COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2019-244

GREG LINDSEY **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 **APPELLEE**

*** *** *** *** ***

The Board, at its regular February 2021 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated January 20, 2021, 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 25th day of February, 2021.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. William Codell
Hon. Whitney True Lawson
Ms. Cynthia Watson

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

JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF JUVENILE JUSTICE **APPELLEE**

** ** ** ** **

This matter came on for an evidentiary hearing using Amazon Chime video teleconferencing software on August 25, 2020, and August 31, 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, Greg Lindsey, was present and was represented by the Hon. Whitney True Lawson, both appearing by Amazon Chime. The Agency/Appellee, Justice and Public Safety Cabinet, Department of Juvenile Justice, was present and represented by the Hon. William Codell, who also appeared by Amazon Chime.

At issue was the Agency's demotion and involuntary transfer of the Appellant, a classified employee with status who was formerly employed as a Juvenile Facility Superintendent I at the McCracken Regional Juvenile Detention Center and is now employed as Social Services Worker I, in addition to the Appellant's challenge to a reclassification. The Agency was assigned the burden of proof on the disciplinary actions and the Appellant was assigned the burden of proof on the challenge to the reclassification. Therefore, the Agency had to establish by a preponderance of the evidence that there was just cause for the Appellant's demotion and involuntary transfer and that such disciplinary actions were neither excessive nor erroneous. The Appellant had to establish by a preponderance of the evidence that he was penalized through an improper reclassification.

BACKGROUND

1. Following the presentation of opening statements by both parties, the Agency called **Tim Corder** as its first witness. Before his August 1, 2020 retirement, Corder was formerly employed by the Justice and Public Safety Cabinet, Department of Juvenile Justice for a period of 26.5 years, last serving as a Division Director of the West Region. His primary duties as Division Director included oversight of the youth development centers, group homes, and day treatment centers in the West Region of DJJ, which included the McCracken Regional Juvenile Detention

Center. He was the Appellant's third line supervisor and supervised Facilities Regional Administrator Bryan Bacon.

2. In August 2019, the witness received a phone call and a follow-up email from Facilities Regional Administrator Bryan Bacon, entered into the record as **Appellee's Exhibit 1,** detailing an incident involving the Appellant and potential interference with the youth grievance process. Specifically, as reported to Corder, substantiated by an investigation, and as incorporated into the November 1, 2019 letter imposing the Appellant's demotion, the Agency alleged:

> **Misconduct, ie.,** as reported by Division Director, Tim Corder, you demonstrated misconduct by threating and intimidating youth who had filed grievances.
>
> On August 13, 2019, a youth at McCracken Regional Juvenile Detention Center called the Internal Investigations Branch (IIB) Hotline. The youth alleged that you had entered Living Unit 200 on August 12, 2019 at 7:00 A.M. and dumped grievances onto a table that multiple youth had filed. Next, you demanded that the youth in the unit raised their hands if they filed a grievance. The youth that called the hotline stated that all the youth in the unit felt compelled to raise their hands if they had filed a grievance. This youth stated that you told all of the youth in the unit that they were wasting their time complaining. This youth further alleged that you stated that the grievances would do nothing to change the phone call times from five minutes back to ten minutes. The youth also stated that shower times had been changed from ten minutes to five minutes.
>
> Director Corder and Facilities Regional Administrator (FRA) Bryan Bacon obtained statements, reviewed the video, which included audio, and interviewed you and staff at McCracken RJDC. Based on the information obtained from statements, video/audio, email and interviews, the allegations are substantiated that you threatened the youth who had filed grievances and intimidated the youth from filing future grievances. Those youth who had filed grievances should have been afforded the opportunity to have his or her grievance heard by the Grievance Hearing Officer in a private setting. Instead, they were forced to not only divulge that they had submitted a grievance, but also to state openly what the grievance pertained to. No record of any resolution or tracking was possible in accordance with Department of Juvenile Justice (DJJ) policy due to these grievances being thrown away. Further, it was found that you used language that was degrading and demeaning in your use of the term "retarded" during this meeting with the youth in the living unit. When referring to privileges that the facility had put into place for the youth as part of the detention reform efforts, you told the youth, "I think they all ought to be thrown away and not even used." These types of actions and behaviors by you, especially in

> a leadership role as the Assistant Superintendent, are inconsistent with DJJ's mission. These actions and behaviors are detrimental and inconsistent with the current reforms being implemented in the detention centers and are in violation of the Department of Juvenile Justice's policies.

