did not take the news well because he was already attached to you.

You stated shortly after telling Mr. Clevenger that it was over, you began receiving threatening phone calls and text messages. You stated Mr. Clevenger stated he would call the institution and make threatening statements about you. You also stated that there has been vandalism of some of your property. When you were questioned about why this was not reported to Law Enforcement, you stated you had no way to prove that it was Mr. Clevenger. Lt Williams asked you why you did not report this to the internal affairs office when you knew Mr. Clevenger was under supervision by probation and parole and you stated, "I was scared because it would be like telling on myself and I was hoping this would just go away."


Upon further investigation, Internal Affairs discovered that Mr. Clevenger was a resident of the Kentucky State Reformatory from August 9, 2011 until he was paroled February 15, 2012. During Mr. Clevenger's incarceration he was housed in Unit A Dorm 1 during the dates of September 2011 to November 2011. You were the Unit A Secretary at that time and your office was located in Dorm 3.

Your actions are a direct violation of CPP 3.1 Code of Ethics, B. Conflicts of Interest Section 3 (D) developing a relationship between staff and offender other than that necessary in the normal conduct of business. An Employee shall not become romantically involved with an offender.

As a Department of Corrections employee, you are held to a standard of conduct that requires you to follow proper protocols in the performance of your duties and as a private citizen. Your contact with Offender Clevenger does not meet the ethical standards established by the Kentucky Department of Corrections. Developing a relationship with an offender other than in the necessary course of business is strictly prohibited. Furthermore, your actions violates the public trust in our Department and creates and environment of misconduct and manipulation by and against offenders. This type of behavior cannot be tolerated in the workplace.

By the provisions of KRS 18A.095, as a classified employee with status, you may appeal this action to the Personnel Board within sixty (60) days after receipt of this notice of dismissal, excluding the date notification is received. Such appeal must be filed in writing utilizing the attached appeal form and in the manner prescribed on the form.

Sincerely,



Clark Taylor  
Warden

Attachment (Appeal Form)

cc: LaDonna Thompson, Commissioner – Department of Corrections  
Tim Longmeyer – Secretary Personnel Cabinet  
Jim Erwin, Deputy Commissioner, Office of Adult Institutions  
Stephanie Appel, Assistant Director - Division of Personnel Services  
Mark Sipek, Executive Director-Personnel Board  
Regional Personnel File

Certified Mail  
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