

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 **OTIS MILLS VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2013-267)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 17th day of September, 2014.



MARK A. SIPEK, SECRETARY
KENTUCKY PERSONNEL BOARD

Copy to Secretary, Personnel Cabinet

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-267

OTIS MILLS

APPELLANT

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

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

APPELLEE

** **

The Board at its regular September 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated July 16, 2014, having noted Appellee's exceptions, Appellant's exceptions, Appellant's response to exceptions, 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 be, and they hereby are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **SUSTAINED to the extent** therein.

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 17th day of September, 2014.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Adam Adkins
Hon. Paul Fauri
Joslyn Olinger Glover

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-267**

OTIS MILLS

APPELLANT

VS.

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

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

APPELLEE

** ** ** ** **

This matter came on for evidentiary hearings on March 11, 12 and 25, 2014, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Kim Hunt Price, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Otis Mills, was present at the hearing, and was represented by the Hon. Paul Fauri. Appellee, Justice and Public Safety Cabinet, Department of Juvenile Justice, was present and was represented by the Hon. Adam Adkins.

BACKGROUND

1. Appellant, Otis Mills, was terminated from his position as a Juvenile Facilities Superintendent I with the Department of Juvenile Justice at the London Group Home by letter dated November 6, 2013, effective November 8, 2013. An intent to dismiss letter had been issued on October 10, 2013, and a pre-termination hearing was held on November 1, 2013. The November 6, 2013 dismissal letter is attached and incorporated herein as **Recommended Order Attachment A**.

2. Appellant filed a timely appeal on November 18, 2013, stating:

I deny the allegations that are set forth in the November 6, 2013 notice of termination from my position as Superintendent I in the Department of Juvenile Justice at the London Group Home. The allegations are not true and, furthermore, do not constitute a basis for taking a disciplinary action against me. I have not violated the statutes or policies set forth therein. In fact, besides not being a violation of KRS 11A.020(1)(a) and (d), the Department and Cabinet have no authority to assert this as an allegation in the letter.

The action is erroneous and certainly excessive. It is further arbitrary in violation of Section 2 of the Kentucky Constitution, as well as Chapter 18A of the Kentucky Revised Statutes.

3. Prior to the hearing, Appellant had filed a Motion to Sustain the Appeal as a Matter of Law and this matter was argued again prior to the beginning of the hearing. The Hearing Officer determined that it was appropriate to take the matter under advisement and proceed with the hearing.

4. The parties stipulated that the Hearing Officer could appropriately take judicial notice of Appeal No. 2012-277, *Otis Mills v. DJJ*. In said appeal, Mills was suspended due to what will be referred to as the Wall/Mills gambling situation.

5. **James Roberts**, a Youth Service Program Supervisor at the Adair Facility for three years and a Youth Worker Supervisor for two years, with a total of thirteen and a half years at the facility, testified initially.

6. Roberts' involvement in the Wall/Mills gambling situation was that he was at work supervising Michael Wall when he noticed Wall in Wall's office on his cell phone. At that time he entered the office because Wall had been told not to be on the phone. Wall had a paper with sports teams and dollar figures written on it. He asked what it was, and Wall told him that he was talking to Mills and that bets were being placed for Mills through a bookie.

7. Roberts testified that after the investigation concerning the gambling, he felt a little pressure at work, but kept doing his job, although he often felt that he was on "pins and needles." Later, Mr. Mangum became Roberts' supervisor, and Roberts felt that things got worse as Mangum was always calling him in and telling him to do something differently. Mangum was not employed at the facility during the Wall/Mills gambling situation. Mangum gave him a Personal Improvement Plan (PIP) which he disagreed with, but did sign. This resulted from an incident where Roberts had been working in detention and received a child at 2:30 a.m. who had a mental health situation. Roberts did not think you were supposed to take mental health children and told the employee to call a worker and get the child out. The child was released the next day. Mangum told Roberts that he should have called him directly.

8. Roberts also related scheduling problems. Employees worked "four days on and three days off" and as staff decreased it was more difficult to schedule. A problem occurred about a May 2 schedule. Roberts was on sick leave for two weeks and before he left he got the schedule done and sent it to Gadberry, the other YSPS, to review and put out while he was on sick leave. Roberts received a call while on sick leave from Burchett because there was not

enough staff and he told him to go through Gadberry because he was at work. Burchett said that Gadberry had left and he told Burchett to obtain coverage for the incident. When Roberts came back from leave Mangum talked to him to see what had happened and Mangum said not to worry about it. Nearly two weeks later, Mangum called him in for a supervisory conference on the issue. He put comments at the bottom and went ahead and signed it. Roberts said he questioned Mangum against this and Mangum said he could take the supervisory conference out of the file. After that, Roberts did his regular job, but he felt Mangum was consistently pointing him aside to do things differently.

9. With regard to the September 12, 2013 meeting, Roberts stated that Mangum came into his office and he told Mangum he felt he was under a lot of pressure from the PIP and supervisory conference and felt that he was being treated unfairly because of the Wall/Mills gambling situation. Mangum left and said, "I'll talk to you later." Mangum came in about thirty minutes before the end of the shift and told him to go with him to Mills' office. Mills and Long were present as well as Mangum. The meeting began with Mills stating that he understood that Roberts felt he was being mistreated because of the Wall/Mills gambling situation and Mills began to talk about the incident and said that from audiotapes he knew of the conversation Roberts had with the investigator. Roberts stated that Mills said, "Even though Wall was on the cell phone you did not know I was on the phone." Mills also said, "You informed an investigator of moving Wall to third shift and asked if he remembered asking to change Wall's schedule to third shift." Mills told him he knew that Roberts had told the investigator that Mills had moved Wall to third shift, but that he should remember that Cundiff was there and was Mills' witness. Roberts also stated that Mills told him that his inexperience in talking with investigators caused him to handle that interview poorly. Roberts stated that during this meeting, Mills asked him if he knew anything about a second meeting and Long asked him the same thing. Roberts told him he did not know of any second meeting.

