

CERTIFICATION OF PERSONNEL BOARD RECORDS

I certify that attached hereto is a true and correct copy of the Findings of Fact, Conclusions of Law and Recommended Order and Final Order in the case of **CHARLES LODESTRO V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF JUVENILE JUSTICE (APPEAL NO. 2019-256)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 25th day of August, 2021.



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

Copy to Secretary, Personnel Cabinet

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2019-256

CHARLES LODESTRO

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 August 2021 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated June 14, 2021, Appellee's exceptions and request for oral argument, Appellant's response, oral arguments, 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 **SUSTAINED**.

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

SO ORDERED this 25th day of August, 2021.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Jamhal Woolridge
Hon. Paul Fauri
Cynthia Watson
Hon. Rosemary Holbrook

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2019-256

RECEIVED

JUN 15 2021

Personnel Board

CHARLES P. LoDESTRO

APPELLANT

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 consideration of the Appellant's *Motion to Sustain Appeal as a Matter of Law* and follow-up *Motion to Submit for Ruling*. The Cabinet filed *Appellee's Response to Appellant's Motion to Sustain Appeal as a Matter of Law*. The Appellant filed his *Reply to Appellee's Response to Motion to Sustain Appeal as a Matter of Law*. The matter has been assigned to the Hon. Roland P. Merkel, Hearing Officer.

The Appellant, Charles LoDestro is represented by the Hon. Paul F. Fauri. The Appellee, Justice and Public Safety Cabinet, Department of Juvenile Justice, is represented by the Hon. Jamhal Woolridge.

BACKGROUND

The Appellee, by its letter dated September 19, 2019, notified Mr. LoDestro of his dismissal from his position of Youth Worker Supervisor with the Department of Juvenile Justice, at Northern Kentucky Youth Development Center, effective close of business Monday, September 23, 2019 (copy attached hereto as "RO¹ Exhibit 1"). Such dismissal was based on allegations of misconduct and poor work performance.

Mr. LoDestro filed his appeal with the Kentucky Personnel Board on November 19, 2019. On the Appeal Form Appellant indicated he is a classified employee and appealed his employment dismissal. In the Attachment supplied with his Appeal Form, Appellant alleged his termination was excessive and erroneous.

¹ "Recommended Order"

The burden of proof was on the Appellee to prove its case by a preponderance of the evidence. KRS 13B.090(7).

Discovery had been conducted between the parties, including provision by Appellee of certain documents.

In the *Motion to Sustain Appeal* Appellant argues the documents produced through discovery "...clearly show that he made no entries on the Observation Log on April 9, 2019...the juvenile inmate was restrained and placed in isolation at 6:30 p.m. on April 9, 2019;" and that Appellant "...was not at work at the time of the isolation and restraint of the juvenile inmate and therefore could not have violated his rights as asserted in the termination letter."

Appellee's *Response* takes the position that "Not only are the policy violations [by several employees including Mr. LoDestro] similar, but the time period covers April 9th-11th, 2019." (Bracketed information supplied for clarification). In its footnote 2, Appellee stipulated: "Counsel for the Appellee will stipulate that the Appellant worked first shift on April 9th, 2019 and later returned to work on April 10th, 2019." In its ARGUMENT Appellee states: "...the Appellant is exactly aware of the nature of the circumstances of his dismissal. A date in the dismissal letter that is off by one day is not fatal to the Appellee. Thus, the Appellant's motion should be overruled."

FINDINGS OF FACT

1. The Appellant, Charles P. LoDestro was, at the date of termination from employment, September 23, 2019, a classified employee with status.

2. The Appellee, by its letter dated September 19, 2019, notified Mr. LoDestro of his dismissal from his position of Youth Worker Supervisor, with the Department of Juvenile Justice, at Northern Kentucky Youth Development Center, effective close of business Monday, September 23, 2019 (letter copy attached hereto as "RO² Exhibit 1"). Such dismissal was based on allegations of misconduct and poor work performance:

"...as reported by Northern Kentucky Youth Development Center, Juvenile Facility Superintendent I, (JFS I) Larry Milburn, you demonstrated misconduct and poor work performance by not providing appropriate supervision of Youth*.

