

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-071**

BOBBY LANG

APPELLANT

**VS. FINAL ORDER
SUSTAINING HEARING OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER**

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

APPELLEE

**** ** ***

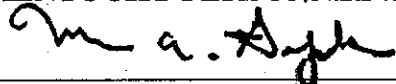
The Board at its regular October 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated August 28, 2015, and being duly advised,

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 **DISMISSED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 14th day of October, 2015.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. William Codell
Bobby Lang
Joslyn Olinger Glover

**COMMONWEALTH OF KENTUCKY
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This matter came on for evidentiary hearing on July 2, 2015, at approximately 9:35 a.m. at 28 Fountain Place, Frankfort, Kentucky, before the Hon. John C. Ryan, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A.

Appellant, Bobby Lang, was present and was not represented by legal counsel. Appellee, Justice and Public Safety Cabinet, Department of Juvenile Justice, was also present and was represented by the Hon. William Codell.

The appeal was the subject of at least one prehearing conference at which the issues were defined and the matter determined to have been timely filed, which aspect came under scrutiny during the pendency hereof. No prehearing discovery was conducted by either party.

BACKGROUND

1. Until February 2, 2015, Bobby Lang, a five-year employee, held the position of Youth Worker II with the Agency, assigned to the Mayfield Youth Development Center (MYDC). By three-page letter of that date over the signature of Bob D. Hayter, Commissioner of the Department of Juvenile Justice, his services were terminated for "Poor Work Performance, Misconduct, and Poor Time and Attendance." A true copy of the termination letter is attached as "**Recommended Order Attachment A.**" Basically, it details certain inappropriate comments (as) made by Mr. Lang to a youth resident and outlines previous disciplines assessed him, viewed to support the dismissal.

2. Mr. Lang took issue with the action by appeal filed on April 7, 2015, under the appropriate categories of "Dismissal" and "Other Penalization." He also alleges "Suspension," deemed academic or moot for purposes of this Order. In his appeal Appellant asserts, "The fact that i (sic) never got my hearing and filled out the paperwork and this is the second time i (sic) have filled this out." This reference apparently has to do with timeliness of the appeal. Appellant resides in Illinois, resulting in breakdowns in communication with him and, as noted, this appeal was ruled to be timely.

3. Upon convening the evidentiary hearing the Agency, under its assigned burden of proof, offered the testimony of **David Willie**, who has been a Youth Worker I for eight months at the Mayfield facility. He briefly defined his duties there as the oversight, safety, and well-being of the juvenile residents housed there. He noted his understanding of the mission of the facility to be rehabbing of errant youth offenders including relevant treatment of them as called for. He insisted that use of profanity by staff in the presence of the residents is strongly discouraged, if not prohibited, but does occur upon occasion.

4. This witness had just commenced employment at the facility, having worked there four days, when he overheard a vulgar, crude remark by Appellant, now set forth in the dismissal letter, directed to one of the residents concerning his mother. He confirmed upon review of the letter that the language cited therein is "almost verbatim," correcting certain minor details.

5. The witness continued that following the episode he encountered Appellant in passing, whereupon Appellant urged him to disavow hearing the comment. He conceded that he did in fact advise the investigator that he did not hear the remark but promptly reconsidered, contacted management, and made a full disclosure.

6. Under brief cross-examination, Appellant pressed the witness concerning his admission that he initially concealed his knowledge but changed his story. The witness agreed that upon occasion he has cursed in the presence of the youth, urging that at no time has he engaged in the type of language of which Appellant is accused.

7. **Richard Wright** is a contract employee/investigator with the Internal Investigations Branch of the Agency. He previously was employed with the Kentucky State Police (KSP) for twenty-eight years during one sequence and worked another five years, also at KSP, as an arson investigator. He depicted his duties under his current contract to be the response to, and investigation of, complaints received from staff or residents under the supervision of the Agency, usually coming in the form of telephone contacts. In the immediate instance, he was informed by management of a "hot-line call" from a resident at the MYDC, received by way of the system in place for this purpose. He was informed that the complaint was use of humiliating and demeaning language by a staff member toward a resident.

8. The witness continued that he conducted an investigation at the Mayfield facility, interviewing seven residents and two staff personnel. He thereupon prepared a report wherein he confirmed that the allegation was substantiated; specifically, Appellant made the demeaning comment to the youth, overheard by seven residents and a staff person, Youth Worker Willie. Appellant denied making the comment. The witness supplied his report as part of his testimony.

