

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2020-098

ERIC KIRST

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 January 2021 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated December 1, 2020, 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 January, 2021.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Erik Carlsen-Landy
Mr. Eric Kirst
Mr. Rodney Moore

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2020-098**

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

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

APPELLEE

** ** * * *

This matter came on for an evidentiary hearing using Amazon Chime video teleconferencing software on September 17, 2020, at approximately 9:30 a.m., EDT, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Stafford Easterling, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Eric Kirst, was present by Amazon Chime and was not represented by legal counsel. The Agency/Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Erik Carlsen-Landy, who also appeared by Amazon Chime.

At issue was the Agency's dismissal of the Appellant, a classified employee with status. The Agency was assigned the burden of proof on the dismissal. Therefore, the Agency had to establish by a preponderance of the evidence that there was just cause for the Appellant's dismissal and that such dismissal was neither excessive nor erroneous.

BACKGROUND

1. Following the presentation of opening statements by both parties, the Agency called **Derek Roberts** as its first witness. Roberts is currently employed as Internal Affairs Supervisor for the Kentucky State Penitentiary, a correctional institution within the Justice and Public Safety Cabinet, Department of Corrections. Roberts has worked in Internal Affairs since 2013 and held his current position at the time of the incident underlying this appeal.

2. The witness's primary duties include combatting the introduction of contraband into the facility, investigating allegations of employee misconduct, and presenting potential cases to other law enforcement agencies. Here, Roberts investigated the November 21, 2019 incident that led the Agency to dismiss the Appellant.

3. In this case, the witness received an email from a Correctional Captain detailing an incident occurring between the Appellant and CTO Michael Massey. Specifically, as reported to Roberts, substantiated by his investigation, and as incorporated into the January 29, 2020 letter imposing the Appellant's dismissal, the Agency alleged:

Misconduct, i.e., when on November 21, 2019, at approximately 12:35 a.m., you were working Two (2) Wall Stand. Classification and Treatment Officer I Michael Massey came to relieve you to allow you to go eat in the Staff Canteen for the Thanksgiving meal. CTO Massey attempted to contact you by institutional radio twice. On the second radio call, you came out onto the Two (2) Wall Stand walk way. You told CTO Massey not to fucking call you on the radio and to leave you alone. CTO Massey stated that he told you not to talk to him like that and asked you if you would like to be relieved for the Thanksgiving meal. You stated "No" that you did not want any "fucking food" and for him to get away from your wall stand "bitch." CTO Massey again told you not to talk to him like that. CTO Massey stated that you continued to talk to him like that and that you told him they could meet in the parking lot after work and you would "beat his fucking bitch ass." CTO Massey stated that he told you "good luck with that one" and that you stated "Fuck it. I will come down there right now and beat your ass." CTO Massey reported that he replied "That's a good idea, go ahead and leave your post." CTO Massey stated that he said he did not have time for this and walked away. CTO Massey reported that as he was walking away, you stated the following: "Get the fuck away from me you asshole, just keep walking you piece of shit, and you remember that a .223 round travels at like 220 feet per second."

4. The core controversies to be resolved in this evidentiary hearing are: 1) whether the Appellant actually engaged in the conduct on November 21, 2019 as alleged by the Agency's letter of dismissal, 2) if the Appellant did engage in the conduct alleged by the Agency, whether such conduct violated Agency policy and 3) if the Appellant engaged in the alleged conduct and such conduct violated Agency policy, whether dismissal is the appropriate level of discipline for the Appellant's violation of policy.

5. The witness testified about his December 4, 2019 investigative report and the documents attached to the report totaling twenty-eight (28) pages, hereby entered into the record as **Appellee's Exhibit 1**. Roberts' investigative report consists of five (5) pages and detailed the steps he took in his investigation of the allegations. Primarily, he interviewed the Appellant, CTO Massey, the captain who emailed him the initial complaint, and reviewed documentation that he deemed relevant. Included in the documentation he reviewed and attached to his investigative report is the Appellant's prior disciplinary/corrective history and occurrence reports from all staff who had knowledge of the underlying incident, including the Appellant's occurrence report, which

detailed his version of the incident. The Appellant's prior corrective history consisted of a written reprimand, a one (1) day suspension, and two separate three (3) day suspensions. Notably, multiple documents included in the Appellant's prior corrective history involve allegations of misconduct stemming from the Appellant behaving in an aggressive, demeaning, or disrespectful manner towards other coworkers and supervisors.