10. Roberts said that in this meeting he felt trapped and as if he was on trial. He was aggravated that the investigation of the gambling was being discussed and felt that he was being pumped for information that would benefit Mills at his hearing.

11. On cross-examination, Roberts denied that there was any discussion on the September 12, 2013 meeting concerning Bradshaw's scheduling and military leave.

12. Roberts stated that after this meeting he took sick leave for two weeks because he felt trapped. Roberts felt that he talked to someone at the Ethics Committee after the September 12 meeting, but he was not sure what their name was.

13. Roberts testified that after he caught Wall on the cell phone with Mills, he debated on how to handle the situation because Mills was the facility Superintendent, but a couple of days later he went to his direct supervisor, Long, who handled the matter from there. About a week later there was a meeting in Long's office with Bowling and Mills also present, where Mills began the meeting with a profanity and talked about his report to Long and Mills tried to defend what had happened by comparing it to "fantasy" football. He told Mills at that meeting that what he did was illegal because it was with bookies and Mills agreed not to do it in the building anymore. Roberts testified that he did not have any written reprimands or suspensions.

14. **Michael D. Mangum**, the Assistant Superintendent at the Adair Youth Development Center, testified that he had been in this position for three years in July. He had fifteen plus years with DJJ, having been a Superintendent previously at Lincoln Village. He testified that he had been Roberts' supervisor since approximately September 2012. He did not work at the facility during the Wall/Mills gambling situation.

15. Mangum testified that he believed that he was the cause of the September 12, 2013 meeting. He went to Mills because he was trying to supervise Roberts, but Roberts kept making the same mistakes. One day when he had spoken with Roberts in his office, Roberts said that he was retaliating for the Wall/Mills gambling situation and he told Roberts that he did not know what was going on about that because he had not worked at the facility then and had no personal knowledge of the matter. Mangum told Mills that Roberts had made this statement and he would take care of it. However, a second issue arose where he told Roberts if he was struggling with something to call him and a mental health care child was held illegally. Roberts again accused him of taking action concerning this matter because of the Wall/Mills gambling situation. He tried to meet with Roberts often and get on the same page and had him on a PIP because of this situation.

16. He also told Mills of this situation and this is what caused the meeting on September 12. Mangum related that the September 12 meeting was opened by Mills. Mills began by telling Roberts that Mangum was his supervisor and he had to listen to him. Mills told Roberts he is not influencing Mangum in any way on how to supervise him. Mills did state that there was a civil suit by Wall and he would have to answer questions because his name had been mentioned in discovery. Long mentioned the second meeting and he did not know what that was about. The meeting with Roberts only concerned the Wall/Mills gambling situation because Roberts had brought the issue up. Mills did not tell Roberts during the meeting that Mills knew what Roberts told investigators. He did say Roberts was inexperienced. Roberts made a comment about the Bradshaw scheduling issue and Mills pointed this out as an example of Roberts' inexperience.

17. Mangum could not recall having stated to the investigator that Mills talked to Roberts about his inexperience with an investigator, but only recalled the reference to a civil suit. Mangum had one or two informal conferences with Roberts about his performance prior to the September 12 meeting when he took the matter up to Mills. Mangum did not feel that Mills threatened Roberts concerning the Wall/Mills gambling situation during the September 12 meeting and no body language of Mills indicated any threats.

18. Mangum testified that during the September 12 meeting, Mills told Roberts to be honest on who had made the call to change Wall's schedule and that was Roberts himself. There was also a general discussion of Roberts listening to Mangum because he was his supervisor. Mills had moved Roberts to Mangum's supervision because Mangum knew nothing about the Wall/Mills gambling situation.

19. **Hasan Davis**, Commissioner for the Department of Juvenile Justice for three years, testified that he learned of the September 12, 2013 meeting in an initial investigative report. He understood that Roberts felt threatened. The request for the investigation went through the Cabinet and Personnel and DJJ reviewed that and made a recommendation. It then goes to Diana McGuire, Deputy Commissioner of Operations, and then to him. DJJ did not make the request for the investigation as it usually does, but learned of it as it was being initiated.

20. Davis testified that he reviews any recommendations and the initial draft of any disciplinary action and then often sends them back to McGuire and the letter comes back to him for final review. Mills requested a pre-termination hearing and he participated in that. At that time, he determined it was appropriate to accept the recommendation of the termination. This decision was made because the situation continued to grow and could put them in an increased risk of legal situations, adding scrutiny on an agency because of circumstances, whether they were intended or not, in which an employee felt the Agency was putting them in a position to be harassed and intimidated.

21. Davis testified that Mills was transferred, as of the date of the intent to dismiss letter entered on October 10, 2013, and that the regional office recommended that, probably Director Sewell. This was done because there was a sense that a lot of people were going to use the Wall/Mills gambling situation as an excuse for their work performance. This was months after the situation came to light and Mills was suspended for it.

22. Davis testified that when he made the decision for termination he had reviewed a copy of the investigative report, but had not reviewed the disks of the interviews and did not talk to anyone who had signed off on the report or any of the witnesses. This would be his normal procedure in reviewing disciplinary actions.