3. The core controversies to be resolved in this evidentiary hearing are: 1) whether the Appellant actually engaged in the conduct on August 12, 2019, as alleged by the Agency's letter of demotion and attendant involuntary transfer; 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 demotion and transfer is the appropriate level of discipline for the Appellant's violation of policy.

4. The witness testified about his investigation into the allegations against the Appellant and stated that McCracken RJDC had audio/video of the incident in question, which was identified, entered into the record under seal as **Appellee's Exhibit 3**, and, in pertinent part, played during the hearing. The witness also testified about his August 27, 2019 investigative report and the documents attached to the report, hereby entered into the record under seal as **Appellee's Exhibit 4.** The witness then detailed his concerns with the way the Appellant addressed the youth's grievances on August 12, 2019, focusing on the breach of confidentiality, use of the word "retarded" repeatedly, and his belief that the Appellant's actions unduly intimidated youth for engaging in the authorized grievance process. He also stated that, prior to August 12, he issued the Appellant a memo placing him on light duty and limiting his work responsibilities, thus making the Appellant's presence in the youths' unit on August 13 unauthorized. He also detailed the findings of his investigative report, finding that the youth felt threatened for filing grievances, were intimidated against filing future grievances, and that the Appellant mishandled the youth's grievance on August 12.

5. The witness further testified about the underlying context of the youth's grievances. He stated that a previous DJJ Commissioner consulted with an outside group specializing in juvenile justice and that the group recommended several policy changes, primarily focusing on moving juvenile facilities from a model similar to adult correction facilities into a more rehabilitative model focused on the juvenile's needs. The group also specifically stated that the conditions at McCracken RJDC were among the most concerning that they had encountered in any juvenile facility nationwide. Specifically, they noted that McCracken RJDC "employs a behavior management system that is the most restrictive that the team has seen in any juvenile facility across the team members' more than 120 years of (combined) experience accessing conditions in juvenile facilities. MRJDC relies on a system of extreme control and scrutiny of the most minor behaviors, such as requiring youth to look straight ahead at all times unless given permission by staff to do otherwise. Youth receive consequences for the smallest deviations from these very restrictive rules, which often rapidly accumulate and result in room confinement." The leadership of DJJ agreed with those changes and worked to reform juvenile facilities in the Commonwealth. Amongst the changes recommended and implemented, juvenile facilities were to offer additional recreational activities to the youth, create a youth focus group to get input from the youth, to allow youth to keep more books, comics, and magazines, and to expand privileges to all youth who

demonstrated positive behavior. The outside group also specifically recommended that all facility responses to grievances must be respectful, even if the grievance was unsubstantiated.

Here, the Appellant called the juveniles into an open forum, explained that the specific issue they were grieving was not authorized by policy, and then threw the juveniles' grievance forms into the trash.

6. Corder then addressed the Appellant's prior disciplinary history, including a suspension for use of excessive force in April 2019, and his decision to recommend demotion and transfer for the Appellant. He focused on the Appellant's repeated use of the word "retarded" towards the youth, though not directed at any particular individual, and questioned the manner in which the Appellant handled the entire situation.

7. The witness next testified under cross-examination. The Appellant began by addressing the demotion letter issued to the Appellant, entered into the record as **Appellant's Exhibit 1**. The witness agreed that the Appellant's demotion was from a Grade 16 position to a Grade 13 position. Corder noted that he recommended demotion but did not select the position to which the Appellant should be demoted. He agreed that, in March 2019, he assigned responsibility for the facility's grievance process to the Appellant after a previous Grievance Officer at MRJDC was removed from handling grievances after "screaming, yelling, and threatening residents for filing grievances." He also agreed that the previous officer did not receive any discipline for his inappropriate behavior as he was terminated for other unrelated reasons.

8. Corder was next asked to address the hotline call that began the investigation into the Appellant's actions on August 13, 2019. A Justice Cabinet Internal Investigations Branch intake form memorializing a hotline phone call from a MRJDC resident was entered into the record under seal as **Appellant's Exhibit 2**. He testified that the residents at MRJDC were separated into two units with different levels of privileges afforded to each unit. The incident at issue here occurred on Unit 200, the upper level, more privileged unit. The witness agreed that the resident made multiple complaints during the phone call, including complaints that only new residents get new underwear and socks. He further agreed that the youth grievances at issue in this appeal were about the reduction in phone call times and shower times, both from ten minutes to five minutes. Later in the cross-examination, he agreed that temporary staffing issues explained the facility reducing shower and phone times.

