

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 **MICHAEL PILLION V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2019-125)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 18th day of November, 2021.



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

Copy to Secretary, Personnel Cabinet

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2019-125**

MICHAEL PILLION

APPELLANT

VS.

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

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

APPELLEE

* * * * *

The Board, at its regular November 2021 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated July 22, 2021, Appellee's Exceptions and Request for Oral Argument, Appellant's Motion to Continue, 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 altered as follows:

Delete Conclusion of Law paragraph 22 and substitute the following:

22. In the dismissal letter (Appellee's Exhibit 8), the allegations against the Appellant were identified "...as reported by Internal Affairs supervisor Derrick Roberts and Human Resources Administrator A'Neial Lockhart on March 7, 2019..." The March 7, 2019 Investigative Report authored by A'Neial Lockhart and Derrick Roberts (Appellee's Exhibit 2) shows that the sole behavior or act upon which they based their finding of "inappropriate behavior" in violation of CPP 3.5 was that the Appellant "admittedly called himself 'sexist.'" Such statement was made in response to a question posed to Appellant by a superior officer, Captain Rogers.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as Altered, 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 18th day of November, 2021.

KENTUCKY PERSONNEL BOARD



**MARK A. SIPEK
SECRETARY**

A copy hereof this day mailed to:

Hon. Heather Jones
Hon. Amy Barker
Hon. Rosemary Holbrook (Personnel Cabinet)
Rodney Moore

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2019-125

MICHAEL PILLION

APPELLANT

VS. FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND RECOMMENDED ORDER

JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS

APPELLEE

* * * * *

This matter came on for an evidentiary hearing on February 24, 2021, at 10:30 a.m., ET, at the office of the Kentucky Personnel Board, 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A. By agreement of the parties, the evidentiary hearing was conducted using Amazon Chime video teleconferencing.

The Appellant, Michael Pillion, was present and represented by the Hon. Heather L. Jones. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Erik Carlsen-Landy. Also present as Agency representative was Mr. Rodney Moore.

The issues on appeal were:

1. Whether or not there was just cause for the termination of the Appellant from his position as a Correctional Officer with the Justice and Public Safety Cabinet, Department of Corrections, Office of Adult Institutions, Kentucky State Penitentiary, effective April 9, 2019, and whether such penalty was excessive or erroneous. The burden of proof was on the Appellee to prove its position by a preponderance of the evidence.
2. Whether or not the Appellant's right to inspect or copy records was denied, abridged, or impeded by the Appellee. The burden of proof was on the Appellant to prove his position by a preponderance of the evidence.

The rule separating witnesses was invoked and employed throughout the course of the hearing. Counsel for the parties advised the Hearing Officer that the Appellant had decided to withdraw his appeal regarding the inspection or copying of records. Therefore, the appeal, with regard to the second issue, has been **DISMISSED**. Both parties waived the presentation of opening statements.

BACKGROUND

1. The first witness for the Appellee was **Marie Brindle**. For the past year, Brindle has been employed as a Social Worker by the Cabinet for Health and Family Services. Prior to that time, she had been employed on the day shift as a Correctional Officer (CO) by the Department of Corrections at the Kentucky State Penitentiary. She testified about her duties.

2. On January 25, 2019, at approximately 2:00 p.m., Michael Pillion came to the Front Gate area and went outside the facility for a while. He returned a short time later and worked the front area with Brindle. The evening shift began to come into the facility. Appellant was at the x-ray machine while Brindle was at the scanner. There were some issues that day with the scanner. Some employee ID badges were more stubborn than others and not properly read. Brindle tossed Appellant an ID card. He turned around and said, "Here, you do it, learn your role."

3. Captain Rogers came in to start his shift. Brindle told Captain Rogers that Appellant had made some inappropriate comments. Appellant had stated, "One sex is stronger than the other and should know their traits." She told the Captain that Appellant was being sexist. Captain Rogers asked Appellant if he was sexist and Appellant replied, "I might be." Brindle was surprised by that response.

4. Appellant started to walk away from the area. Brindle told him to wait, that this was his spot too. He told Brindle she needed to "fluff and fold...fluff and fold." Brindle thought that was a strange remark. She then realized he meant for her to fluff and fold Captain Roger's shirt that had just gone through the x-ray machine.

5. Brindle called her shift commander, but the commander was too busy conducting a count. She called another officer at the middle gate and asked if she would switch positions with her. She was told no. After a few more people came through the check-in area, Appellant said, "I'm done" and walked away. Brindle thought Appellant told her to fluff and fold because she is a woman.

6. She spoke to Sergeant English about the matter. Sgt. English advised her to fill out a report. She identified Appellee's Exhibit 1 as the January 25, 2019 Information Report of that day's occurrence. She was later interviewed about the incident.

7. When presented a copy of Appellee's Exhibit 2 (a confidential investigative report dated March 7, 2019, from A'Neial Lockhart, HR Administrator Inst.), Brindle testified she had never seen that document prior to today. After reading the document at the hearing, she testified the statements in that report about her were consistent with her written occurrence report and interview.