9. The Investigator recalled that initially he was advised by Youth Worker Willie that he heard no demeaning comment by Appellant, but shortly thereafter he was re-contacted by staff and the worker corrected his story, supplying details of the sequence. He further recalled that the worker informed him that Appellant requested that he, who was new at the time, deny the events and he went along but quickly recognized his error.

10. Under cross-examination by Appellant, the witness expanded that there was a slight delay between the event and the hot-line call by the juvenile. It was his information, from his investigation, that initially the youth viewed the event as minor, but upon disclosing it to his counselor, either the counselor or other management urged him to submit a formal complaint in light of the crude and vulgar nature of the comment. The witness was not aware of any other calls or complaints by this resident. He surmised that coworker Willie, who was new on the job, was influenced by Appellant, a more seasoned employee.

11. **Bryan Bacon** has served as Superintendent of the MYDC for approximately eleven years. He holds a total of fifteen years with the Agency and possesses a Master's degree in Counseling as well as being a certified Juvenile Sexual Offender Counselor. He has also enjoyed a twenty-five year span with the U.S. Army and holds the rank of Lieutenant Colonel, assigned to a medical brigade at Nashville. His total experience working with youth approximates twenty-five years. His supervisory duties at the facility encompass its overall operation including, but not limited to its food service, its school, youth treatments, and supervision of all personnel. He depicted the facility as designed exclusively for the treatment of juvenile sexual offenders who are sent there, and its mission or goal is to rectify the errant behavior of the juveniles to a level to enable them to return to a productive place in society.

12. Addressing the status of Appellant, the witness confirmed that he was employed as a Youth Worker II at the facility and assigned to supervise a unit of juveniles during a specified shift. He produced a job description for the position as part of his testimony. He also supplied for the record a series of policies, asserting that all staff are made aware thereof and are required to sign as acknowledging their understanding and their commitment to comply with the various rules and policies. He produced a receipt executed by Appellant for this purpose. He pointed out that contained throughout the policies inappropriate language or behavior toward the residents is expressly prohibited, whether directed at them or in their presence. He noted that the policies are quite explicit in their requirements and expressly detail that profanity is prohibited. He urged that the guidelines carefully detail the standards expected of all staff, focusing upon setting the highest possible example for the residents while simultaneously providing all means available in their treatment.

13. The witness explained that a mechanism is in place for investigation of accusations or complaints, including an outline of youth rights, such as the availability of the hot-line. Included therein is a prohibition against interfering with any investigation and a requirement that all staff cooperate fully in the event a complaint invokes further review. This requirement is likewise made abundantly clear to all staff at the time they commence employment.

14. The witness addressed the issues surrounding Appellant's behavior at some length and explained for the record the steps taken in seeking discipline of him. He noted that while Appellant was serving a twenty-day suspension in November, 2014 arrangements were that he should serve ten days thereof, report for work one day, and thereupon serve the remaining ten days. The purpose of this related primarily to preservation of his employee insurance coverage. He recalled that at the time this particular suspension was implemented, Appellant was called in and informed of the specific day upon which he should report to work. However, Appellant failed to appear and alternate arrangements were required to be made to cover his shift. The witness explained that in a twenty-four hour facility, all scheduling is interlocking and staff must depend upon one another to come as scheduled. Appellant's lack of dependability in that regard was one of many issues management was encountering with his behavior.

15. The witness continued that on December 1, 2014, he prepared and submitted a major corrective action request for discipline of Appellant, primarily triggered by the vulgar and profane comment set forth in the discipline letter. He noted, however, that this was the latest in a series of incidents involving Appellant depicting various levels of lack of good behavior, as fully outlined in the dismissal letter. Consequently, he viewed that the actions and behavior of this employee were detrimental to the facility and he should be terminated.

16. The superintendent expanded upon the overall circumstances. He explained that the resident to whom Appellant directed his vulgar comment has been in treatment at the facility for more than two years, which well exceeds the normal term, and he remains in treatment currently. This youth suffered particular issues with his mother and the comment directed at him by Appellant was seen as damaging, risking undoing the treatment program designed for him. Accordingly, Appellant's behavior in this instance was viewed to be egregious and entirely unbecoming of a Youth Worker. The witness reiterated that the overall behavior, as recited in the lengthy dismissal letter, violated numerous policies and was destructive to the mission of the facility.