9. Directed to **Appellant's Exhibit 3**, the 2019 MRJDC resident handbook, Corder also agreed that the handbook lists ten-minute phone calls and ten-minute showers as privileges that could be earned by the residents and that privileges could be taken away. He agreed that DJJ's grievance policy does not require employees to handle the grievances in a private setting. Further, he testified that the grievance process is in place for residents who believe their rights, as delineated by the resident handbook, have been violated. The rights set out by the handbook include the right to food, medical treatment, consultation with legal counsel, and the right to be free from sexual harassment and sexual assault. However, he also later clarified that, pursuant to DJJ policy, phone calls are also considered a right afforded to residents while extended phone calls are a privilege.

Additionally, he confirmed the DJJ policies upon which the handbook is based, specifically establish which matters residents can grieve and lays out a process for handling non-grievable concerns. He also testified that the Appellant reached out to DJJ Ombudsman Walter Wright after throwing away the residents' grievance forms, seeking advice for how to handle his acknowledged mistake in tossing those forms. This was done before DJJ had received any resident report stemming from the grievance issue.

10. The Agency's next witness was **Kelli Morrow**. She was the Treatment Director for MRJDC on August 12, 2019. Her duties included directly supervising MRJDC counselors, providing individual and group services to residents, and having primary responsibility over the provision of mental health services. She was made aware of the August 12 incident by two counselors under her supervision who passed along concerns from the juvenile residents about how their grievances were handled. After reviewing the audio/video of the grievance incident, by an email entered into the record as **Appellee's Exhibit 11**, she then forwarded those concerns to Bryan Bacon in DJJ upper management. Morrow testified that she believed that the Appellant violated DJJ policy in his handling of the resident's grievances and that the residents suffered negative consequences as a result of how the grievances were addressed, including loss of faith in the structure put into place by MRJDC. On cross-examination, the witness discussed her impressions after reviewing the audio/video of the grievance incident. She agreed that she deemed the Appellant's actions "threatening" in large part because of the Appellant's role at MRJDC instead of her remembering any specific statement made by the Appellant. Later, she clarified that she got involved in the grievance incident when a resident was having behavior issues; Marrow tasked the counselors she supervised with figuring out what was causing the youth to act out. During that conversation, the youth mentioned the grievance issue, certain additional residents told the counselors they were upset by the incident, the counselors told Morrow about the issue, Morrow reviewed the video on the next day, and then relayed her concerns about the Appellant's actions to her supervisors.

11. Next, the Agency called **Walter Wright**. He serves as the Ombudsman for the Department of Juvenile Justice. In that role, his primary job duties include investigation of complaints received by the Agency, whether the complaints are filed by residents of DJJ facilities, DJJ staff, members of the public, or other source. He became involved in the underlying grievance incident when the Appellant called him after throwing away residents' grievance forms. The witness testified that the Appellant told him that "I screwed up big time" when he threw away the grievance forms and needed advice on how to remedy his mistake. Wright told the Appellant that it "was no big deal," just take the grievance forms out of the trash. After the Appellant informed him that it was too late to do that because the trash had already been emptied, he advised the Appellant to have the residents fill out new grievance forms to replace those that were thrown away.

12. The day after the phone call with the Appellant, Wright sent an email relaying his conversation with the Appellant to Tim Corder and DJJ Deputy Commissioner Kris Mann, previously entered into evidence as **Appellant's Exhibit 4**. He noted that when the email was

sent, he had not yet received any complaint about the grievance incident and had not yet reviewed the video of that incident. After reviewing the video and complaints relating to the incident, his perception that the incident was not "a big deal" changed. He testified that the Appellant was more aggressive and less professional than he could have been. He stated that it was improper to address the grievances with the residents as a group; as a DJJ grievance trainer since September 2012, he instructs employees, likely including the Appellant, to address grievances with residents individually.

13. On cross-examination, the witness agreed that the Appellant followed his advice, informed the MRJDC supervisor about the incident, asked the residents to file new grievance forms if they still wanted to pursue them, and forwarded the new grievance forms to him. Certain of those new forms were entered into the record, under seal. He also testified that there is no way to know whether the new grievance forms were the same as those that were thrown away.

14. The Agency's next witness was **Dena Burton**. She is a career employee with the Agency, is the Division Director for Quality Assurance, and serves as the American Correctional Association (ACA) State Accreditation Manager for DJJ. In that role, she ensures that the Agency meets the standards set by the ACA, which cover most aspects of correctional facilities including recordkeeping, policy, procedure, and practice requirements and are incorporated into law, binding the Agency. Failure to maintain ACA accreditation would cause significant adverse consequences for the Agency. Adherence to those standards is ensured through comprehensive onsite inspection by outside investigators every three years. Here, the witness testified that the mandatory ACA standards set out requirements as to how the Agency should handle resident grievance reports, entered into the record as **Appellee's Exhibit 13**. Importantly, those standards require the Agency to retain original copies of youth grievances and, given the weight afforded that mandatory standard, failure to meet that standard potentially, by itself, exposes a facility to an automatic fail. She also stated that residents would be authorized to file grievances on phone calls and shower time in addition to testifying that the facility must keep physical copies of a grievance even if it is unauthorized/non-grievable.