6. The witness next testified under cross-examination, primarily addressing the Appellant's contention that either 1) Massey acted unreasonably in continuing on with his duties after the November 21 incident or 2) Massey continuing on with his duties demonstrates that Massey did not perceive the incident as immediately/significantly threatening in nature.

7. The Agency's next witness was **Michael Massey**. He is a Classification and Treatment Officer (CTO) at the Kentucky State Penitentiary and he has held that position since 2016. In that role, he is primarily responsible for the programmatic needs of inmates. Most pertinently herein, Massey was the individual with whom the Appellant allegedly had conflict during the November 21, 2019 incident.

8. Massey testified consistent with the allegations contained in the Agency's letter of dismissal. He specifically testified that he perceived the Appellant's statements as threats of physical violence and that he was concerned that the Appellant would follow up with his threats. He also confirmed that a .223 rifle is standard-issue equipment for correctional officers in wall stands and that the Appellant had ready access to a .223 rifle when he made the comments about the speed of a .223 round. He also testified that the Appellant's reference to the .223 rifle made this a more significant matter than a generic threat to "beat someone's ass."

9. During cross-examination, the Appellant again focused on his contention that either 1) Massey acted unreasonably in continuing on with his duties after the November 21 incident or 2) Massey continuing on with his duties demonstrates that Massey did not perceive the incident as immediately/significantly threatening in nature. The Appellant argued at length with the witness that walking on towards Two (2) Wall Stand would have placed Massey at greater danger had this been a situation with an active shooter.

10. The Agency's next witness was **DeEdra Hart**. She is the former Warden of the Kentucky State Penitentiary, held that position for two years before her retirement, and was the Warden who recommended the discipline at issue herein. She noted that she only recommended discipline in this case, when, as Warden, she would ordinarily have the authority to take disciplinary action herself, because the decision to terminate the Appellant was reached during the transition between governors and the paperwork granting her authority to take disciplinary actions had not yet been completed.

11. The witness then walked through her decision-making process as to why she decided to terminate the Appellant. She began by discussing the investigative report that she reviewed, which had been previously entered into the record as Appellee's Exhibit 1. She noted that the report substantiated the allegations against the Appellant. She noted that the Appellant admitted that he told Massey that he would meet him out in the parking lot. She noted the Appellant's prior disciplinary history, especially the allegations against the Appellant involving aggressive, demeaning, or disrespectful behavior towards other coworkers and supervisors.

12. The Agency then introduced several exhibits into the record through this witness. The Appellant's January 13, 2020 intent to dismiss letter was entered into the record as **Appellee's Exhibit 2**. The Appellant's January 29, 2020 dismissal letter was entered into the record as **Appellee's Exhibit 3**. Kentucky State Penitentiary Internal Policy and Procedure 03-01-01 was entered into the record as **Appellee's Exhibit 4**. Kentucky State Penitentiary Internal Policy and Procedure 03-11-01 was entered into the record as **Appellee's Exhibit 5**. She then detailed specifically how she believed the Appellant's alleged behavior violated institutional policy. Lastly, she explained why she determined that termination was the appropriate level of discipline. She focused on the threat of physical harm against a coworker when the Appellant threatened to fight CTO Massey. She said the incident was then significantly enhanced by her belief Appellant's threat to shoot CTO Massey and had access to a firearm when he made that threat.

13. On cross-examination, the Appellant focused on the Warden's decision to believe CTO Massey's version of events over his version of events. She noted that Internal Affairs determined that the incident was substantiated and she then took action on that substantiated report, particularly noting the Appellant's admission that he did offer to fight CTO Massey in the parking lot and the prior suspension for inappropriate behavior towards a coworker. She then highlighted the information reports submitted with the Internal Affairs' finding, which did not independently lead to discipline, but alleged aggressive behavior by the Appellant towards multiple other coworkers. She also testified that she believed a threat to shoot a coworker is a violation of policy that is equally serious as pointing a firearm at a coworker and that she put great weight on the firearm statement and the fact that the Appellant had ready access to a firearm when he made that statement.