17. Appellant briefly quizzed the witness concerning asserted tendencies of the youth under scrutiny; the witness disavowed direct knowledge of specific information sought by Appellant as to certain "acting out" aspects.

18. **Bob Hayter** is currently the Commissioner of the Department of Juvenile Justice, serving previously as a division director and Deputy Commissioner. He also holds forty years time with the military, as well as serving in private industry. His job is complete oversight of an agency which employs 1300 personnel and operates 32 facilities. He numbers among his duties the analysis and assessment of disciplinary actions of Agency personnel. He confirmed that the Agency engages a progressive discipline policy. However, most or all of its facilities are around-the-clock and the jobs therein are quite difficult; accordingly, the imposition of discipline for violation of policy or errant behavior takes into consideration the stress attendant to the various positions, the intent being to "handle the situation at the lowest possible level."

19. Directed to Appellant's circumstances, the witness ratified that it was he who ultimately determined his level of penalization, i.e., dismissal, after consideration of all factors. He recalled that a pre-termination meeting or hearing was scheduled with standard notice thereof issued to Appellant, who did not appear, nor did he advise management of his reasons for failure to appear. A dismissal letter was prepared and delivered which undertook to recite Appellant's discipline and behavioral history. He ratified a copy of the letter, which he approved and signed, as part of his testimony.

20. The witness pointed to the variety of events and prior disciplines outlined in the dismissal letter as sufficient to demonstrate that continued employment of Appellant was not in the best interest of the Agency. He viewed that the repeated bad behavior resulting in a variety of prior disciplines clearly signals that Appellant is not sufficiently dedicated to complying with Agency rules.

21. Under very brief cross-examination, Appellant explored with the witness whether there are specific timeframes or a fixed reach back period for review of prior discipline or imposition of penalizations for infractions. The Commissioner reacted that no fixed timetable of this nature exists within Agency policy.

22. The Agency completed its proof-in-chief. Appellant, **Bobby Lang**, offered his own testimony. It was developed during his presentation that he was employed at the Mayfield facility for five years and was unemployed at the time of hearing. He urged that he did not view that his actions were sufficiently egregious to justify termination and insisted that the comment attributed to him in the dismissal letter was taken out of context. He viewed that the youth asserting it was merely seeking retribution for having been disciplined. Appellant also felt that some of the negative events attributed to him were too remote to serve as a basis for the current action and should not apply. He missed his pre-termination meeting due to a weather-related miscommunication; specifically, an untimely snowstorm delayed his mail so much that he was unable to prepare and attend the meeting. He conceded that it was unlikely that attending the meeting would have altered the ultimate disposition of his situation by management.

23. Under cross-examination, Appellant confirmed that he received a total of seven weeks training when he was initially employed, a portion of which included indoctrination in the policies previously introduced. He ratified that he obtained, understood, and signed for these policies. Directed to the profane or vulgar comment attributed to him, Appellant discussed the exact wording thereof, noting that it varied slightly, although not substantially, from that set forth in the dismissal letter. The Agency quizzed Appellant concerning other episodes involving one or more residents and/or a mother of a resident. Appellant offered no documents or exhibits in his own behalf and there was thereupon concluded the sworn testimony.

24. KRS 18A.095(1) requires that, "A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause." Other provisions of the statute blueprint and detail the requisite notice and steps required for dismissal of a status employee. Appellant has not challenged these with the exception of his failure to attend pre-termination meeting with the Commissioner. In that regard, he essentially concedes the events attributed to him with minor variations, urging only that one or more of the behavioral aspects should not have been considered as too remote in time.

25. 101 KAR 1:345 is the regulation relating to imposition of disciplinary actions. Section 1 thereof authorizes that, "Appointing authorities may discipline employees for lack of good behavior for the unsatisfactory performance of duties." Section 2, cited in the dismissal letter, relates to technical processing of dismissal and notification to be supplied to the employee.

26. 101 KAR 2:095, Section 2, relates to attendance and hours of work. 101 KAR 2:102, Section 10, relates to absence without leave. Appellant was charged with violations of time and attendance requirements as more fully set forth in the dismissal letter, which he has not disputed in either his appeal or his testimony.