15. **Steven Potts** was called as the Agency's next witness. He worked for the Justice Cabinet's Internal Investigations Branch from 2007 until 2019 when he was detailed to a position of Deputy Commissioner of facility operations with DJJ. His job duties included oversight of the day-to-day operations of all of DJJ's facilities. He was informed of the August 12 grievance incident by Tim Corder and reviewed the investigative report and request for major corrective action compiled by Corder. He also agreed with Corder's recommendation to impose a demotion and involuntary transfer on the Appellant for the incident, given the facts and policy violations detailed in Corder's request for corrective action. In addition, Potts was involved in the decision as to the Appellant's placement as a Social Service Worker I. He explained his rationale for removing the Appellant from DJJ facilities, largely focusing on the residents and how staff misconduct undermines their faith in DJJ. He also asserted that the Appellant's ability to effectively lead MRJDC staff according to DJJ policy was fatally compromised by his actions on August 12.

16. Next, the Agency called **Cynthia Watson**. She has been DJJ's Human Resources Branch Manager since 2015 and was serving in that capacity in August 2019. Her primary job duties include responsibility over the Agency's personnel actions, payroll, medical requests, EEO, and processing requests for discipline. She discussed the Agency's reliance on progressive discipline principles and the procedures in place for handling/reviewing/processing discipline. Here, she was responsible for drafting the disciplinary letter at issue. She addressed the Appellant's prior disciplinary history, including a three-day suspension for the use of excessive force, and her agreement with Corder's recommendation to demote and transfer the Appellant to a Social Service Worker I position. She noted that she attempted to compare the discipline imposed on the Appellant with the discipline imposed by DJJ on other similarly situated employees to ensure the Agency was disciplining employees in a consistent manner, but she had difficulty finding other DJJ disciplinary actions to which to compare the Appellant's discipline because no other employee at the Assistant Superintendent level or higher had committed similar policy violations. She said the decisionmakers put great weight on the Appellant's leadership position in the facility when determining demotion and transfer was the appropriate level of discipline.

17. The Agency's last witness in its case-in-chief was **Bryan Bacon**. He is employed by the Agency as a Facility Regional Administrator (FRA) for the West Region of DJJ, held that position during the period of time at issue herein, and was in the Appellant's chain-of-command. He was made aware of the August 12 grievance incident through an email from Treatment Director Kelli Marrow and, in response to the Morrow email, instructed Marrow to discuss the incident with Facility Superintendent Matthew Harned, then report it in writing to IIB. He deemed the grievance incident "significant" for a number of reasons, including the fact that the Appellant was supposed to be on light duty - restricted to the administration building and not interacting with residents – the lack of regard for confidentiality, and his belief that the Appellant's behavior was intimidating to the youth. He noted that he assisted in conducting the investigation of the grievance incident at Corder's request, primarily through helping to conduct witness interviews. He also reviewed the video recordings of the incident and testified about his concerns with the Appellant's behavior captured in that video highlighting his belief the environment was intimidating, which was especially problematic given the Appellant was specifically counseled in a Performance Improvement Plan (**Appellee's Exhibit 16**) to focus on being less intimidating in his behavior. He found the Appellant's repeated use of the word "retarded" unacceptable. He testified about the importance of an open grievance process, the impact of using inappropriate words on residents, and his belief that violation of those norms is more egregious when violated by a person in a leadership position. He stated that the Appellant's actions during the August 12 incident caused him to lose confidence in the Appellant's judgment and in his ability to remain in a leadership position at the facility.

18. On cross-examination, Bacon addressed **Appellant's Exhibit 16**, an August 15, 2019 email exchange between he and Facility Superintendent Matthew Harned. In that email, Harned informed Bacon that he had reviewed the video of the August 12 grievance incident, determined that the Appellant had acted inappropriately, and then issued the Appellant a written warning for his behavior. Bacon informed Harned that complaints were received by IIB and the Ombudsman's office and, as a result, it was inappropriate for him to issue the Appellant discipline

before the conclusion of those investigations. He further informed Harned that, even if it was appropriate for Harned to issue discipline, Harned did not consider the Appellant's prior three-day suspension for excessive force, and therefore did not follow progressive discipline. Bacon told Corder about Harned's attempt to issue a written warning for the August 12 incident and also told Corder that he did not allow that warning to stand.