14. The Agency's last witness was **Michelle Barnes**. She is the Human Resources Director for the Justice and Public Safety Cabinet, a position she has held since 2017. She oversees the Agency's Office of Human Resources, which is responsible for insurance, payroll, training, processing disciplinary actions, and other HR services. She also signed the letter of termination underlying the Appellant's appeal. She noted that she signed the termination letter as a result of a transition between gubernatorial administrations and the delay in processing paperwork delegating appointing authority to the warden. She testified about her agreement with the decision to terminate the Appellant and what materials she reviewed to reach her decision. She stated that the level of discipline imposed on the Appellant is consistent with prior discipline imposed on other employees and that the firearm statement justified dismissal instead of a suspension. The Agency closed its case-in-chief and thereafter moved for a directed verdict, which was overruled.

15. In his case-in-chief, the Appellant called himself, **Eric Kirst**, to the stand as his first and only witness. He began by disputing the characterization of him as a threatening or violent person. He then laid out his employment history, including working as a correctional officer at the Kentucky State Penitentiary for approximately three (3) years. He pointed out that he has had a relatively clean disciplinary history, noted that he lives in Tennessee, an hour drive away, and that he is a military veteran with ten (10) years' service with the United States Army, including service with the 82nd Airborne Division.

16. He detailed his familiarity with firearms; specifically disputing the statement that he allegedly said that a .223 round travels 220 feet per second. He testified that a .223 round does not travel at that speed, that no one who had any sort of firearms knowledge would think that the statement was accurate, that no one who made such a statement could be an actual threat, and that the inaccuracy of the statement proves that it was "made up."

17. The Appellant verified that he had no prior knowledge of or experience with CTO Massey before the November 21 incident. He acknowledged that he told CTO Massey that they could "talk about this" in the parking lot after work, but denies that he threatened to "beat his ass."

18. Upon the Hearing Officer's questions, the Appellant laid out the November 21, 2019 incident in greater detail. He testified that CTO Massey approached his post and informed him that he was able to be relieved so that he could go eat Thanksgiving dinner. The Appellant said he was working on another task and told CTO Massey to hold on a minute. CTO Massey responded by calling the Appellant on institutional radio, which made the Appellant "perturbed." He explained that institutional radio is an open channel, which means that everyone at the facility could hear CTO Massey's call to him. He stated that being called on the institutional radio could create the impression that he was sleeping, slacking, or otherwise not being attentive to his duties. The Appellant agreed that he was somewhat "annoyed" at CTO Massey when he went out to speak with him, but stated that he did not make the statements alleged by the Agency during that conversation. The Appellant alleges that he did not curse at CTO Massey and that CTO Massey did not curse at him. The Appellant claims that CTO Massey was so annoyed at the Appellant's decision to not eat Thanksgiving dinner that they discussed meeting after work to discuss it further. He again denied making the statements alleged by the Agency and argued that he should not have been terminated. Thereafter, the Appellant closed his case-in-chief.

FINDINGS OF FACT

1. By letter dated January 29, 2020, the Appellant was dismissed from his position as a Correctional Officer with the Justice and Public Safety Cabinet, Department of Corrections for misconduct. Specifically, on November 21, 2019, the Appellant is alleged to have engaged in inappropriate and threatening behavior towards CTO Massey that involved a threat to use a firearm. The Hearing Officer notes that many of the facts set out in the dismissal letter have been agreed to by the parties, including the verbal altercation between the Appellant and CTO Massey; the Appellant disputes some of the statements he allegedly made in addition to the assertion that

he told CTO Massey that “a .223 round travels 220 feet per second,” but acknowledges that he told CTO Massey they could continue their heated conversation after work.

2. The Appellant filed the instant appeal on March 25, 2020, asserting that the disciplinary action was not issued upon just cause and is either excessive or erroneous. The Appellant argues that the November 21, 2019 incident did not occur as alleged in the Agency’s letter, so was taken without just cause, and that termination is excessive.