23. Davis acknowledged that Wall had sued both Mills and the Cabinet and that Roberts might have to be a witness in that civil action. Davis also testified that he did not review the policy listed on page 2 of the dismissal letter, but relied on his staff to have that accurate. He does regularly review policy and is generally familiar with it. Davis acknowledged that the Adair facility had received the "Facility of the Year" award for 2013 under the Appellant's supervision and this award had also been received by the facility at least one other time while Appellant was the Superintendent of the facility. Davis testified that Mills' statements in the investigation that he had discussed the investigation with Roberts was inappropriate and showed a violation of policy and standard operating procedure. He further stated that Mills telling Roberts that Mills thinks Roberts lied when he was interviewed violated the policy and standard operating procedures. Davis acknowledged that he was familiar with Appellant's work performance over the years and that it was exceptional.

24. **Ron Long**, the Superintendent at the Adair Youth Development Center since September 2013 and previously the Assistant Superintendent, testified that he began with DJJ in August 1999. He was Roberts' supervisor for about a year and also supervised Roberts when Roberts was at YSTS. Roberts complained to him about Mills and Wall being involved in gambling and that resulted in the original investigation.

25. Concerning the September 12 meeting, Long testified that he and Mills were in the office and Mangum came in upset saying that he had been addressing problems with Roberts and Roberts was saying he was just being retaliated against because of the Wall/Mills gambling situation and that it was the second time that this had occurred. Mills told him to bring Roberts up to the office and later in the afternoon the meeting took place. Long recalled that Mills began the meeting by addressing the fact that Roberts was saying Mangum was trying to correct him because of the Wall/Mills gambling situation and that was not true. There was an issue discussed with the Bradshaw scheduling at the September 12 meeting. Mangum had previously addressed the issue with Roberts and it still had not been fixed. Toward the end of the meeting, Mills said that he had heard Roberts' testimony on the investigation and statements since then were inconsistent concerning Wall's and Bradshaw's scheduling situation.

26. Long testified that he asked about a separate meeting and was aware there was an Ethics Commission issue as Roberts had told him about it. Long used the example in the September 12 meeting that someone saying there was a second meeting because he had been asked about it, but it turned out there had not been one. (Roberts had not yet met with Ethics.) The September 12 meeting talked about Roberts' inexperience in general, including the Bradshaw scheduling problem. Mills made the statement that the investigator had made a statement and Roberts had agreed to it, rather than the investigator asking a question. There was no other reference to the Wall/Mills gambling situation. He did not recall Mills ever telling Roberts he was volunteering information to investigators.

27. Long felt that Roberts had been a good Youth Worker and supervisor, but as he moved on up the chain his work was not as good. He was aware that Mangum had become Roberts' supervisor to decrease Roberts blaming his poor performance on the Wall/Mills gambling situation because Mangum had not been there when that came up. Long verified that Roberts still had some of the same management problems with scheduling as he did prior to this meeting and doing favors for others which creates problems in his scheduling. Long verified that at the meeting there was no discussion of testimony or that it should be a certain thing, but at one time something was said about a civil suit and that people would have to answer questions. Long felt Roberts' pressure was from the fact that he had added additional job performance issues as he moved up the ladder and was not doing his job well. Long believed Roberts was a high-strung individual and he had to calm him down on other occasions.

28. **Kimberly Whitley**, the Human Resources Branch Manager for DJJ since May 1, 2012, testified that she learned of the September 12 meeting from a disciplinary request form from the Deputy Commissioner's office. She submits this to the Personnel Administrator who drafts the disciplinary action. It is then up-lined to the Deputy Commissioner for review. She reviews the investigative report and the entire personnel file and disciplinary file an employee has, as well as the policies that are issued and recommends a level of disciplinary action. When she receives it back from the Commissioner she gives it to her Personnel Administrator who puts it in letter form. She reviews it again and sends it to the Commissioner for review and signature. She felt that the policies and standard operating procedures set forth in the letter had been violated. She was not part of the pre-termination hearing. She believed that violation concerning an investigation occurred. In her opinion, it did not matter if an investigation was complete if there was still pending litigation, which there was in this case, Mills could not address the matter under policy. When she read the investigation she was under the belief that Roberts was going to be a witness in future matters.

29. **James Gabbard**, an Investigator for the Justice and Public Safety Cabinet for a year and a half in the Internal Investigation Branch, testified that he conducted an investigation report in this matter. He immediately began his testimony with the fact that he had found an error in the Summary of Investigation and said that it should have said, "By statements of Mr. Long and Mr. Mangum . . .," not that Appellant had admitted to certain statements.

30. Gabbard received the assignment for the investigation on September 8, 2013, and he and Internal Affairs Investigator Steven Potts went to Campbellsville to meet Roberts. Potts did an interview with Gabbard being present and it was recorded. Gabbard interviewed Long and Potts interviewed Mangum separately. Gabbard then interviewed Mills separately and all interviews were recorded on CDs, which were introduced as Appellee's Exhibit 11. He reviewed the tape of the Mangum interview and prepared the synopsis in the report.

31. In his interview with Appellant during the investigation, Mills told Gabbard that the purpose of the meeting on September 12 was to tell Roberts that when Mangum addressed his work performance issues, it had nothing to do with the Wall/Mills gambling situation. Mills told him that he brought up an issue with Roberts that Roberts had brought up inaccurate and misleading information in the Wall/Mills gambling situation investigation. Mills also told him that the Bradshaw matter was brought up as a way of Mills trying to explain to Roberts that he felt he was inappropriate in blaming the Bradshaw scheduling situation on this due to his being young and inexperienced. Mills did tell Roberts that no one dragged him into the Wall/Mills gambling situation. Mills also stated that during the interview he told Roberts that he would like to get together with him and talk with him about what was going on at the time when this was all said and done. During the interview, Mills also said in retrospect he could have just not had the meeting and let Roberts go on not taking responsibility for his mistakes.