8. When Appellant told her to “know your role,” she believed at that time she had been told to know her job better. She also denied throwing an employee ID at the Appellant. She did call him a “sexist pig,” but would not have done so without him having made sexist comments. A few weeks prior, she and Appellant worked together at the bottom door leading to the yard. He had called Brindle “pissy” because he said that she had been “PMS-ing,” which was not true. She did not file a complaint at that time.

9. She had previously filed Occurrence Reports alleging sexual harassment against two other coworkers. One of the coworkers had, during multiple incidents, touched her inappropriately. She had obtained a two-year domestic violence order against one of the coworkers.

10. **Jylian A’Neial Bell**, formerly known as A’Neial Lockhart, was the next witness. Since January 1, 2009, she has been employed at the Kentucky State Penitentiary as an HR Administrator Inst. She oversees the Personnel Office, hiring, and personnel actions. She had been in charge of investigating allegations of sexual harassment. She conducted interviews as part of investigations.

11. She received a report about the January 25, 2019 incident reported by Brindle and began an investigation. She interviewed Brindle, Appellant, and Captain Rogers. She had previously listened to a recording she made of her interview with Appellant (which is a part of the disk labelled Appellee’s Exhibit 3). She had conducted that interview with Internal Affairs Supervisor Derek Roberts.

12. As a result of the investigation, she recorded that Appellant had admitted he was possibly a “sexist pig.” He also told Brindle to “know your role” and made comments to her to “fold and fluff.” His statements were consistent with other interviews conducted in this case. When Captain Rogers asked Appellant if he was a sexist, Appellant responded he “might be.”

13. She compiled and authored the Investigative Report (Appellee’s Exhibit 2). In her findings, she stated:

We find that Officer Pillion admittedly called himself a “sexist.” Even if this was in a joking manner, it is inappropriate behavior. Officer Pillion is in violation of CPP 3.5 which states that “Corrections’ employees shall avoid offensive or inappropriate conduct or sexually harassing behavior at work.”

She believed that, even if Appellant’s comments had been made in a joking manner, sexist jokes are also a violation of Corrections Policies and Procedures (CPP) 3.5.

14. This was not the first time Appellant had gotten into trouble for using offensive language. The witness generated a confidential investigative report dated December 7, 2018, (Appellee's Exhibit 4), regarding a November 2018 incident. She investigated allegations of inappropriate statements made by Appellant about an African American inmate. He had called the inmate the "N-word." During her interview of Appellant, he stated he did not remember the incident, but he does joke around with the inmate and had called him the "N-word" in a joking manner.

15. The witness believed both the 2018 incident and the incident with Brindle involved offensive behavior. Brindle found the statements "know your role" and "fluff and fold" offensive to her. Bell relied on whatever was reported to her by Brindle as to how Brindle perceived the matter. Brindle reported to her that she was offended.

16. When asked if Appellant had any prior disciplinary action, Bell responded in the affirmative; that Appellant had received a five (5) - day suspension for misconduct regarding the November 2018 incident. Bell then confirmed that Appellant had only received notice of an intent to suspend him for five (5) days and that such proposed disciplinary action had been dismissed. The Department of Corrections employs a progressive disciplinary scheme unless a situation warrants a higher level of discipline. Bell had no role in the recommendation or decision of the level of discipline in this case.

17. The next witness was **DeEdra Hart**. For two years, Hart had been employed as Warden of the Kentucky State Penitentiary by the Department of Corrections. She retired in August 2020. She oversaw the daily operations of the facility and its staff and was the institution's appointing authority.

18. She became aware of the January 25, 2019 incident when she received CO Brindle's written report that same morning. She directed an investigation begin.

19. Warden Hart had read Bell's (formerly Lockhart) March 7, 2019 Investigative Report therein. According to the investigation, Appellant and Brindle had been working together on the day shift at the Front Gate. There was a discrepancy whether the ID scanner was working. Brindle asked Pillion if it was broken. He responded, "Here, you do it; know your role." Brindle was offended by that comment and submitted the written Occurrence Report. Brindle felt Appellant's behavior had been inappropriate.

20. The report stated Captain Rogers then came into the Front Gate area. Brindle told Rogers that Pillion was a "sexist pig." Rogers asked Pillion if he was. Pillion responded, "I might be." These statements were reiterated in the Investigative Report and interviews. Even if the statements had been made in a joking manner, they were still inappropriate behavior. She believed that such behavior was a violation of CPP 3.5.

21. When this Investigative Report had been presented to Hart, a suspension action was pending against Appellant, ready to be issued that same day. The suspension was to be issued for Appellant's use of the "N-word" around an African American inmate. Warden Hart had Bell (Lockhart) contact the Human Resource Director to determine whether to combine the two incidents or treat them as separate disciplinary actions. The Justice Cabinet recommended Warden Hart dismiss the Appellant from employment, and that such dismissal letter mention that there had been a pending five (5) - day suspension.