19. The witness next addressed **Appellant's Exhibit 17**, an August 14, 2019 text message exchange between he and Treatment Director Kelli Morrow. Those texts begin with Bacon asking Marrow what steps she has taken and instructing her as to how to handle the reporting of the August 12 incident. Thereafter, Bacon and Marrow discussed Harned and their perceptions of how Harned was handling the incident. Their conversation included the following exchange:

> Bacon (B): Look Matt it's [sic] going to have to make a choice. It's pretty clear. I'm sure that's what he is stressed about. You might want to go ahead while it's fresh in your mind and start working on a statement
>
> Marrow (M): Ok. I sometimes think he sees it and it's just easier to not deal with it because its [sic] always been this way but then I also think he's shifting to a place of realizing he has to protect himself because Lindsay will let him fall in a second
>
> B: That's exactly where I want him to get it because that's exactly what's happening
>
> B: You want to make it to retirement pick a side
>
> B: It's really that simple
>
> M: Yes exactly

There was an additional exchange on August 21, 2019, where Bacon and Marrow were discussing another employee being "onboard," meaning onboard for certain scheduling, handbook, and culture changes, and Marrow stated: "[a]ny doubts I've had went away when I had real conversations with him present without the influence of Lindsey." The witness agreed that this conversation occurred before an investigation into the grievance incident or request for corrective action was completed and that they took action on making changes to MRJDC when the Appellant "was no longer there to be an impediment."

20. Bacon said that by "make a choice" he meant Harned would have to decide whether to report the Appellant's actions and "address it head on" or continue not taking such issues seriously. He agreed, however, that Harned issued the Appellant a written warning, so Harned had taken some action on the incident, even if he believed the action Harned took was not authorized by policy since the incident resulted in an IIB complaint.

21. The witness agreed that, since the Appellant's demotion, Harned was subsequently demoted to the position of Youth Worker Supervisor and he is aware that Harned has his own pending Personnel Board appeal. He is also aware of another member of MRJDC leadership, LaShawn Webster, who was fired and then reinstated to his position after the Personnel Board reduced his termination to a 10-day suspension. Further, the witness agreed that the Appellant's prior three-day suspension for use of force stemmed from the same restraint of a youth that underlie LaShawn Webster's successful Board appeal.

22. On re-direct, Bacon clarified that, pursuant to DJJ policy, facility superintendents do not have the authority to issue discipline to employees without consultation with someone higher in their chain-of-command. He further stated that Harned did not consult him or anyone else above him in the chain-of-command before Harned issued the written warning to the Appellant; therefore, pursuant to policy, Harned did not have the authority to issue any discipline, including the written warning, to the Appellant. He testified that, in a situation like this one where allegations are made against a facility superintendent, it would be inappropriate for a facility superintendent, like Harned, to investigate another facility superintendent, like the Appellant; such investigations should be handled by investigators outside of the facility, like IIB. He also stated that, while a Social Services Worker I like the Appellant would still have contact with residents of a detention center, that employee would have little to no authority over the residents. Thereafter, the Agency closed its case-in-chief.

23. In his case-in-chief, the Appellant called himself, **Greg Lindsey,** to the stand as his first and only witness. He is currently employed as a Youth Services Worker I following the demotion at issue herein. Prior to his demotion, he was employed as a Facility Superintendent I, the Assistant Superintendent, at MRJDC from 2008 until 2019.

24. Directed to August 12, he testified that, early in the morning, he was made aware of issues occurring on Unit 200 by an employee coming off of the midnight shift. That employee told him Unit 200 "was off the chain" and gave another employee "hell," due to the shower and phone call changes made by Harned. The employee mentioned several residents of Unit 200 filed grievances about those changes, which she did not think were fair to the youth, and asked the Appellant to look into the issue. He began his review by speaking with a resident who had been placed into isolation for her behavior protesting the shower and phone call changes. She told the Appellant that Unit 200 residents got together to submit grievances about the changes, which shaped the way he handled the grievances.