² "Recommended Order"

The Justice and Public Safety Cabinet, Internal Investigations Branch (IIB) conducted an investigation into the allegation of inappropriate supervision, in which the allegation was substantiated. The findings are contained in the investigative report, IIB #2797-19.”

The letter continued:

“On April 9, 2019, you wrote down that you completed sixteen (16) observations on Youth’s* Isolation Observation Log while Youth* was in the isolation cell. However, review of video footage provided by the facility shows you were present at the isolation door only seven (7) times. Therefore, you failed to provide appropriate supervision of youth. As a supervisor, you have a heightened responsibility to know, understand, and follow policy.”

3. Mr. LoDestro timely filed his appeal with the Kentucky Personnel Board on November 19, 2019. On the Appeal Form he indicated he is a classified employee and appealed his employment dismissal. In the Attachment supplied with his Appeal Form, Appellant alleged his termination was excessive and erroneous, and:

“I do not believe that the policies that are cited in support of my termination were violated and, in fact, some of the policies were barely in effect as of April 9, 2019. I believe I was following the procedure and did provide appropriate checks of this youth. I did not violate the policy for observing youth in isolation.”

4. Appellee stipulated: “Counsel for the Appellee will stipulate that the Appellant worked first shift on April 9th, 2019 and later returned to work on April 10th, 2019.”

5. Appellee stated in its *Response* that Appellant and several other employees were dismissed for failure to perform bed checks on an isolated youth and falsification of observation logs. It also stated the following for the first time: “...the time period covers April 9th-11th, 2019.”

6. There is no dispute that the Youth* in question had been restrained and placed in isolation beginning 6:30 p.m. on April 9, 2019 and left isolation about 1:05 a.m. on April 11, 2019 (Isolation Observation Log-Exhibit 1 to Appellant’s *Motion*³).

7. Appellant was not present at work when the subject Youth* had been restrained and spent time in isolation beginning at 6:30 p.m. on April 9, 2019. There is no evidence that

³ Although the header of this Exhibit indicates Youth* was placed in isolation at 6:30 p.m. on 4/9/19 and taken out of isolation at 1:05 (illegible) on 4/11/19, the two pages of this Exhibit appear to run only to the early morning hours of 4/10/19.

shows he was at work at anytime after 4:00 p.m. on April 9, 2019. As he was not at work on April 9, 2019 when the subject Youth* had been restrained and spent time in isolation beginning at 6:30 p.m., Appellant could not have made any entries in the Isolation Observation Log for that day pertaining to the subject Youth*. As Appellant was not at work during this time, he had no duties pertaining to the appropriate supervision of the subject Youth* on that day.

8. Appellee presented several documents to Appellant in response to Appellant's discovery requests. Appellant based his *Motion* on these documents and the sole affidavit of Martin Strouse, Facility Superintendent of the Northern Kentucky Youth Development Center. Appellee provided no documents or other affidavits in its *Response*. No testimony (other than the affidavit of Mr. Strouse) has been taken and offered at this time.

9. Appellee did not present in its *Response* to Appellant's *Motion*:

- a direct response to the central issue raised by Appellant;
- evidence of Appellant having made 7 entries in the Isolation Observation Log on April 9, 2019;
- the video supporting the allegation that Appellant had been seen at the isolation door on April 9, 2019;
- the Investigative Report IIB #2797-19;
- the missing/misplaced sign-in sheets for April 9 and 10, 2019;
- the Isolation Observation Log for April 10 or 11, 2019.