3. The Agency argues that termination is appropriate because of the Appellant’s unacceptable threat of physical harm against a coworker when the Appellant threatened to fight CTO Massey after work, an incident significantly enhanced by the Appellant’s threat to shoot CTO Massey while having access to a firearm as he made that threat. They further argue that progressive discipline supports escalating the severity of disciplinary actions to termination as the Appellant has been involved in multiple incidents of threatening and/or aggressive behavior towards coworkers.

4. The core controversies to be resolved in this appeal are: 1) whether the Appellant engaged in the behavior alleged by the Agency’s January 29, 2020 letter of termination, 2) whether the Appellant’s alleged actions on November 21, 2019, violated Agency policy and 3) if it did, what is the appropriate level of discipline for the Appellant’s violation of policy. The Appellant offers an alternative version of events that contradicts the Agency’s version. Specifically, the Appellant agrees that he and CTO Massey got into a verbal conflict, but disputes the threatening statements as alleged by the Agency; however, the Appellant’s version of events wholly rests on his testimony, is not internally consistent, and is not supported by any evidence other than his own testimony. Given the evidence of record, including the Appellant’s acknowledgements, the Hearing Officer finds that it is more likely than not that the Appellant did, in fact, engage in the behavior alleged by the Agency in its letter of dismissal; thus, the Appellant violated Kentucky State Penitentiary Internal Policy and Procedure 03-01-01 and Kentucky State Penitentiary Internal Policy and Procedure 03-11-01 on November 21, 2019, when he offered to fight CTO Massey after work. The Hearing Officer also specifically finds that it is more likely than not that the Appellant did make a statement about the speed of a .223 round while having access to a .223 rifle, which also violated Kentucky State Penitentiary Internal Policy and Procedure 03-01-01 and Kentucky State Penitentiary Internal Policy and Procedure 03-11-01. Accordingly, the Agency had just cause to discipline the Appellant for his policy violations; still at issue is whether the discipline imposed, termination, was excessive or erroneous.

5. Given 1) the seriousness of the incident as it involved the potential use of firearms, 2) the Appellant’s prior disciplinary record, including previous incidents involving threatening and/or disrespectful behavior towards coworkers, and 3) the Agency’s zero-tolerance policy on workplace violence and/or threats of workplace violence, the Hearing Officer finds that a termination is neither excessive nor erroneous and that the Agency acted properly within its discretion in imposing such action.

CONCLUSIONS OF LAW

1. The Agency's complaint with Appellant has to do with his asserted "lack of good behavior." 101 KAR 1:345 does not present examples of what should be considered as "lack of good behavior" nor does the regulation (or the underlying statute) provide the level of penalization to accompany the determination of poor performance, as it cannot. This is left to management's discretion, with the factors deemed relevant thereto summarized in the statutorily-mandated, written notice assessing the penalty. Stated differently, the grounds for disciplining a merit employee must be set out in the letter and due process principles mandate that justification for any penalization be predicated upon those grounds. The basis for any penalization, and likewise any challenge thereof, must be statutory, regulatory, fact-based, or a combination of these. KRS 18A.095 (1), (8).

2. In the immediate appeal, many of the underlying facts are largely uncontested. A conversation did occur between the Appellant and CTO Massey on November 21, 2019. The respective parties, however, present significantly differing interpretations of that conversation. The Hearing Officer found above that the Agency's version of events is more credible than the Appellant's. Thus, just cause for a penalization was established and the primary question before the Hearing Officer is whether the Appellant's termination was excessive.

3. The evidence establishes that given 1) the seriousness of the incident as it involved the potential use of firearms, 2) the Appellant's prior disciplinary record, including previous incidents involving threatening and/or disrespectful behavior towards coworkers, and 3) the Agency's zero-tolerance policy on workplace violence and/or threats of workplace violence. Given the totality of the circumstances, including the Appellant's prior disciplinary history, the Hearing Officer concludes that a termination is neither excessive nor erroneous.

4. Accordingly, the Agency has carried its burden to establish that there was just cause to impose discipline on the Appellant and has carried its burden of proof to establish, by a preponderance of the evidence, that a termination was appropriate under the circumstances.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **ERIC KIRST V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2020-098)** 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 Stafford Easterling** this 15th day of December, 2020.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Erik Carlsen-Landy
Eric Kirst