32. Gabbard testified that he determined there was an error in his report when this hearing was originally scheduled in January, but was cancelled for snow. He had reviewed the tape and advised counsel for Appellee as soon as he discovered this error. Gabbard verified that both Long and Mills had stated that they had similar performance meetings with Roberts in the past.

33. **Gary Sewell**, Director for the Division of Southeastern Region for five to six years, testified that Mills had been the supervisor at the Adair facility the entire time he served as Division Director. He visited each facility at least every other week and had phone conversations as needed. Sewell explained that Mills' supervisor had called to talk to him about Mills placing bets through Wall to a bookie while at work. When Wall reported this, he had told him that he was as culpable as Mills. Sewell then reported this to his supervisor, Diana McGuire. Sewell stated that after the twenty-day suspension when Mills returned to work, everything went back to normal. Mills had told him that every time Mangum tried to supervise Roberts, Roberts claimed it was due to the Wall/Mills gambling investigation. Sewell had talked with his boss, Diana McGuire, on January 12, 2013, concerning this previous problem with Roberts' supervision and she had said to get Mills out of there because it was going to be a problem and they did not want Mills to be in a bad situation. The process for removing him then began.

34. Sewell sent a memo to Diana McGuire on September 12, 2013, introduced as Appellee's Exhibit 12, requesting that Mills be detailed to the London Group Home. He talked with Appellant about the September 12 meeting on September 16 and Mills told him that he had to address the situation with Roberts. He did not think it was the smartest thing that Mills could have done. Sewell testified that Mills was at London prior to the paperwork being completed at Personnel.

35. McGuire had asked him to call Mangum and see what problem had occurred with Roberts that required this September 12 meeting and Mangum said it was scheduling problems which Roberts had continual problems with. He reported this to McGuire. On September 26, Davis e-mailed McGuire listing the policies that had been violated and on September 27, she forwarded that to him and told him to do a request for disciplinary action and for Lisa Tucker to do it. Tucker, the Regional Administrator, was new to the position and had not done one; so he did the body of it and Tucker revised it. The wording was taken verbatim from the investigative report and the policies came from an e-mail he received from McGuire.

36. Sewell stated that Mills was in a precarious situation. The conversation would get anyone with ill feelings an opportunity to claim retaliation. The other options that he had to address the situation were letting Mangum address the issue as Mills had previously and that was not a good answer because it had not worked. Sewell would have gone down to help if he had been asked and Lisa Tucker could have helped, although she had been in the job only a couple of weeks. Sewell testified that McGuire does not go to the facilities often and would have expected someone else to go down to handle the situation.

37. Sewell had a similar situation in Middlesboro and had to go down to do the Superintendent's job and the Superintendent would tell employees he would have to get Sewell down to help with the situation.

38. Sewell testified that these situations such as were addressed at the September 12 meeting would normally have been handled by a Superintendent of the facility.

39. Sewell acknowledged that the actual letter detailing Appellant's special duty took place on October 14, 2013, and that Appellant had actually moved there in September and been doing the job on the verbal approval of Ms. McGuire.

40. Sewell testified that all investigations are discussed after they are completed and that he had taken completed investigations to Superintendents under his supervision and gone over with them. He felt that someone from higher up should have intervened to help Mills with the Roberts' situation.

41. Sewell stated that investigative findings are routinely discussed. However, he acknowledged this is a different situation because Roberts was not the employee who was being investigated in the investigation that was discussed and was only a witness.

42. The September 12, 2013 meeting was about two years after the initial gambling incident. During that time the Adair facility had received the Outstanding Facility in the State award and had carried the weight of other facilities whose kids act up and were sent down to Adair.

43. Sewell had been Mills' supervisor and had never given him an evaluation with less than an "outstanding" rating. The Adair facility was a very difficult facility to run because it was the end of the line for kids that would age-out there or go on to prison. The kids were doing a lot there in GEDs and workshops without much incentive to do well. The Adair facility was in bad shape before Mills came there with a prison-type atmosphere, with kids being placed in punishment areas with guards, and staff being in disarray and constantly being fired. When Mills had taken over the facility, children could not leave the building and go to where they could get out in the community to work. While Mills was there, they were able to get out in the community, the razor-wire fence was removed and the kids were able to go home from there rather than step down to another facility.

44. Sewell was sure that Mills had the capability to run the London Group Home and to exceed the requirements of operating it. Sewell would not have made a recommendation of dismissal because there was no clear understanding of what Appellant was investigated for or clear definition of an on-going investigation. He felt that Appellant made a dumb decision, but not a fatal decision. Sewell acknowledged that Mills could have used the opportunity to file a grievance if he felt retaliated against.

45. **Ron Long** was recalled near the end of the hearing in the Appellant's case and stated that during the September 12 meeting there was no discussion concerning testimony at the Ethics Commission and that Mills made no statement to Roberts that he should change his testimony at the Personnel Board. There was a discussion that Roberts had made inconsistent statements, but no talk of specifically what he should testify to at any hearing. Long felt the meeting on September 12 with Roberts was no different than any other meeting with employees and that if you do not embrace employees' problems they will become worse. Mills did not say anything about everyone needing to be prepared to testify and answer questions and he did not recall any discussion of the Personnel Board appeal at that meeting. There was mention of a civil suit that Wall had filed against Mills and that questions would have to be answered concerning that. Long did not feel the meeting was hostile or in an attempt to influence testimony of Roberts. There was no discussion of allegations concerning Mills' gambling during the September 12 meeting.

