

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2017-073**

MICHAEL ROBERTS

APPELLANT

VS.

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

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

APPELLEE

*** **

This matter came on for an evidentiary hearing on July 21, 2017, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before R. Hanson Williams, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Michael Roberts, was present at the hearing and was not represented by legal counsel. Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and was represented by the Hon. Oran S. McFarlan. Also present as Agency representative, was Warden Aaron Smith, Kentucky State Reformatory (KSR).

BACKGROUND

1. This matter involves the demotion of the Appellant from Correctional Sergeant to the position of Correctional Officer, by virtue of letter dated March 9, 2017. (Attached hereto as **Recommended Order Attachment A.**)

2. In summary, the Appellant was demoted for violating various policies and procedures relating to use of force and mechanical restraints; failing to properly discharge the duties of his position; failing to obey a properly given order by his supervisor; and failure to be responsible for enforcing and following policies and procedures.

3. The burden of proof was on the Appellee by a preponderance of the evidence to show that the discipline imposed was appropriate under the surrounding circumstances and neither excessive nor erroneous.

4. Appellee's first witness was **John Grevious**. He has been a Correctional Unit Administrator at the Kentucky State Reformatory (KSR) for the previous two years. As such, he oversees that unit and coordinates security, mental health, and sees that all inmate needs are met.

5. The witness testified that on February 22, 2017, in the Restrictive Housing Unit (formerly Segregation Unit) two inmates were put into restraint chairs for various reasons. One was because of bad behavior and the other because of threatened self-harm. This is done for the safety of Correctional Officers who enter the Unit and for the inmates themselves. The witness stated that the supervisor on duty, Lieutenant Hogan, had gone home early that day. As a result, around 3:00 p.m. or shortly after, when the Appellant arrived to relieve him, this witness informed him that two inmates had been placed in the self-restraint chairs. The witness further related that an inmate can only be kept in the chairs for a period of two hours, after which time a medical person must ascertain whether they can be kept further. The witness related that these two inmates had been in the chair for almost two hours and had only fifteen minutes left before they were to be examined, when the Appellant came on scene.

6. The witness then related that he told the Appellant about the need to remove the inmates, when the Appellant then supposedly stated, "Shit, I ain't doing that." The Appellant then left the office where both Kim Thompson and Captain Williams were present. The witness also stated that nurse came in somewhat later and told him that, "Inmates have been in the chair too long."

7. The witness also introduced Appellee's Exhibit 2, a March 6, 2017, e-mail from himself to Deputy Warden Coyne in which he did not recall that the Appellant had ever told him he did not have enough staff to release the inmates.

8. On cross-examination, the witness confirmed that the inmates were finally released approximately one hour after their two-hour limitation had been surpassed.

9. Appellee's next witness was **Kim Thompson**. She has been employed at KSR as a Unit Administrator for approximately three years. She related that on February 22, 2017, she was present in John Grevious' office after two inmates had been placed in a restraint chair. She confirmed she saw the Appellant arrive at Grevious' office at approximately 3:00 p.m. where Grevious informed him of the fact about the inmates.

10. She explained that the inmates are placed initially in the chair for two hours, with their legs and shoulders strapped down. Because there are policy and safety concerns, they must be examined by medical personnel after two hours.

11. The witness confirmed again that the Appellant did not promptly remove the inmates, and that approximately 4:00 p.m., after one hour, he was asked again. Upon refusing to do so, she stated that Greivous asked the Appellant to prepare a statement as to why he did not remove the inmates from the chair until an hour after being asked.

12. The witness testified that she also asked for a statement at approximately 4:15 p.m. from the Appellant. The witness also stated that at approximately 4:15 p.m., the Appellant for the first time told her that he needed more staff.

13. Appellee's next witness was **James Coyne**. He has been the Deputy Warden for Security at KSR for three years. He oversees all functions at the prison and reports directly to the Warden.

14. The witness related on the next workday after February 22, 2017, he was informed of the Appellant's failure to release the two inmates from their restraint chairs as ordered. This information was reported to him by Kim Thompson along with the fact she had requested a report from the Appellant, which he did not furnish.

15. The witness related that he met with Appellant to get his side of the story. He ordered Captain Noonan to get a report from the Appellant concerning the incident, which the Appellant did not furnish. The Appellant never told this witness that he did not have enough staff to perform the job (Appellee's Exhibit 7).