25. Directed to the video of the August 12 incident, the Appellant gave his version of events. As a result of an incident where the aforementioned LaShawn Webster was screaming at residents while handling their grievances, the Appellant was serving as the primary grievance officer for MRJDC. He called the residents of Unit 200 out to the doorways of their cell. He told the assembled residents what the isolated resident told him in addition to the impressions of the midnight shift employee. He noted that the grievance box was overflowing and started going around the assembled residents quizzing them about the filed grievances. Among the questions

the Appellant was focusing on, nine grievances were filed about the shower and phone call changes, but there were only seven residents in Unit 200; pursuant to policy, residents were only permitted to file a single grievance per issue and some residents told him that they had not filed a grievance, which he believed meant that at least two residents violated that policy, likely more. Because he viewed the grievances to be improper for a number of reasons, he asked the residents if they wanted to withdraw their grievances. The Appellant emphasized in his testimony that he did not raise his voice when he asked them if they wanted to withdraw their grievances, was standing with his hands in his pockets, so he did not present a physical threat, and used this as "a teachable moment" to explain the difference between rights and privileges to the residents.

26. The witness then testified about the background behind the shower and phone call changes. Because MRJDC was short-staffed, they moved to having employees working three twelve-hour shifts along with one six-hour shift. As a result of those scheduling changes, which began right before August 12, from 6 p.m. to 8 p.m., the facility was short-staffed, so the decision was made to secure the residents early to reduce the staffing requirements. That two-hour period, after school, before bed, was when the residents had the freedom to use their privileges, including phone calls and longer showers, so the facility altered the previous policy, which allowed five minute phone calls during the week and ten minute phone calls during the weekend, to allow residents to make ten minute phone calls every day, when staffing permitted. The residents were not happy with the policy changes and filed the grievances at issue.

27. He noted that, after the meeting he held with Unit 200 residents on August 12, several residents chose to withdraw their grievances. He asserts that he attempted to handle the grievances "informally" and challenged the Agency's interpretation as to when a grievance is "filed," saying that he does not believe the residents' grievances were filed when he discussed them with the residents. He further asserts that he handled the residents' grievances in accordance with DJJ Policy 706, which requires the grievance officer to discuss the grievances with the residents; he believed that, by explaining the staffing changes and policies to the residents, they were handling those grievances informally. He testified that he successfully resolved some of the residents' concerns informally as evidenced by the fact that those residents decided to withdraw their grievances. Other residents decided to pursue their grievances with another grievance officer, which he facilitated by placing those grievances back into the grievance box. One of the residents who chose to withdraw their grievances told the Appellant to rip up his grievance. The Appellant told the resident that he was not allowed to rip it up, so certain residents responded by ripping up their own grievances and throwing them into the trash.

28. After the meeting, he went to his office and recapped the meeting with Harned, including the destruction of the grievance forms. Harned asked the Appellant if "they" were allowed to destroy grievance forms. He testified that, when he first started serving as a grievance officer, residents were permitted to destroy grievance forms, noting that Ombudsman Walter Wright did not train him on grievance officer policies. He also noted that policy had changed since he completed grievance training to require retention of those records. Upon Harned's question, the Appellant reviewed the current policy, realized that he had violated that policy, and called the Ombudsman's office for guidance as to how to proceed.

29. The Appellant then provided his version of events about his prior discipline, both the Performance Improvement Plan and the three-day suspension. He agreed that the facts underlying both of those incidents were accurate, however, he asserted that both of the incidents were accidental. After detailing what he was seeking in his Board appeal, he testified that he believed he handled the grievance incident appropriately. He does not believe he should receive any discipline for the August 12 incident.

30. On cross-examination, the Appellant acknowledged he was responsible for being aware of DJJ policy (**Appellee's Exhibit 17**). Directed to the Agency's grievance policy, DJJ 706 (**Appellee's Exhibit 10**), he agreed that the grievance policy instructs the grievance officer that if a grievance is about them, they should not handle that grievance and, instead, should pass the grievance up the chain-of-command to the next-line supervisor for review. Here, the resident's grievances pertained to shower and phone call changes that were made by MRJDC with the Appellant's input. The Appellant denied that the grievances were about him or his actions, asserting that Harned was responsible for the changes at issue, an assertion in contradiction to his written response to the request for corrective action, entered as **Appellant's Exhibit 18**, where he states, "[d]ue to the fact that myself & Mr. Harned had changed the rules that they were upset about, I gave them the chance to handle issues informally by discussing them with me."

31. Directed to paragraph N of the grievance policy, the Appellant agreed that the policy requires that an original copy of the grievance shall be kept in the file, a copy shall be placed in the resident's file, and that the resident shall receive a copy of the grievance form. He also agreed that it is not possible to retain an original copy if it is destroyed. He agreed that, if a resident wanted to withdraw their grievance, policy requires getting the youth's signature on the grievance form indicating they want to withdraw the grievance and retention of the signed form. He also agreed that policy dictates that employees should attempt to resolve issues **prior to** the filing of grievances. No policy permits employees to resolve grievances informally after they have already been filed as they were in the underlying incident.