46. Appellant, **Otis Mills**, testified that he had been teaching as an adjunct professor at a community college since the spring of 2014. He had worked at DJJ fifteen years prior to being terminated, beginning as a residential counselor at Mayfield, moving to Assistant Superintendent at the Laurel Juvenile Detention facility then to Superintendent at that facility; then to Superintendent at the Adair facility and lastly at the London Group Home as Superintendent. He had been promoted three times. Appellant had received the 2007 Residential Employee of the Year Award; 2008 and 2010 Corrections Administrator Award nominee; and in 2010 and 2013 the Adair facility received the Facility of the Year with him at the helm of leadership.

47. Mills testified that Mangum had previously told him about a problem where Roberts had said that he was only getting on to him for work performance in retaliation over the Wall/Mills gambling situation. On that first occasion, Appellant had told Mangum to go back and tell Roberts that he was his supervisor and Roberts had to do what Mangum instructed him to do. About six weeks later the Bradshaw issue arose and Roberts came to him and Long and said he should have said they have to deny Bradshaw's request off, but did not give any details. The next day Roberts went to Mangum and Mangum told him to approve the leave because Bradshaw had put in for the leave request in a timely manner. Roberts then came to his office and he told him if Roberts had given him the information upfront to Mangum he would have said to deny it, but he also instructed Roberts to get back more timely on such matters.

48. On September 12 Mangum met with Roberts concerning the scheduling problem. Roberts blamed it on the Wall/Mills gambling situation and said it was from Mills and not Mangum. Mangum asked him what he wanted to do because every time he told Roberts something, he brought up the Wall/Mills gambling situation. During the meeting, it was discussed that Mangum was his supervisor and boss, that nothing that was occurring was because of the Wall/Mills gambling situation, and that employees must take responsibility for their actions. By the time of the September 12 meeting, Appellant had admitted to gambling at the facility and the only purpose of his appeal was to try to get less of a suspension than the twenty days.

49. Appellant stated that he referred to the Wall investigation because they were addressing scheduling with the most recent problem being the Bradshaw matter. In the first investigation concerning Wall, he had listened to the tapes he had obtained through open records and used this as an example of a pattern of Roberts not accepting responsibility for scheduling problems. He told Roberts at that meeting that a scheduling supervisor cannot make all employees happy. During this September 12 meeting he referenced Potts' interview with Roberts in the Wall/Mills gambling situation where Potts did not ask a question, but made a statement that he knew it was not Roberts' decision to move Wall to third shift and Roberts did not correct that.

50. Mills testified that he had settled several of the Ethics Commission cases because he could not afford the potential fine that he might receive and the cost of attorney fees for the hearing. A settlement was offered in July 2013, and no witness list was ever filed in that Ethics matter.

51. Mills stated that during the September 12 meeting, there was no discussion of a Personnel Board hearing, but he did talk about the Wall civil lawsuit and depositions in relation to it. He stated that he did not admonish Roberts during the meeting, but did talk about his inexperience in his current position, but not in inexperience in dealing with investigators.

52. Appellant testified that at the time of the September 12 meeting, the hearing date was scheduled for his Personnel Board case, but he did not believe Roberts was a witness there because he was not on the witness list and did not think Roberts would be a witness in the Ethics matter, because it was in the process of being settled.

53. **Katie Gabhart**, General Counsel of the Executive Branch Ethics Commission, was involved in the Agency case against Mills. An investigation was opened concerning the Mills' matter on September 20, 2012. An initiating order occurred on May 20, 2013. That is the charging document in which Roberts was one of the witnesses they had talked to. The notice assigning the case occurred on June 19, 2013. On August 9, 2013, the Hearing Officer scheduled the hearing for December 10 and 12, 2013. She began contacting witnesses for this hearing in August 2013 and subpoenaed them. She asked if Roberts wanted to talk in person when he called and told her that he had been approached by Mills about the investigation and he did, so they met on September 16. She contacted the DJJ Ethics Officer and then the investigation began. She met with Roberts in Frankfort along with Jeff Jett and Executive Director John Steffen. The witness list deadline was originally November 25, 2013, but was rescheduled to March 25, 2014, which is the same date on which Mills signed a settlement. Therefore, no witness and exhibit list was ever filed in the Ethics case. She referred the matter to DJJ because she believed Roberts was an Ethics witness, but did not know if he was in the Personnel Board case.

FINDINGS OF FACT

1. The following pertinent Findings of Fact from Appeal No. 2012-277 Recommended Order:

a. #6. Appellant has admitted he placed sports bets while at work. "From day one, I've acknowledged making a very poor mistake in terms of making a very poor decision. I've taken full responsibility from the very

beginning.” He admitted to Gary Sewell, Division Director of the Southeast Region, that he had placed bets through Wall. He admitted to Steven Potts, the Internal Affairs Investigator, that he had placed bets with Wall while at work and while away from the AYDC.

b. #7. Appellant’s betting practices were known to many of the employees of AYDC (refer to the testimony of: Michael Wall; Shane Bowling; James Roberts; Ron Long; Amy Cundiff; and Brent Kimbler).

c. #8. Shane Bowling, who was Wall’s supervisor, told Wall to stop taking and placing bets while at work. James Roberts, Youth Services Program Supervisor, found Wall in the fall of 2011 on his cell phone in the office placing bets. Roberts told Wall to stop taking bets and to start doing his job.