22. Warden Hart gave a detailed chronology of the disciplinary events pertaining to the Appellant.

- December 7, 2018: She received an Investigative Report from A'Neial Lockhart.
- December 19, 2018: Appellant submitted his resignation. Warden Hart was not going to take any action regarding the Investigative Report because they had Appellant's resignation. A few weeks before his last day of employment, Appellant withdrew his resignation.
- January 8, 2019: Warden Hart instructed Lockhart to prepare a written reprimand based on the Investigative Report for the November 2018 incident.
- January 17, 2019: Warden Hart signed a written reprimand for the Appellant (Appellee's Exhibit 5) for the incident of November 14, 2018, and cited violation of KSP 03-01-01.
- January 29, 2019: She received notification from Deputy Commissioner Randy White that he and Human Resource Director Rodney Moore had refused the written reprimand and instructed her to withdraw that document and issue a suspension.
- January 30, 2019: Warden Hart spoke with Deputy Commissioner White and sought approval to reduce a proposed ten (10) - day suspension to a five (5) - day suspension. That request was approved and a letter of Intent to Suspend Appellant for five (5) days was delivered to Appellant. (Appellee's Exhibit 6.)
- February 9, 2019: Appellant tendered a written statement responding to the Intent to Suspend. Warden Hart reviewed the

statement and decided to move forward with issuance of the suspension.

- February 25, 2019: She directed Lockhart to prepare the five (5) - day suspension letter.
- March 6, 2019: Lockhart forwarded the suspension letter to Warden Hart. That day, Appellant had been assigned to hospital duty outside the facility. They decided to issue the document to him on the following day.
- March 7, 2019: Warden Hart received the Investigative Report from Lockhart regarding the January 25, 2019 incident involving Brindle. Hart had not yet issued the five (5) - day suspension. She directed Lockhart to send the Investigative Report to HR Director Rodney Moore and advise him the five (5) - day suspension had not yet been issued. She also made inquiry whether they should combine the actions or take alternative action. Director Moore responded the next day and said he would send the matter up to the Justice Cabinet.
- March 12, 2019: Director Moore responded to Warden Hart, advising her the Justice Cabinet recommended dismissal of Appellant.
- March 14, 2019: A letter advising Appellant he was being placed on Administrative Leave and a Notice of Intent to Dismiss, both dated March 15, 2019, were prepared and delivered to Appellant on March 15, 2019. (Appellee's Exhibit 7).

23. Warden Hart met with Appellant on April 1, 2019, for a pre-termination hearing. Appellant stated he and Brindle had ongoing arguments that started with an earlier Facebook post. He felt he did not say anything sexist that day. She had thrown an ID badge at him and called him sexist. When he was asked by Captain Rogers if he was sexist, he had answered it was possible.

24. Following the pre-termination hearing, Warden Hart concluded that termination was proper and issued the April 8, 2019 letter notifying Appellant of his dismissal effective April 9, 2019. (Appellee's Exhibit 8.) That letter specifically set out the alleged misconduct of January 25, 2019, and that same was in direct violation of Corrections Policy and Procedure 3.5, which states:

Corrections' employees shall avoid offensive or inappropriate conduct or sexually harassing behavior at work. Complaints of harassment shall be investigated in a prompt, effective, and uniform manner. Appropriate action shall be taken to ensure that any harassment does not recur.

Warden Hart believed Appellant's statements were sexist and a violation of CPP 3.5. (Appellee's Exhibit 9.)

25. The incidents of 2018 and 2019 were similar, as Appellant had told her on both occasions that he had acted in a joking manner. The Department of Corrections teaches employees is it not the intent of what one says, but the impact of those words on the other individual. Warden Hart believed termination was the appropriate measure in this case.

26. Brindle had interpreted Appellant's remarks as sexist. Warden Hart testified, "I saw it as degrading to her." Appellant's statement to his Captain that he might be sexist was also damaging. Such behavior is "like a virus" that can run throughout your personnel department. "It was a strong enough violation that warranted dismissal."

27. When asked on cross-examination whether she would be surprised to hear that Brindle testified she did not consider Appellant's remarks "on their face" to be sexist, Warden Hart testified she would indeed be surprised. She added that given the span of time, Brindle might have had a change of attitude toward what occurred; Brindle had not told her that the matter was not offensive.

28. Warden Hart had relied "some" on the 2018 incident in making a decision to terminate. It showed a pattern of behavior for Appellant. She also considered his written statement following the Notice of Intent to Dismiss as well as the statements he made at the pre-termination hearing. As the appointing authority, Warden Hart made the final decision to dismiss the Appellant.

29. The next witness was **Rodney Moore**. Since December 2019, Moore has been employed as Director of the Division of Employment Management by the Justice and Public Safety Cabinet. Prior to that time, beginning in May 2016, he was employed as Division Director for the Division of Personnel by the Department of Corrections.