16. The witness then introduced Appellee's Exhibit 8, the Incident Report Summary involving the two inmates. This exhibit shows that the inmates were placed in the restraint chairs at 1:11 p.m. and 1:16 p.m. respectively. Under the two-hour rule, this would have meant they needed to be released two hours from those times.

17. Asked why he recommended the discipline of demoting the Appellant, the witness replied that putting inmates in the chairs constitutes a use of force. He added that the Use of Force policy was violated by the refusal to remove the inmates after two hours. He also stated that failure to release the inmates after two hours without medical examination, could result in further injury and possible liability to the institution. Therefore, he felt demotion was appropriate.

18. Appellee's next witness was **Aaron Smith**. He has been the Warden of KSR for over three years. He testified that he made the final decision which had been recommended by Deputy Warden Coyne. He was informed of all the facts and met with the Appellant to ascertain his version. He stated that others who reported to him had contradicted the Appellant's side of the story.

19. He stated the Appellant's actions, or lack thereof, constituted a violation of the Use of Force policy relating to the two hours. He specifically referred to Corrections Policies and Procedures (CPP 9.1, Use of Force). He specifically related as having been violated, the provisions of CPP 9.1, II. G., Levels of Force, (j)(1) and (2). These provide:

j. When using Restraint Control Level 4 or 5, the following procedure shall be followed:

(1) Use of Level 4 or 5 restraints shall not last longer than behavior continues as observed and documented by monitoring personnel.

(2) If it is believed that extended use past two (2) hours is necessary, medical personnel on site shall physically check the inmate and apprise the health authority or designee of the inmate's condition. The health authority or designee shall determine if the inmate is medically able to tolerate further restraint.

....
(Appellee's Exhibit 10 – Under seal.)

20. The witness identified Appellee's Exhibit 11, which is KSR 03-00-14. The witness stated the provisions of I.C.(I), (K) and (O) had been violated. These relate to failure to cooperate in an investigation, failure to properly discharge duties, failure to obey a properly given order, and engaging in other activity deemed detrimental to the proper discharge of duties.

21. Further, The Warden decided KSR Post Order #61 pertaining to Unit D Supervisors had been violated (Appellee's Exhibit 12). The witness stated that the provisions of B., Purpose, paragraphs 18 and 22 had been violated. These relate to ensuring that all Use of Force is in compliance with CPP 9.1, and that the Correctional supervisors are responsible for enforcing and following all policies.

22. The witness then added that there had never been any disciplinary issues with the Appellant during his past employment.

23. The Cabinet closed.

24. The Appellant, **Michael Roberts**, called himself as his only witness. He testified that he has been employed in excess of twenty years at KSR. His most recent position was Correctional Sergeant.

25. He testified that he normally works on the West Gate during his shift and after closing the West Gate at approximately 3:00 p.m. or shortly thereafter, he reports to Unit D. The witness testified that upon arriving on February 22, 2017, at Unit D he was never briefed about the two inmates being in restraint chairs until, at some point, he was told by an officer in Segregation 5.

26. He stated that upon learning this, he then questioned Mr. Grevious, who told him about the inmates' situation. This witness insists that he checked the inmates at that point and called back to Mr. Grevious telling him of a lack of necessary staff. The Appellant then insisted that Grevious, at that point, that he (Grevious) would call the Captain's office for assistance.

27. The witness then said that Kim Thompson had never asked for his statement about the situation and that upon meeting with Deputy Warden Coyne, that he did not want a written statement, which the witness insists he had prepared, but said Coyne wanted the incident statement reported to him by e-mail.

28. On cross-examination, the witness then contradicted himself by stating that Grevious, at some point, had told him about the two inmates. However, he denies telling Grevious he would not release them. He also said that he did not know the inmates had been in the chair for almost two hours when he arrived and that he thought medical personnel had already checked these inmates, since he thought they had been in the chair two hours. The witness also insisted he was never asked for a statement concerning the incident by a supervisor.

FINDINGS OF FACT

1. The testimony clearly shows the Appellant was told about the two inmates being in restraint chairs and of the need for them to be released. This took place upon his arrival in John Grevious' office and witnessed by Kim Thompson and Captain Williams.

2. The Appellant did not see that the inmates were released from the restraint chairs until almost an hour after they should have been released. He did not offer a reason at that time for his failure to do so.

3. The Appellant failed to furnish a statement for his actions after having been directed to do so by Kim Thompson and Deputy Warden Coyne.

4. The Appellant's actions during this episode violated CPP 9.1, KSR Policy 03-00-14 and KSR Post Order #61, and constituted a lack of good behavior and poor work performance pursuant to 101 KAR 1:345.