d. #9. Ron Long, currently Assistant Supervisor at AYDC, was approached by Bowling in 2011. Bowling related he could no longer supervise Wall as Wall had been using a cell phone while on duty, placing bets for Mr. Mills. James Roberts approached Long and related his discovery of Wall on the cell phone accompanied by a list of sports teams with dollar amounts shown on the document.

e. #10. Long arranged a meeting with Mr. Mills, Mr. Roberts, and Mr. Bowling. They related to Mills their concerns of how the betting through Mike Wall interfered with Wall’s work and their ability to supervise him. Mr. Mills admitted to gambling and told those present he would stop such practice at work.

f. #16. On November 26, 2012, Commissioner Davis signed and issued a letter that advised Appellant that he would be suspended from duty and pay for a period of twenty working days (Appellee’s Exhibit 7). The disciplinary action was based on 101 KAR 1:345, Section 1, for **Misconduct**. The letter also cited alleged violation of KRS 11A.020(1)(a) and (c); Executive Branch Ethics Code Executive Order 2008-454(3)(ii)(iv); Department of Juvenile Justice Policy #102, “Employee Code of Ethics” , I., IV. (C., I. and J.); Department of Juvenile Justice Policy #104, “Employee Code of Conduct”, I., IV. (A., C., F., I. and S.); and Adair Youth Development Center Standard Operating Procedure #104, “Employee Code of Conduct”, I., III. (C., F. and S.).

Said suspension was upheld in Personnel Board Appeal No. 2012-277.

2. Appellant was issued a Notice of Intent to Dismiss dated October 10, 2013, from his position as a Juvenile Facility Superintendent I at the London Group Home. A pre-termination hearing was held on November 1, 2013. Appellant was dismissed by letter dated November 6, 2013, for poor work performance and misconduct.

3. DJJ Policy and Procedure 102, Employee Code of Ethics, IV. C., D., I., J., and K. (Appellee's Exhibit 8) states:

IV. Procedures

...

C. Relationships with colleagues shall be of such character to promote mutual respect within the profession and improvement of its quality of service.

D. Staff shall respect the importance of all elements of the criminal justice system and cultivate professional cooperation with each segment.

...

I. Staff shall be familiar with and understand the Executive Branch Ethics Code (Executive Order 2008-454) and follow this code. Further, the 'Guide to the Executive Branch Code of Ethics' published by the Executive Branch Ethics Commission provides additional guidance in this area. DJJ staff are directed to take all available and necessary action to follow these guidelines and avoid even the appearance of unethical conduct.

J. Staff shall not use their official position to secure privileges for self or others and shall not engage in activities that constitute a conflict of interest.

k. Staff shall not act in their official capacity in any matter in which they have personal interest that may impair objectivity and create the appearance of conflict of interest.

Adair Youth Development Center Policy 104 III. B., F., S., and Y. mirror these requirements.

4. DJJ Policy and Procedure 104, Employee Code of Conduct, I and IV. B., F., S. and W.(2). (Appellee's Exhibit 6) states:

- I. Employees shall conduct themselves in a professional manner. Staff shall be aware that their personal conduct reflects upon the integrity of the agency and its ability to provide services to youth.

...

IV. Procedures

...

- B. Employees shall perform their work assignments competently and in a professional manner. It is the responsibility of each employee to know and act in accordance with Department policy and standard operating procedures.

...

- F. Loud, abusive, or profane language and boisterous and unprofessional conduct shall not be tolerated. Employees shall refrain from making comments which are critical of colleagues or the agency, particularly while in the presence of youth or representatives of youth.

...

- S. As a representative of the Department, employees shall act in a manner that provides youth with a positive role model.

...

- W. Employees shall fully cooperate with and not interfere in an investigation conducted by the Office of Investigations (OOI), a DJJ Supervisor, or Ombudsman, subject to Federal and State constitutional protections.

- 1. Employees shall provide a written or verbal statement in a departmental investigation or when directed by a supervisor. Failure to provide a written statement as requested shall result in a disciplinary action, up to and including dismissal.

2. Employees shall not discuss the investigation with anyone other than OOI staff, a DJJ Ombudsman, or someone within their supervisory chain. Exceptions to this may be made under the direct authorization of the DJJ Commissioner's Office.

Adult Youth Development Center Policy 104, III, B, F, S and Y mirror these requirements.

5. Appellant filed a timely appeal.
6. The factual basis for the termination centered on a meeting that occurred in Appellant's office on September 12, 2013.
7. Roberts was being supervised by Mangum (who was not employed by the facility at the time of the Wall/Mills gambling incident) in order to assure no problems followed from the gambling incident to daily supervision of Roberts.
8. Mangum had previously admonished Roberts on his performance, namely in relation to Roberts' problems with scheduling and in relation to a mentally disabled child being held illegally. Consistently, when he was corrected on work performance, Roberts did not accept responsibility for his shortcomings, but alleged he was being retaliated against due to reporting the Wall/Mills gambling incident.
9. Mangum had reported this problem in supervising Roberts on at least one occasion prior to the September 12, 2013 meeting. Mills had instructed Mangum to keep supervising, and tell Roberts he needed to accept responsibility for his shortcomings.
10. When Mangum brought the problem to Mills' attention again on September 12, 2013, Mills called the meeting. Those present were Roberts, Mangum, Mills and Assistant Superintendent Long.
11. During the meeting, there was no discussion of Mills' pending Personnel Board hearing. There was a discussion of a civil suit Walls had filed against Mills and Appellee. Mills referred to the Wall/Mills gambling situation investigation when stating Roberts needed to accept responsibility for his shortcomings by referring to the scheduling problem discussed in the gambling investigation. Mills also referred to Roberts being inexperienced with investigators and volunteering information not asked for or letting an investigator lead him. It was clear Mills knew of Roberts' statements to investigators.