30. In his current employment, his duties include the oversight of the Training and Recruitment Branch, EEO, and Employee Relations Branch. He reviews and assigns EEO Investigators, investigations, and recommends disciplinary action for the Justice and Public Safety Cabinet. In his previous employment, he performed similar duties, but more for Department of Corrections' institutions.

31. He was involved in the current disciplinary process. When Warden Hart referred this matter to the Justice and Public Safety Cabinet, at the time, the Department of Corrections was without a Commissioner. The Acting Commissioner was the Deputy Secretary of the Justice and Public Safety Cabinet. Moore discussed the matter with the Acting Commissioner and the Executive Director of Human Resources for the Cabinet. It was Moore's recommendation to them that the Appellant be dismissed.

32. Moore made that recommendation based on the Appellant's consistent behavior of having made racial statements during one incident, and subsequently having made sexist comments to Brindle. Moore believed Appellant should have been dismissed for the racial comments. "There is no place for that in any setting, particularly in Corrections. The Appellant's comments to CO Brindle showed he had no remorse for the first incident and had not learned anything. Termination was warranted."

33. Moore answered, "Yes" to having put a lot of weight on the 2018 incident in making his decision to recommend termination. He agreed Appellant did not have an opportunity to appeal that prior matter or that the disciplinary process for that incident had not been completed. When asked if the incident involving Brindle was sufficient in and of itself to warrant the termination, Moore testified, "In and of itself, no sir, we would have not dismissed."

34. When asked, in regard to Appellee's Exhibits 7 and 8, if there was anything in those letters that gave Appellant prior notice of the 2018 incident as part of the grounds for his dismissal, Moore answered, "In the dismissal letter, it mentioned on page 2 that the Intent to Suspend was issued to him." The suspension matter was not a prior disciplinary action as it was never completed. The Brindle incident occurred prior to the Department issuing the suspension letter to Appellant. In just a matter of a few months, the Appellant had committed the second infraction.

35. Moore was asked by the Hearing Officer whether they were required by statute to have given the Appellant notice of the time, place, and circumstances of the 2018 incident if that incident was part of the basis for the dismissal. He answered that the Intent to Suspend was given to him and the details of that incident were mentioned in that document.

36. A written reprimand had been issued to Appellant prior to issuance of the Intent to Suspend. The Appellant learned the details of that incident from the written reprimand. Within a matter of months, he continued inappropriate commentary at work. In considering disciplinary action, the Cabinet looks at all prior incidents. Appellant was terminated not because of the latest incident alone but because of his history. Moore agreed that the Brindle incident was "the straw that broke the camel's back."

37. The Appellee rested its case.

38. The sole witness for the Appellant was the **Appellant, Michael Pillion**. Currently, Appellant is employed by a window manufacturing company. For approximately five (5) years, up until April 9, 2019, he had been employed as a Correctional Officer at the Kentucky State Penitentiary.

39. On January 25, 2019, Appellant left the yard and headed toward his assignment at the Front Gate to help process people coming into the facility. He had made an arrangement with the Shift Captain to quickly run out to his car and check on his children by telephone. There had been a prior school shooting in Marshall County where his daughter attended school. On his way out, he told Brindle he would be right back.

40. When he returned, he started working the front area. People were running things through the x-ray machine. One person came through to scan their ID. Instead of handing the ID to Appellant, Brindle threw it at him while his back was turned away from her. He told her "I'm not picking it up." Captain Rogers came through. Brindle told the Captain that Appellant was "a sexist pig." The Captain asked Appellant if he was a sexist, and he responded, "It's possible." The Captain stated, "Well don't."

41. The Captain's shirt was placed on a tray. Appellant patted the shirt down and sent it through the x-ray machine. He then commented how everything was pressed and creased and stated that if he made Captain's money, he would be "fluff and fold all the way too." Brindle lost her mind over this. Appellant said he made that statement to Captain Rogers; he did not instruct Brindle to do anything with the Captain's clothing. When he told Brindle to "know your role," he meant for her to do her job.

42. Appellant does not believe his commentary was sexist. By this appeal, he is requesting a return to his former job.

43. The Appellant closed his case. There was no rebuttal evidence from the Appellee. Each of the parties presented closing arguments.

44. At that point, the Hearing Officer determined it was necessary to receive briefs from the parties limited to the following:

Whether the April 8, 2019 termination letter from the Department of Corrections to Michael Pillion (Appellee's Exhibit 8) fully complied with the requirements of KRS 18A.095(7) and, if it did not comply, the prejudice, if any, resulting therefrom to the Appellant.

This was memorialized in the Hearing Officer's February 24, 2021 Interim Order.

FINDINGS OF FACT

1. At the time of his termination from employment, Appellant, Michael Pillion, was a classified employee with status. He had been employed as a Correctional Officer (CO) with the Justice and Public Safety Cabinet, Department of Corrections, Office of Adult Institutions, at the Kentucky State Penitentiary until his termination effective April 9, 2019.