27. The Agency has in place a series of behavior-related policies which seek to provide guidance and to define the requisite demeanor on the part of its personnel employed in its residential treatment centers. These policies require staff to treat the individuals in their care with respect and fairness and to set a good example for them and coworkers. They also prescribe that staff must be truthful and forthcoming in investigations. All new hires are made familiar with, and furnished copies of, these policies and must sign as receiving and understanding them.

FINDINGS OF FACT

1. At all times germane to this appeal Appellant, Bobby Lang, was a five-year classified employee with status of the Commonwealth, holding the position of Youth Worker II with the Department of Juvenile Justice within the Justice and Public Safety Cabinet, workstation Mayfield Youth Development Center. Following a series of penalizations for lack of good behavior, including asserted misconduct and poor time and attendance, his employer deemed him unfit for its needs in working with the youth offenders at the facility and terminated his services effective February 2, 2015. Violation of time and attendance requirements at a 24-hour/7-day facility is deemed particularly egregious, since all personnel there must of necessity engage in interlocking schedules and are vastly dependent upon each staff member appearing and functioning as assigned.

2. In addition to the aforesaid recited violations, which were for the most part undisputed by Appellant, the triggering episode resulting in management deeming him no longer fit for the Youth Worker position was a crude and vulgar comment having a sexual connotation involving the mother of a youth which he admits uttering to the youth. The uncontroverted proof is that the particular resident, a sex offender, was and is under intense therapy, and the derogatory remark addressed to him by Appellant was seen as expressly contrary to the focus of his therapy. When the episode came under scrutiny, Appellant undertook to persuade a coworker who overheard the comment to disavow any knowledge thereof.

3. Given the history of infractions, dismissal was deemed the final step in a somewhat substantial series of disciplines of Appellant, coming after at least four suspensions of varying lengths ranging over a two-year span, more fully outlined in the suspension letter.

4. The Hearing Officer finds the testimony of all witnesses and of Appellant to be credible.

CONCLUSIONS OF LAW

1. Appellant does not dispute the negative behavior of which he is accused, nor does he present a credible defense thereto. The series of disciplines, ranging back at least two years, demonstrate at the least that he has not adapted well to the requirements for youth worker service. The violations fall squarely within the intent of 101 KAR 1:345.

2. The specific action(s) which triggered the latest penalization, including the crude and derogatory remark directed at the troubled resident already in long-term therapy for deviant sexual behavior, constituted a direct violation of several policies. Appellant's effort to induce a coworker to falsify information in an investigation of the matter is violative as well. These policies are in place to curtail this very type of action by staff. Appellant acknowledges the policies but chose to repeatedly ignore them.

3. The Agency has sustained its burden of proof, and its action, the termination of Appellant, was not clearly erroneous or excessive in light of the overall circumstances.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **BOBBY LANG VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF JUVENILE JUSTICE (APPEAL NO. 2015-071)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

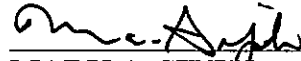
Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are 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).

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 John C. Ryan** this 28th day of August, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof mailed to:

Hon. William Codell
Bobby Lang



JUSTICE AND PUBLIC SAFETY CABINET

Steven L. Beshear
Governor

Department of Juvenile Justice
1025 Capital Center Drive, 3rd Floor
Frankfort, Kentucky 40601-8205
Phone (502) 573-2738
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www.kentucky.gov

J. Michael Brown
Secretary

Bob D. Hayter
Commissioner

February 2, 2015

Mr. Bobby Lang

*VIA HAND-DELIVERY, CERTIFIED &
REGULAR U.S. MAIL*

Dear Mr. Lang:

Because of your failure to appear on February 2, 2015, at the pre-termination hearing in order to show cause, if any, why the intended dismissal should not be imposed by the appointing authority, it has been determined that there is no sufficient reason to alter the notice of intent to dismiss, dated January 21, 2015.

Therefore, based on the authority of KRS 18A.095 (2) and (3), and 101 KAR 1:345, Section 2, you are hereby notified that you are officially dismissed from your position as Youth Worker II at the Mayfield Youth Development Center, effective Monday, February 2, 2015.