32. Directed to **Appellee's Exhibit 4**, Corder's investigative report, the Appellant acknowledged that he used the word "retarded" three times towards the residents of Unit 200. He confirmed that he admitted in his written statement (**Appellant's Exhibit 18**) that he told the residents that they "were acting retarded." The Appellant then attempted to draw a distinction between saying a resident "acted retarded" and calling a resident that word. After some additional questions from the Hearing Officer and the parties, the Appellant rested his case-in-chief.

FINDINGS OF FACT

1. By letter dated November 1, 2019, the Appellant was demoted and involuntarily transferred from his position as a Juvenile Facility Superintendent I at MRJDC with the Justice and Public Safety Cabinet, Department of Juvenile Justice to a Social Services Worker I for misconduct. Specifically, on August 12, 2019, the Appellant is alleged to have demonstrated misconduct by threating and intimidating youth who had filed grievances in addition to other

violations of DJJ policy. The Hearing Officer notes that many of the facts set out in the demotion letter have been agreed to by the parties; what remains at issue is whether the August 12 grievance incident amounts to misconduct and, if so, what is the appropriate level of discipline.

2. The Appellant filed the instant appeal on November 8, 2019, asserting that the disciplinary action was not issued upon just cause and is either excessive or erroneous. He also advanced an additional claim challenging a reclassification of the Appellant. The Appellant argues that the Agency misinterpreted the August 12, 2019 grievance incident. He asserts that he did not behave in a threatening or intimidating manner, he followed the appropriate DJJ policies, and the conduct alleged in the demotion letter was taken out of context, so the discipline imposed by the Agency was taken without just cause, and that demotion is excessive.

3. The Agency argues that demotion is appropriate because of the Appellant's unacceptable handling of resident grievances in addition to his use of degrading language on multiple occasions. They assert that the Appellant violated multiple DJJ policies in handling those grievances and, moreover, they argue that they can no longer trust the Appellant's judgment in a leadership position. They further argue that the progressive discipline supports escalating the severity of disciplinary actions to demotion and involuntary transfer as the Appellant has been involved in prior recent incidents of threatening and/or intimidating behavior towards juvenile residents.

4. The core controversies to be resolved in this appeal are: 1) whether the Appellant engaged in the behavior alleged by the Agency's November 1, 2019 letter of demotion and involuntary transfer, 2) whether the Appellant's alleged actions on August 12, 2019, violated Agency policy, and 3) if it did, what is the appropriate level of discipline for the Appellant's violation of policy. Additionally, the Appellant alleges the Agency improperly reclassified the Appellant.

5. While the facts underlying this appeal are largely agreed to by the parties, interpretation of those facts are largely contested. The August 12 grievance incident was recorded, video and audio, using institutional cameras. The parties agree on, the video confirms, and the Hearing Officer finds the following basic facts, presented here in the narrative form:

> On August 12, 2019, at approximately 7:00 a.m., the Appellant entered Living Unit 200. On that day, the Appellant was serving as the Assistant Superintendent who had primary responsibility for the enforcement of rules and imposition of discipline in addition to serving as a secondary grievance officer for MRJDC. Prior to his arrival on Unit 200, the Appellant was made aware that the unit was "off the chain" the previous night and the residents filed multiple grievances on the same issues underlying their rowdy behavior the previous night: MRJDC's decision to change the amount of time residents were allowed to shower and make phone calls. The Appellant called the residents of Unit 200 into a lengthy group meeting where the residents were standing in front of their cells and discussed the

filed grievances with the residents. The Appellant told the residents that their grievances were not allowed by policy as they concerned privileges as defined by the MRJDC handbook, not rights. Following the meeting, certain residents wanted to withdraw their grievances and the Appellant allowed them to do so by throwing the grievance forms into the trash, some of which were torn apart before being placed into the trash.

During the meeting, the Appellant largely maintained physical distance from the residents and did not speak in a harsh aggressive manner with the residents. Nonetheless, the Appellant said the following statements during the conversation:

> -"All these things are privileges that I give you. Me and Mr. Harned. They are privileges, not rights."
>
> -"Three meals a day unless you're acting retarded, in isolation, threatening my staff."
>
> -"Me and Mr. Harned make the rules in here. So file all the grievances you want to. If they are about phone calls, it ain't going to change it."
>
> -"I can do things in this building that no one else can do."
>
> -After a resident complained about running out of hot water in the shower, "I guess you think we turn the hot water off. Do you know how retarded…?"
>
> -"I don't let my staff talk to me retarded."