2. On December 7, 2018, following an investigation of a November 14, 2018 incident involving Appellant, A'Neial Lockhart, Human Resource Administrator Inst. at Kentucky State Penitentiary, tendered her investigative report to Warden DeEdra Hart (Appellee's Exhibit 4). COs J'Michael Collins and Jeffrey Miller alleged Appellant had escorted an inmate from the Laundry House to 4 Cellhouse where Appellant stated, "Yeah, fuck that N---, he don't get a shower." During his interview, Appellant stated he did not remember making that comment, but that he did joke around with the inmate and say the word "N---" to the inmate in a joking manner.

3. On January 17, 2019, Warden Hart signed and had delivered a written reprimand to Appellant based on the November 14, 2018 incident (Appellee's Exhibit 5). Although the Appellee subsequently issued a Notice of Intent to suspend for the same incident by letter dated February 6, 2019 (Appellee's Exhibit 6), that effort was aborted by Appellee. There is no evidence or record of Appellant having received any notice that the written reprimand had been withdrawn or expunged. The written reprimand is, and remains, the corrective action of record taken against Appellant for the November 14, 2018 incident.

4. Appellant submitted his resignation on December 19, 2018. A few weeks before his last day of employment, Appellant withdrew his resignation.

5. On January 25, 2019, at approximately 2:00 p.m., Appellant and CO Marie Brindle were posted at the Front Gate of the Kentucky State Penitentiary. While employees entered the building to begin the evening shift, Brindle operated the ID scanner and Appellant operated the x-ray machine. The scanner was apparently not functioning properly. Brindle then tossed an employee ID card to Appellant. Appellant turned around and told Brindle, "Here. You do it. Learn your role."

6. Captain Rogers then entered the building and, while at the Front Gate, was told by Brindle that Appellant was a "sexist pig." Rogers asked Appellant if he was a sexist pig and Appellant responded, "I might be." Rogers told him to stop it.

7. Rogers then prepared to place a shirt through the x-ray machine. Appellant patted the shirt down, then sent it through the machine. Appellant and Brindle testified to differing versions of what happened next. Appellant testified he had commented how the Captain's clothing were all pressed and creased and that if he made Captain's money, he would be "fluff and fold all the way too." Brindle testified she told Appellant this was his spot too, as Appellant

walked away from the post; that Appellant then told her she needed to “fluff and fold...fluff and fold.”

8. At 3:30 p.m. on January 25, 2019, Brindle completed and submitted a Kentucky State Penitentiary Information Report about the incident (Appellee’s Exhibit 1). She reported: Officer Pillion, “appeared to have issues with ID scanner.” Brindle asked if it was broken and Pillion looked at Brindle and said, “Here, you do it. Know your role;” Brindle reported that such comment, made in the presence of “multiple staff members” appalled and humiliated her; and, when Captain Rogers arrived, Pillion told him “One sex is stronger and the other has to know their traits.”

9. Jylian A’Neial Bell (formerly known as A’Neial Lockhart) was, at that time, the Human Resource Administrator at the Kentucky State Penitentiary. On January 25, 2019, she received a report about the incident between Appellant and Brindle and began an investigation. She interviewed Brindle, Captain Rogers, and Appellant. She conducted and recorded the interview of Appellant with Internal Affairs Supervisor Derek Roberts (Appellee’s Exhibit 3).

10. Captain Rogers, in his interview, recalled that as he was being processed through the Front Gate, Officer Brindle told him that Officer Pillion had made sexist statements. When Rogers asked Appellant if he was a sexist, Appellant stated, “I might be.” Rogers told Appellant to be professional at the Front Gate with Brindle. Rogers did not mention anything during the interview about a “fluff and fold” statement.

11. Bell then compiled her findings in the Investigative Report dated March 7, 2019 (Appellee’s Exhibit 2). In her findings, Bell stated:

We find that Officer Pillion admittedly called himself a “sexist.” Even if this was in a joking manner, it is inappropriate behavior. Officer Pillion is in violation of CPP 3.5, which states that ‘Corrections’ employees shall avoid offensive or inappropriate conduct or sexually harassing behavior at work.’

12. On January 29, 2019, Warden Hart was advised Deputy Commissioner Randy White and HR Director Rodney Moore had refused the written reprimand she wrote for Appellant for the November 2018 incident. She was instructed to withdraw same and, thereafter, issue a suspension. Warden Hart asked Deputy Commissioner White and received permission to reduce the proposed suspension from ten (10) days to five (5) days.

13. On February 6, 2019, Warden Hart signed and issued Appellant a letter notifying him of the intent to suspend him for five (5) days based on misconduct (Appellee’s Exhibit 6). The letter does not mention the January 17, 2019 written reprimand or any change in the status of that previously issued corrective action for the November 14, 2018 incident. Thereafter,

Appellant submitted a written statement and response. Warden Hart, on February 25, 2019, directed Lockhart to prepare the five (5) day suspension letter.