10 The institution's timesheet shows Mr. LoDestro worked on April 7, 2019 from 6:35 a.m. to 4:00 p.m.; 8 hours of which were "regular" hours (6:45 a.m. to 3:15 p.m. with ½ off for lunch) and 0.75 hours of which was "overtime" (3:15 p.m. to 4:00 p.m.) (Exhibit 2 to Appellant's *Motion*). It also shows he worked on April 8, 2019 from 7:55 a.m. to 4:25 p.m.; April 9, 2019 from 6:45 a.m. to 4:00 p.m.; April 10, 2019 he worked 7 "regular" hours; and April 11, 2019 he worked 8 "regular hours" and 0.25 "overtime).

11. The institution provided sign-in sheets for April 7, 8 and 11, 2019. Appellant signed in and out as follows: April 7: 6:35 a.m./4:00 p.m.; April 8: 7:55 a.m./4:25 p.m.; April 11: 6:40 a.m./3:30 p.m.

12. The institution could not locate the sign-in sheets for April 9 or 10, 2019 and provided the affidavit of Martin Strouse. Mr. Strouse stated under oath:

- “4. After diligent effort, the sign-in sheets for April 9-10, 2019 are not able to be located.
5. It is the Affiant’s belief that these sign-in sheets for the days April 9-10, 2019 have been misplaced because they are kept in one central location at the facility after the conclusion of the particular month.”

13. There is no evidence to show Appellant was at work on April 10 or 11, 2019 at any time after working a total of 7 hours on the 10th and 8.25 hours on the 11th.

14. There is no evidence to show Appellant, while at work on April 10 or 11, 2019 had any involvement with Youth* while said Youth* was in isolation.

CONCLUSIONS OF LAW

1. “A classified employee with status shall not be dismissed...or otherwise penalized except for cause.” KRS 18A.095(1). Such employee who is terminated shall be notified in writing of several items, including “The specific reason for the action including: date, time, and place of the action or activity;” KRS 18A.095(7)(b)3. Such notice must contain sufficient facts to provide the aggrieved employee sufficient opportunity to reply to the charges. *Wade v. Commonwealth, Dept. Of Treasury*, 840 SW 2d 215 (KY Ct of Appeals 1992).

2. Appellant in his *Motion* did not contest the validity of the termination notice, or that he had not been provided sufficient facts by which he was prevented from being able to reply to the charges. Rather, he has replied to the charges through his denial and alleged the facts, as evidenced by the documents in discovery, will not under any circumstance show he committed any acts constituting a violation of policy involving the subject Youth*, during his first shift on April 9, 2019. He has requested Summary Judgment. It was Appellee, in its *Response*, that raised a defense of having given sufficient notice per the requirements of KRS 18A.095.

3. Summary Judgment shall only be granted if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56.03. Summary Judgment should only be used to terminate litigation when, as a matter of law, it appears it would be impossible for the respondent to

produce evidence at the trial warranting a judgment in her favor and against the movant; the record must be viewed in a light most favorable to the party opposing the motion, and all doubts are to be resolved in her favor. Steelvest, Inc. v. Scansteel Service Center, et al., 807 S.W. 2d 476 (Ky. 1991).

4. When the Cabinet sent the September 19, 2019 termination letter to Mr. LoDestro, such letter was in full compliance with the statutory due process notice requirements of KRS 18A.095(7). In that letter, the Agency specifically alleged Appellant's acts of April 9, 2019 constituted misconduct and poor work performance. However, the Agency cannot, by its *Response* alone, now take the position that Appellant's acts occurred within a "time period" of "April 9th-11th, 2019". The Agency would have been within its rights to dismiss or withdraw any or all the charges, but there appears to be no persuasive authority that authorizes it to amend charges pending a KRS 13B appeal by changing a significant due process requirement of notice to the Appellant of the date of an alleged incident, absent a motion to amend.