12. Mr. Long brought up the second meeting which was apparently the Ethics Commission matter at the September 12, 2013 meeting.

13. Roberts was inconsistent on his testimony concerning the Ethics Commission not realizing where the interviews took place or how many people were present.

14. At the September 12, 2013 meeting, there was no discussion on testimony Roberts should or should not give for any upcoming hearings.

15. Roberts is a "high-strung" individual. He felt intimidated by the September 12, 2013 meeting and took medical leave after the meeting.

16. Mills told Sewell well prior to the September 12, 2013 meeting that Roberts was blaming his problems in work performance on the Wall/Mills gambling investigation. Further, Sewell was aware of other employees blaming their performance shortcomings on alleged retaliation from the gambling matter. In fact, as early as January 2013, Sewell had told his supervisors the prior matter was affecting Mills' ability to supervise Roberts and others. McGuire told him to get Mills out of the facility to stop his supervision problems caused by the gambling matter.

17. Despite these known problems, Appellee did not take steps to move Mills until after the September 12, 2013 meeting. Thereafter, he was nearly immediately moved to his position in London although the paperwork for the transfer did not occur until October 2013.

18. As of the September 12, 2013 meeting, Roberts was not named on the Witness List for either of Mills' Personnel Board hearings or any Ethics Commission hearing.

19. Gabbard made corrections to the investigative report on the date of the hearing concerning admissions that Mills had not made to telling Roberts to expect to answer questions from the interview at the Personnel Board hearing, but had been set forth as an admission in his investigative report. Therefore, no one making the disciplinary decisions knew the report was incorrect.

20. Commissioner Davis made the ultimate decision to terminate. In doing so he relied entirely on the investigative report. He did not review the disks of the interviews. Ms. Whitley, who made the recommendation of termination to Commissioner Davis, likewise relied solely on the investigative report.

21. The Wall/Mills gambling investigation was complete well prior to the September 12, 2013 meeting.

22. 101 KAR 1:345, Section 1, states:

Appointing authorities may discipline employees for lack of good behavior or the unsatisfactory performance of duties.

CONCLUSIONS OF LAW

1. The primary policy violation discussed at hearing was DJJ 104, IV. W. This policy was not violated as language shows it applies to ongoing investigations and the Wall/Mills gambling investigation was complete at the time of the September 12, 2013 meeting. The beginning paragraph of “shall cooperate with and not interfere in an investigation” requires that an investigation be ongoing. As the main paragraph this follows to the subparagraphs. *Black’s Law Dictionary* defines “investigation” as:

To follow up step by step by patient inquiry or observation; to trace or track mentally; to search into; to examine and inquire into with care and accuracy; to find out by careful inquisition; examination; the taking of evidence; a legal inquiry.

[Appellant’s Closing Brief, p. 17]

This language shows an ongoing process.

2. The remaining provisions of DJJ 104 cited in the dismissal letter I., IV. B., F. and S. were not violated. The meeting was held in a professional manner in the normal course of business to correct an employee’s performance. It was part of Mills’ job duties to conduct such meetings. There was no evidence of “loud, abusive, or profane language and boisterous and unprofessional conduct.” None of the actions occurred in the presence of youth and would in no way effect serving as a role model for youth.

3. Appellant’s actions at the September 12, 2013 meeting did not violate any policies set forth in the intent to dismiss letter. Although not done on the best manner possible, the meeting was an attempt to correct poor performance of an employee and thus actually met DJJ 102 IV. C. purposes of promoting mutual respect and improving quality of service. DJJ 102, IV.D. applies to the criminal justice system and segments thereof, which is inapplicable to the facts of this case. DJJ 102, IV. I. was not violated as the only evidence introduced of ethics matters was a settlement occurred.

4. DJJ 102, IV., J. and K., concerns acting to secure privileges for self, activities that constitute conflicts, and not acting in an official capacity in a matter in which they have a personal interest were at least technically violated because Appellant did monitor the gambling investigation and he had upcoming hearings scheduled in those matters. However, Appellee had left him in the situation as supervisor over employees who reported the gambling and was aware that employees, including Roberts, were regularly using the Wall/Mills gambling investigation as an excuse for their poor work performance.

5. The Personnel Board has no authority to act under KRS 11A. Therefore, any discipline imposed based on any violations thereunder is improper.

6. Appellant's counsel objected to the investigative report being admitted into the record under the case of *Prater vs. Cabinet for Human Resources*, 954 S.W.2d 954 (Ky. 1997). The Hearing Officer withheld a ruling on this issue in abeyance until the recommended order in this case. The Hearing Officer admits the investigative report into the record in order to discuss various discrepancies in the report and because the Commissioner relied upon the report in taking the disciplinary action in this matter. Nothing contained within the report was considered for the truth of the matter asserted.