14. On March 7, 2019, Warden Hart received the Investigative Report pertaining to the January 25, 2019 incident between Appellant and Brindle. The five (5) - day suspension had not yet been delivered to Appellant. Warden Hart sought advice from HR Director Moore on how to proceed. Moore sent the matter to the Justice Cabinet for further guidance and advice.

15. The Justice Cabinet responded with a recommendation that Appellant be dismissed. Rodney Moore, who at that time was Division Director of the Division of Personnel, had recommended Appellant be dismissed. He testified he believed Appellant should have been dismissed for his prior racial comments (the November 14, 2018 incident); Appellant's comments to Brindle showed he had no remorse for the first incident and had not learned anything; that in reaching his decision, he had placed a lot of weight on the 2018 incident; and that the incident with Brindle was not, in and of itself, sufficient to warrant termination.

16. On March 15, 2019, Warden Hart signed and had delivered to Appellant two documents: (1) a notice that Appellant was placed on Administrative Leave, effective March 15, 2019; and (2) a notice of the intent to dismiss Appellant for misconduct (Appellee's Exhibit 7). The "Intent" letter cited violations of CPP 3.5 and 101 KAR 1:345, Section 1 (unsatisfactory performance of duties), based upon the incident of January 25, 2019. That letter also stated, "You have been served an intent to suspend for misconduct on February 6, 2019." The Intent to Suspend letter had been issued based on the November 14, 2018 incident. The Intent to Dismiss letter did not mention the status of the previous written reprimand. The Notice of Intent to Dismiss did not state: the specific reason, action, or activity from the November 14, 2018 incident, for dismissal; the statutory or regulatory violation resulting from that incident; the time or place of the activity; or the name of the parties involved.

17. Appellant requested and then met with the Warden in a pre-termination hearing on April 1, 2019. Following that hearing, Warden Hart concluded termination was appropriate and issued the April 8, 2019 letter notifying Appellant of his dismissal effective April 9, 2019. Such disciplinary action was taken pursuant to the authority of 101 KAR 1:345, Sections 1 and 2, KRS 18A.095, and for alleged violation of CPP 3.5. The termination letter also notified Appellant, "You have been served an intent to suspend for misconduct on February 6, 2019." (Appellee's Exhibit 8.) Warden Hart testified she had relied "some" on the 2018 incident involving Appellant in making the decision to terminate him. Such letter did not state the specific reason, action, or activity from the November 14, 2018 incident, for dismissal; the statutory or regulatory violation resulting from that incident; the time or place of the activity; or the name of the parties involved.

18. At all times pertinent to the events described herein, the following was in full force and effect:

- Kentucky Corrections Policy and Procedure, Policy No. 3.5, Sexual Harassment and Anti-Harassment (Appellee's Exhibit 9).
19. Appellant timely filed his appeal of the dismissal with the Kentucky Personnel Board.
20. Following the close of all evidence and testimony, and presentation of closing arguments, the Hearing Officer determined it necessary to receive briefs from the parties limited to the following:
- Whether the April 8, 2019 termination letter from the Department of Corrections to Michael Pillion (Appellee's Exhibit 8) fully complied with the requirements of KRS 18A.095(7) and, if it did not comply, the prejudice, if any, resulting therefrom to the Appellant.
21. The parties timely filed their respective briefs pursuant to the February 24, 2021 Interim Order.

CONCLUSIONS OF LAW

1. A classified employee with status shall not be dismissed...or otherwise penalized except for cause. KRS 18A.095(1). Appointing authorities may discipline employees for lack of good behavior or the unsatisfactory performance of duties. 101 KAR 1:345, Section 1. At the time of his termination from employment, Appellant, Michael Pillion, was a classified employee with status.
2. As stated in KRS 13B.090(7):
- The agency has the burden to show the propriety of the penalty imposed or the removal of a benefit previously granted. The party asserting an affirmative defense has the burden to establish that defense. The party with the burden of proof on any issue has the burden of going forward and the ultimate burden of persuasion as to that issue. The ultimate burden of persuasion in all administrative hearings is met by preponderance of evidence in the record.
3. "Preponderance of evidence" means: "...evidence which, as a whole, shows that the facts sought to be proved is more probable than not. With respect to burden of proof in civil actions, means greater weight of evidence, or evidence that is more credible and convincing to the mind." Black's Law Dictionary, 5th ed., p. 1064. Failure to meet the burden of proof is grounds for a recommended order from the hearing officer. KRS 13B.090(7).

4. A “penalization” includes, but is not limited to, dismissal as well as any action that diminishes the level, rank, discretion, or responsibility of an employee without proper cause, and the abridgement or denial of other rights granted to state employees. KRS 18A.005(24).

5. Prior to dismissal, a classified employee with status shall be notified in writing of the intent to dismiss him. The notice shall also state: (a) the specific reasons for dismissal, including: (1) the statutory or regulatory violation; (2) the specific action or activity on which the intent to dismiss is based; (3) the date, time, and place of such action or activity; and (4) the name of the parties involved. Such notice shall also state whether the employee is placed on administrative leave by the appointing authority with pay upon receiving the intent to dismiss letter prior to the agency’s final action. KRS 18A.095(2). 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 S.W.2d. 215 (Ky. App. 1992).