5. From the current record on file, and the evidence provided by both parties, including the documents produced by the Appellee, it appears it would be impossible for the Appellee to produce evidence at an administrative hearing warranting a judgment in its favor and against the movant for acts alleged to have occurred while Appellant was at work on first shift on April 9, 2019. Viewing, then, the record in a light most favorable to Appellee, there does not exist a genuine issue of material fact that may only be resolved at hearing.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the Appellant's *Motion to Sustain Appeal as a Matter of Law* be **SUSTAINED** and therefore, that the appeal of **CHARLES P. LODESTRO VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF JUVENILE JUSTICE (APPEAL NO. 2019-256) BE SUSTAINED**. The dismissal of the Appellant should be vacated and Appellant restored to his previous employment position, or a position of like status and pay, with full reinstatement of wages and benefits from and after the effective termination date. and he should otherwise be made whole.

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 items 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 the **Hearing Officer, Roland P. Merkel**, this 14th day of June, 2021.

KENTUCKY PERSONNEL BOARD



ROLAND P. MERKEL
HEARING OFFICER

A copy hereof was mailed on June 16, 2021 to: GA

- Hon. Paul F. Fauri
- Hon. Jamhal Woolridge
- Hon. Rosemary Holbrook (Personnel Cabinet)

RECEIVED

SEP 25 2019

54-523-30038147
Lodestro, Charles

Personnel

9-24-19



JUSTICE AND PUBLIC SAFETY CABINET

Matthew G. Bevin
Governor

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Fax (502) 573-4308
www.kentucky.gov

John C. Tilley
Secretary

Denver E. Butler
Commissioner

September 19, 2019

Charles Lodestro

Via Certified & Regular Mail

PERNR:

Dear Mr. Lodestro:

After considering the comments made at your pre-termination hearing held on September 17, 2019 it has been determined that there is no sufficient reason to alter the notice of intent to dismiss, dated August 26, 2019.

Therefore, based on the authority of KRS 18A.095 (7), and 101 KAR 1:345, Section 2, you are hereby notified that you are officially dismissed from your position of Youth Worker Supervisor, with the Department of Juvenile Justice, at Northern Kentucky Youth Development Center, effective close of business on Monday, September 23, 2019.

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

Misconduct and Poor Work Performance i.e., as reported by Northern Kentucky Youth Development Center, Juvenile Facility Superintendent I, (JFS I) Larry Milburn, you demonstrated misconduct and poor work performance by not providing appropriate supervision of Youth*. The Justice and Public Safety Cabinet, Internal Investigations Branch (IIB) conducted an investigation into the allegation of inappropriate supervision, in which the allegation was substantiated. The findings are contained in the investigative report, IIB #2797-19.

On April 9, 2019, you wrote down that you completed sixteen (16) observations on Youth's* Isolation Observation Log while Youth* was in the isolation cell. However, review of video footage provided by the facility shows you were present at the isolation door only seven (7) times. Therefore, you failed to provide appropriate supervision of youth. As a supervisor, you have a heightened responsibility to know, understand, and follow policy.

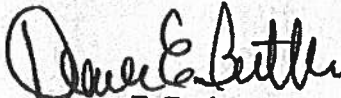
RO EXHIBIT	
tabbles	1

Charles Lodestro
Dismissal
September 19, 2019
Page 2

Your misconduct and poor work performance demonstrated by inappropriate supervision, poor judgement and lack of youth's medical welfare constitutes violations of Department of Juvenile Justice Policy #104, "Code of Conduct", I, IV. (B., L.); Department of Juvenile Justice Policy # 110, "General Security Guidelines in Facilities and Programs", IV, (A.)(6.)(a., b., d.,and e.); Department of Juvenile Justice Policy #323, "Isolation", IV, (K.)(8.). Department of Juvenile Justice Policy #324, "Restraints", IV. (C.)(2.)(g.)(i.)

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,



Denver E. Butler
Commissioner

DEB/lmc

Attachments: Personnel Board Appeal Form

C: Hon. Mark A. Sipek, Executive Director, Personnel Board
Ed Jewell
Scott Whitaker
Steve Potts
Tim Corder
Hillary Truesdell
Martin Strouse
Cynthia Watson
DJJ Legal
DJJ Personnel
Personnel File