7. Appellant's meeting with Roberts concerning Roberts' use of the Wall/Mills gambling incident as an ongoing excuse for his poor work performance constitutes lack of good behavior and unsatisfactory performance of duties pursuant to 101 KAR 1:345, Section 1. Appellant had available to him options of calling Sewell or others in the higher chain of command to handle the matter since he had at least the appearance of a conflict or personal interest in discussing this matter as he had a pending Personnel Board appeal and a pending Ethics Commission case concerning the matter. However, given the surrounding circumstances of Appellee not having moved Appellant to another location, despite being aware of his problems on continuing to supervise at the Adair facility due to the Wall/Mills gambling incident; the Hearing Officer finds the termination of Appellant was excessive and erroneous.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **OTIS MILLS VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF JUVENILE JUSTICE (APPEAL NO. 2013-267)** be **SUSTAINED to the extent** that his dismissal be rescinded and modified to a thirty (30) day suspension. The Appellant shall be reinstated to his previous position or a position of like pay and status and further awarded lost pay and benefits, other than his period of suspension, and that he otherwise be made whole. KRS 18A.105 and 200 KAR 12:030.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

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

Any document filed with the Personnel Board shall be served on the opposing party.

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

ISSUED at the direction of Hearing Officer Kim Hunt Price this 16th day of July, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof mailed this date to:

Hon. Paul Fauri
Hon. Adam Adkins



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

J. Michael Brown
Secretary

A. Hasan Davis
Commissioner

November 6, 2013

Mr. Dwayne Mills

VIA CERTIFIED & REGULAR U.S. MAIL

Dear Mr. Mills:

After considering the comments made at your pre-termination hearing held on November 1, 2013, it has been determined that there is no sufficient reason to alter the notice of intent to dismiss, dated October 10, 2013.

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 Juvenile Facility Superintendent I with the Department of Juvenile Justice, at London Group Home, effective close of business on Friday, November 8, 2013.

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

Poor Work Performance and Misconduct, i.e., as reported by Southeastern Region Facilities Regional Administrator Lisa Tucker, you demonstrated poor work performance and misconduct by engaging in inappropriate communication with a subordinate employee related to pending administrative litigation. An investigation into the allegation of your improper discussion with a subordinate employee was conducted by the Justice and Public Safety Cabinet, Internal Investigations Branch (IIB), and the findings of the internal affairs investigation are contained in the report, IIB IA #245-13, dated September 24, 2013.

For this investigation, IIB Investigators James Gabbard and Steven Potts conducted interviews with Youth Services Program Supervisor James Roberts, Juvenile Facility Superintendent II Michael Mangum, Juvenile Facility Superintendent II Ronald Long and you. Witness interviews confirmed that Mr. Mangum requested Mr. Roberts to attend a meeting in your office on September 12, 2013, with Mr. Long and you. You engaged in a discussion with Mr. Roberts regarding IIB investigation, IIB IA #210-12, relative to allegations against Youth Worker Supervisor Michael Wall and you. Mr. Roberts informed Investigator Gabbard that during this meeting, he felt intimidated by your statements to him. You admitted to Investigator Gabbard that the meeting with Mr. Roberts included

**APPELLEE'S
EXHIBIT**

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discussion of interview statements made by Mr. Roberts during the IIB-IA #210-12 investigation. By your own admission to Investigator Gabbard, your comments to Mr. Roberts during the September 12, 2013, meeting included statements noting Mr. Roberts' inexperience in dealing with investigations, admonishing Mr. Roberts for volunteering unsolicited information to the investigator and accusing Mr. Roberts of allowing the investigator to lead him in answering questions according to the investigator's desired response. You also admitted to Investigator Gabbard that you told Mr. Roberts that he could expect to answer questions regarding the content of his IIB IA #210-12 investigative interview at the Personnel Board appeal hearing. Mr. Roberts reported to Investigator Gabbard that he felt intimidated by your comments during the meeting, and felt that you were attempting to direct his testimony for upcoming administrative hearings.

Because of your pending Kentucky Personnel Board Appeal Number 2012-277 and Kentucky Executive Branch Ethics Commission case, any discussion by you with Mr. Roberts regarding statements he made to investigators relative to the IIB IA #210-12 investigation, which formed the basis for these pending administrative actions, was inappropriate. As a Juvenile Facility Superintendent III, you are responsible for enforcing Department of Juvenile Justice policies and facility procedures, which you failed to do by intimidation of a subordinate employee in attempting to influence the employee's testimony in ongoing administrative litigation matters.

Your poor work performance and misconduct, demonstrated by engaging in inappropriate communication with a subordinate employee related to pending administrative litigation, constitute violation of KRS 11A.020(1)(a. and d.); Department of Juvenile Justice Policy #102, "Employee Code of Ethics", I, IV.(C., D., I, J. and K.); Department of Juvenile Justice Policy #104, "Employee Code of Conduct", I, IV.(B., F. and S.), IV.(W.)(2.); Adair Youth Development Center Standard Operating Procedure #102, "Employee Code of Ethics", I, II.(C., D., I, J. and K.); and Adair Youth Development Center Standard Operating Procedure #104, "Employee Code of Conduct", I, III.(B., F. and S.), III.(Y.)(2.).

Furthermore, you received a twenty (20) day suspension by letter dated November 26, 2012, for misconduct (gambling while on duty and use of your official position to secure privileges for yourself by using a Department of Juvenile Justice employee to engage in your gambling activities).

A copy of this notice is being furnished to the Personnel Cabinet in accordance with

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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,



Hasan Davis
Commissioner

HD/msc

Attachment: Personnel Board Appeal Form

C: Hon. Timothy Longmeyer, Secretary, Personnel Cabinet
Hon. Mark A. Sipek, Executive Director, Personnel Board
Hon. Paul Fauri
Barney Kinman, Internal Investigations Branch
Diana McGuire
Sherre Smith-Jones
Josllyn Olinger Glover
Gary Sewell
Lisa Tucker
Kimberly Whitley
DJJ Legal
DJJ Payroll
Personnel File