6. Appellant was issued a March 15, 2019 letter notifying him of the Appellee’s Intent to Dismiss him for misconduct, where specific dates and facts were provided pertaining to an incident with CO Marie Brindle on January 25, 2019. On the second page of that letter was the sentence, “You had been served an Intent to Suspend for misconduct on February 6, 2019.” (Appellee’s Exhibit 7.) There was no mention that he had already received a written reprimand for the same February 6, 2019 incident.

7. After a pre-termination hearing held April 1, 2019, Appellant was issued an April 8, 2019 letter notifying him of his dismissal, effective April 9, 2019, based on the same misconduct alleged in the previous Notice of Intent to Dismiss. On the second page of this letter appeared the following sentence: “You had been served an Intent to Suspend for misconduct on February 6, 2019.” (Appellee’s Exhibit 8.) This letter did not mention Appellant had already received a written reprimand for the same February 6, 2019 incident.

8. Appellant timely filed his appeal herein on June 7, 2019. He indicated he appealed his five (5) - day suspension, termination from employment, and the denial, abridgement, or impendance of his right to inspect or copy records.

9. At the August 10, 2019 pre-hearing conference before the Kentucky Personnel Board, Appellant clarified that the five (5) - day suspension was not being directly appealed, only to the extent that it was used in making the determination to dismiss him. The issues were then narrowed by the Hearing Officer to Appellant’s dismissal and his allegation he had been denied records by the Agency.

10. Notice of an agency intending to suspend a classified employee is not a matter that may be appealed to the Kentucky Personnel Board. It is not a final disciplinary action and the

Board has no jurisdiction over that matter unless and until an actual suspension (or final action) has been issued. KRS 18A.095(8)(d) and KRS 18A.095(16)(b).

11. Appellant had, on January 17, 2019, been issued a written reprimand for the incident of November 14, 2018 (Appellee's Exhibit 5). That was the only corrective action taken for that incident. The subsequent Intent to Suspend letter went no further than "intent" and, as a suspension was never issued, the written reprimand remains the sole corrective action of record.

12. Although Deputy Commissioner White and HR Director Moore instructed Warden Hart to withdraw the written reprimand and issue a suspension instead, there was no evidence the written reprimand was ever withdrawn or expunged from Appellant's personnel file, despite the subsequent issuance of a Notice of Intent to Suspend.

13. It is curious that at the time White and Moore instructed Hart to issue a ten (10) - day suspension to Appellant (which was later reduced to a Notice of Five (5) - Day Suspension by request of Warden Hart), neither Warden Hart nor Rodney Moore apparently believed at that time that Appellant's conduct of November 14, 2018, warranted dismissal. This is in stark contrast to and detracts from the credibility of Moore's subsequent testimony that he believed: (a) Appellant should have been dismissed based on the November 14, 2018 incident alone, and (b) he placed "a lot of weight" on that incident in recommending dismissal after the January 25, 2019 incident. He also believed the January 25, 2019 incident was not, in and of itself, sufficient to warrant termination.

14. We turn to the issue of whether the termination letter complied with the requirements of KRS 18A.095(7). The statute requires that when an employee is to be dismissed, he shall be notified in writing of:

- a. the effective date of his dismissal or other penalization;
- b. the specific reason for this action, including:
 1. the statutory or regulatory violation;
 2. the specific action or activity on which the dismissal or other penalization is based;
 3. the date, time, and place of the action or activity;
 4. the name of the parties involved; and

- c. that he may appeal the dismissal or other penalization to the board within sixty (60) days after receipt of this notification, excluding the day he received notice.

15. The termination letter gave Appellant full and complete notice in compliance with KRS 18A.095(7) as it pertained to the allegations of the January 25, 2019 incident.

16. The termination letter attempted to include, by reference only, the February 6, 2019 Intent to Suspend letter and its contents, as another ground for Appellant's termination. However, as stated above, that Intent to Suspend was aborted by the Appellee, leaving the previously issued written reprimand as the sole corrective action for the November 14, 2018 incident. Neither the March 15, 2019 letter of Intent to Dismiss (Appellee's Exhibit 7) nor the April 8, 2019 dismissal letter (Appellee's Exhibit 8) provided Appellant any notice that the written reprimand formed a basis for his termination. With reference to the November 14, 2018 incident, Appellant was not given, in either the Notice of Intent to Dismiss or the Dismissal letter, full and complete notice, required by the statute, of the specific reason, action or activity that warranted dismissal; the statutory or regulatory violation resulting from that incident; the time or place of the activity; or the name of the parties involved.

17. A written reprimand is a corrective action and not a disciplinary action. It may not be appealed to the Kentucky Personnel Board. In this matter, therefore, Appellant had no record of disciplinary action prior to the January 25, 2019 incident.

18. Neither the written reprimand nor the Intent to Suspend letter could be cited as a reason "in and of itself" sufficient to warrant termination following the January 25, 2019 incident.