In accordance with 101 KAR 1:345, Section 1, you are being dismissed from your position for the following specific reasons:

Poor Work Performance, Misconduct and Poor Time and Attendance, i.e., as reported by Mayfield Youth Development Center Juvenile Facility Superintendent II Bryan Bacon, you demonstrated poor work performance, misconduct and poor time and attendance by making an inappropriate comment to a resident, interfering with an investigation and failure to obtain supervisory approval and provide notice for a work absence. The Justice and Public Safety Cabinet, Internal Investigations Branch (IIB) conducted an investigation into these allegations, and the findings are contained in the investigative report, IIB #2580-14, dated November 29, 2014.

For the investigation, IIB Investigator Richard Wright conducted interviews with Youth Worker I David Willie, Youth*, seven (7) residents and you. Based upon the investigation, it was determined that on November 1, 2014, while supervising residents on second shift, you told Youth* that "he wasn't worth the cum that ran down his mother's ass crack and left a stain on the mattress. Mr. Willie, Youth* and six (6) residents present on the unit overheard your inappropriate remark to Youth*. Youth* notified his counselor the following date regarding your

**APPELLEE'S
EXHIBIT**

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comment. According to Mr. Willie, you had advised him not to admit to Investigator Wright that he had overheard your vulgar remark to Youth*, thus interfering with the investigation. You denied to Investigator Wright that you had made the inappropriate comment to Youth*, although your action was verified by a co-worker, Youth* and six residents, which resulted in the allegation being substantiated.

On November 25, 2014, you failed to report for your scheduled shift, without contacting your supervisor to request leave and receiving approval for the work absence. You informed your supervisor that you had forgotten that you were scheduled to work on this date. For your absence from work on November 25, 2014, you received eight (8.0) hours of unexcused leave without pay.

Your poor work performance, misconduct and poor time and attendance, demonstrated by making an inappropriate comment to a resident, interfering with an investigation and failure to obtain supervisory approval and provide notice for a work absence, constitute violation of 101 KAR 2:095, Section 2.(1 and 5); 101 KAR 2:102, Section 10.(1); 505 KAR 1:100; Department of Juvenile Justice Policy #102, "Employee Code of Ethics", I, IV.(B. and C.) Department of Juvenile Justice Policy #104, "Employee Code of Conduct", I, IV.(A., B., F., I., Q., R., S. and W.); Department of Juvenile Justice Policy #208, "Youth Rights", IV.(H.); and Mayfield Youth Development Center Standard Operating Procedure #104, "Employee Code of Conduct", (15. And 17.).

Furthermore, you received a twenty (20) day suspension by letter dated November 3, 2014, for poor time and attendance and misconduct (failure to obtain supervisory approval for work absences, falsification of timesheets and unauthorized use of a co-worker's security code to access the maintenance key box); a ten (10) day suspension by letter dated August 25, 2014, for poor work performance and misconduct (communicating inappropriately with a resident, posting Facebook page photographs containing a facility form and communicating inappropriately with a resident's mother); a five (5) day suspension by letter dated August 16, 2013, for poor time and attendance and misconduct (failing to provide proper supervisory notice for work absence, switching work shifts with a co-worker without supervisory approval, requesting leave from work due to consuming alcohol prior to your scheduled shift and failing to provide a written statement as directed by your supervisor); and a three (3) day suspension by letter dated April 2, 2013, for poor work performance (inadequate supervision provided during residents' visitation period, leaving the front door unlocked and failing to re-search a parent who returned after leaving the building).

Bobby Lang
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*To keep confidential the identity of the youth as required by law, the name of the youth referred to is transmitted by the attached list marked "CONFIDENTIAL", which is not to be disclosed without proper authorization.

A copy of this notice is being furnished to the Personnel Cabinet in accordance with personnel rules. As an employee with status, you may appeal this action to the Personnel Board within sixty (60) days after receipt of this notice, excluding the day of receipt. Appeals must be made by completing the attached form and directing it to the address indicated on the form. (See KRS 18A.095 and 101 KAR 1:265, Appeal and Hearing Procedures).

Sincerely,


Bob D. Hayter
Commissioner

BH/msc

Attachments: Personnel Board Appeal Form
Acknowledgement Form

C: Hon. Timothy Longmeyer, Secretary, Personnel Cabinet
Hon. Mark A. Sipek, Executive Director, Personnel Board
Barney Kinman, Internal Investigations Branch
Mark Cook
Joslyn Olinger Glover
John Weyers III
Tim Corder
Bryan Bacon
Kimberly Whitley
DJJ Legal
DJJ Payroll
Personnel File