6. The Agency asserts that the Appellant's behavior during the conversation amounts to threatening and/or intimidating behavior. They further argue that the Appellant violated DJJ policy and put the facility's ACA accreditation at risk by allowing the residents to discard original copies of their grievance forms. The Agency also argues that the Appellant's repeated use of the word "retarded" in the conversation with the residents warrants discipline in and of itself.

The Appellant offers an alternative version of events that contradicts the Agency's version. Specifically, the Appellant agrees that he engaged in the behavior alleged and made the statements alleged by the Agency; however, he asserts that he did nothing significantly wrong. The Appellant believes he acted properly in addressing the grievances with the residents in a group and believes he may have made a minor mistake in allowing the residents to destroy their grievance forms, but remedied that mistake by allowing them to submit new grievance forms. He also acknowledged that he should not have used the word "retarded" multiple times with the youth, but asserts that other MRJDC employees have used worse language in front of residents.

7. However, the Hearing Officer finds that 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 demotion and involuntary transfer; thus, the Appellant violated DJJ Policy 102 ("Code of Conduct"), DJJ Policy 104 ("Code of Ethics"), DJJ Policy 205 ("Youth Rights"), and DJJ Policy 706 ("Grievance Procedure") on August 12, 2019, in his handling of the MRJDC residents' grievances. The Hearing Officer specifically finds the Appellant engaged in intimidating, but not threatening, behavior towards the residents, used the word "retarded" on multiple occasions, and permitted the destruction of grievance forms that policy required to be maintained. While the subject matter underlying the residents' grievances, shower and phone call times, are properly deemed both rights and privileges, the Hearing Officer finds the grievances submitted by the residents were covered by DJJ Policy 706. Thus, the Appellant's handling of those grievances was improper for a number of reasons, including his attempt to resolve grievances about himself as a member of MRJDC leadership, incorrectly asserting that the residents could not grieve the underlying issues, attempting to resolve the grievances informally after formal grievances had already been filed, addressing the grievances as a group, and unwisely co-mingling his roles as a grievance officer and as the facility disciplinarian. Accordingly, the Agency had just cause to discipline the Appellant for his policy violations; still at issue is whether the discipline imposed, demotion and involuntary transfer, was excessive or erroneous.

8. The Hearing Officer also finds that the Appellant failed to carry his burden of proof in his challenge to an alleged penalization through improper reclassification. The Appellant failed to point to evidence of record that would establish an improper reclassification. Instead, it appears that the Appellant's reclassification claim is a collateral attack on the Agency's demotion of the Appellant and subsequent transfer to a Social Services Worker I, a position three pay grades lower than his previous Assistant Superintendent I position. To the extent that the Appellant advances an independent challenge to his transfer, such challenge fails given the evidence of record.

9. Given 1) the seriousness of the incident, 2) the Appellant's prior disciplinary record, including previous incidents involving intimidating behavior towards residents, and 3) the Agency's reasonable assertion that it no longer has faith in the Appellant's judgment, the Hearing Officer finds that demotion and involuntary transfer of the Appellant is neither excessive nor erroneous and that the Agency acted properly within its discretion in imposing such action. The Hearing Officer would note that, although the Appellant established that there was a culture change afoot in DJJ and that the Appellant was resistant to that change, the Appellant failed to establish that the Appellant's resistance to culture change motivated the Agency to take disciplinary action against the Appellant or that the Appellant was subjected to more severe discipline as a result of his resistance to change. Further, the Hearing Officer would additionally note that the determination that demotion and involuntary transfer was appropriate was significantly impacted by the Appellant's continued assertion that he handled the August 12 grievance incident almost

entirely properly as such argument demonstrates that the Appellant's judgment cannot be relied upon.

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) and (8).

2. In the immediate appeal, many of the underlying facts are largely uncontested. A conversation did occur between the Appellant and residents of Unit 200 at MRJDC on August 12, 2019, and the Appellant made certain statements and took certain actions. 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 demotion and involuntary transfer was excessive.

3. Given the totality of the circumstances, including 1) the seriousness of the incident, 2) the Appellant's prior disciplinary record, including previous incidents involving intimidating behavior towards residents, and 3) the Agency's reasonable assertion that it no longer has faith in the Appellant's judgment, the Hearing Officer concludes that the demotion and involuntary transfer of the Appellant were 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 to establish, by a preponderance of the evidence, that demotion and involuntary transfer were appropriate under the circumstances.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **GREG LINDSEY V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF JUVENILE JUSTICE (APPEAL NO. 2019-244) 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 20th day of January, 2021.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Whitney True-Lawson
Hon. William Codell