19. Had the written reprimand been cited in the dismissal letter in lieu of reference to the Intent to Suspend letter (as the written reprimand stands as the sole correction action of record for that incident), it would have been appropriate for the agency to cite the written reprimand as a part of its consideration of progressive disciplinary action for the January 25, 2019 incident. However, the agency failed to correctly cite such prior corrective action.

20. Examination is now made whether the incident of January 25, 2019, justified disciplinary action and whether such action, to wit, termination, was excessive or erroneous.

21. On January 25, 2019, CO Brindle, in her statement to Captain Rogers, accused Appellant of being a "sexist pig." When Captain Rogers asked Appellant if he was a "sexist pig," Appellant responded, "I might be." Rogers directed the Appellant to act professionally.

22. In the dismissal letter (Appellee's Exhibit 8), the allegations against the Appellant were identified "...as reported by Internal Affairs supervisor Derrick Roberts and Human Resources Administrator A'Neial Lockhart on March 7, 2019..." The March 7, 2019

Investigative Report authored by A'Neial Lockhart and Derrick Roberts (Appellee's Exhibit 2) shows that the sole behavior or act upon which they base their finding of "inappropriate behavior" in violation of CPP 3.5 was that the Appellant "admittedly called himself 'racist.'" Such statement was made in response to a question posed to Appellant by a superior officer, Captain Rogers.

23. The April 8, 2019 dismissal letter (Appellee's Exhibit 8) focuses on Appellant's answer to Captain Rogers' question of whether he was a sexist pig: Brindle told Rogers Appellant was "sexist pig;" Captain Rogers asked Appellant if he was sexist and Appellant replied, "I might be." In the February 15, 2019 Internal Affairs interview, Appellant stated that Captain Rogers had asked him if he was a "sexist," to which he replied, "It's possible." In his Internal Affairs interview, Captain Rogers stated that Appellant had responded to the question by saying, "I might be."

24. An "admission" is a confession, concession, or voluntary acknowledgement made by a party of the existence of certain facts. Black's Law Dictionary, 5th ed., p. 44. The qualifying phrases used by the Appellant, to-wit: "might be" and "it's possible," while certainly not a denial of such status, fell short of constituting an admission. There is no evidence Appellant ever admitted he was a "sexist pig." It is recognized Appellant was coy and avoided a direct answer to Rogers' question, and that, by doing so, he inflamed the already-existing level of tension between himself and Brindle.

25. Warden Hart, in her dismissal letter, cited Appellant's alleged behavior as being "...offensive or inappropriate conduct or sexually harassing behavior at work."

26. CPP 3.5 defines harassment as "...continuous verbal or non-verbal conduct of one (1) or more employees which directly results in the **inability of another employee to perform his job duties or otherwise adversely affects another employee's employment opportunities.**" (Appellee's Exhibit 9.) There was no evidence that the alleged behavior in any way resulted in the inability of Brindle to perform her job duties or that it adversely affected her employment opportunities.

27. Policy CPP 3.5 also states that "sexual harassment" is defined in 29 CFR, Section 1604.11. While that section of the Code of Federal Regulations pertains to the liability of an employer in regard to sexual harassment of an employee, we focus on the definition of harassment on the basis of sex. The only portion of Section 1604.11 that pertains to the current incident is 1604.11(a)(3), which states, "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." It has been concluded above that Appellant's "sexist pig" discussion with Captain Rogers did not unreasonably interfere with Brindle's work performance. However, his statements that he "might be" a "sexist pig" does constitute an act that contributed to an offensive working environment.

28. Appellee has proven by a preponderance of the evidence that there was just cause for disciplinary action against the Appellant based on the allegations of misconduct pertaining to the conversation Appellant had on January 25, 2019, with Captain Rogers, and that it was in violation of CPP 3.5.

29. Appellee has failed to prove by a preponderance of the evidence that there was just cause for the termination of the Appellant based on the allegations in the dismissal letter, as termination, in view of the totality of the evidence, was excessive or erroneous.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **MICHAEL PILLION V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2019-125)** be **SUSTAINED to the extent** that:

1. Appellant's dismissal from employment as a Correctional Officer with the Justice and Public Safety Cabinet, Department of Corrections, Kentucky State Penitentiary, be **VACATED** and held for naught, and that Appellant be reinstated to such position with full benefits and privileges and restoration of salary and other benefits from and after April 9, 2019 and to otherwise make Appellant whole;
2. Appellant be suspended for a period of ten (10) days; and
3. The February 6, 2019 letter of Intent to Suspend Appellant from duty and pay for five (5) working days for the incident of November 14, 2018 (Appellee's Exhibit 6), be removed and expunged from Appellant's personnel file. KRS 18A.105, 18A.095(25), 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 Roland P. Merkel** this 22 day of July, 2021.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Heather L. Jones
Hon. Amy Barker
Hon. Rosemary Holbrook (Personnel Cabinet)