CONCLUSION OF LAW

The Hearing Officer concludes as a matter of law the Agency carried its burden of proof by a preponderance of the evidence.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **MICHAEL ROBERTS VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2017-073)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

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

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

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

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 R. Hanson Williams this 12th day of September, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof mailed this date to:

Hon. Oran S. McFarlan
Michael Roberts



DEPARTMENT OF CORRECTIONS

Rodney Ballard
Commissioner

Kentucky State Reformatory
3001 W. Hwy 146
LaGrange, Kentucky 40032
Telephone: 502/222-9441
www.kentucky.gov

Aaron Smith
Warden

March 9, 2017

Michael Roberts

PERN:

Dear Mr. Roberts:

Pursuant to KRS 18A.095, you are advised that you will be demoted for cause from your position as **Correctional Sergeant** to the position of **Correctional Officer** effective beginning of business **March 16, 2017**. As a result, pursuant to 101 KAR 2:034, your salary will be reduced from **\$3455.30** to **\$3290.78**.

You are demoted for violation of Kentucky Corrections Policies and Procedures 9.1 Use of Force and Mechanical Restraints, II. Policy and Procedure, G. Levels of Force, 1. Level One Force - Physical Force-Restraint, j. When using Restraint Control Level 4 or 5, the following procedure shall be followed:, (1) Use of Level 4 or 5 restraints shall not last longer than the behavior continues as observed and documented by monitoring personnel., and (2) If it is believed that extended use past two (2) hours is necessary, medical personnel on site shall physically check the inmate and apprise the health authority or designee of the inmate's condition. The health authority or designee shall determine if the inmate is medically able to tolerate further restraint. Your actions also violated Kentucky State Reformatory's Institutional Policies and Procedures KSR 03-00-14 Prohibited Employee Conduct, Disciplinary Actions, and Appeal Process, Policy and Procedure, I Prohibited Activities and Conduct, C. Failure or refusal to cooperate in an investigation into alleged illegal activities or alleged violations of the Department of Corrections' rules and regulations without good and sufficient cause., I. Failure to properly discharge the duties of his position to include, but not limited to, making every reasonable effort to prevent the escape of an inmate., K. Failure to obey a properly given order by his supervisor., and O. Engaging in any other activity which shall be deemed detrimental to the proper discharge of duties as an employee of the Department of Corrections, or which comes into conflict with attainment of goals and the mission of the Department of Corrections or KSR. Your actions violated Kentucky State Reformatory's Post Order #61 Unit D Supervisor, Procedure, B Purpose, 18. Ensure that all Use of Force is in compliance with CPP 9.1. Ensure that the appropriate staff members are notified of any non-routine Use of Force and that the appropriate documentation is completed in a timely manner., and 22. Correctional Supervisors assigned to Unit D Segregation are responsible for enforcing and following all policies, rules and regulations contained in this Post Order., specified as follows:

On February 22, 2017, at approximately 3:05pm, while assigned as the Unit D Restrictive Housing Unit (RHU) Supervisor, you were in Correctional Unit Administrator II (CUA II) Kimberly Thompson's and

Correctional Unit Administrator I (CUA I) John Grevious's office. CUA II Thompson and CUA I Grevious are the Unit Administrators over Unit D. While in the office, CUA I Grevious instructed you to form a cell extraction team and remove Inmates William Speckine #227330 and William Curtiss #283006 from the Emergency Restraint Chairs (ERC) they had been placed in. Inmate Speckine had been placed in the ERC at approximately 1:11pm and Inmate Curtiss had been placed in the ERC at approximately 1:45pm, both for causing self-harm to themselves. You replied, "No," as you left the office and UA Grevious again instructed you to remove the inmates from the ERC's.

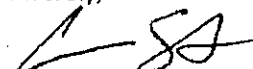
At approximately 4:00pm, UA II Thompson and UA I Grevious were notified that the inmates were still in the ERC's. UA I Grevious contacted you and asked if you had had the inmates removed from the ERC's and you replied, "No." UA I Grevious again instructed you to remove the inmates from the ERC's. At approximately 4:15pm, UA II Thompson contacted you and instructed you to write a statement as to why you had failed to remove the inmates when initially instructed to by UA I Grevious. You refused to write the statement as requested by UA II Thompson. You also failed to have the required medical assessment conducted on the inmates after they had been in the ERC's for more than two (2) hours. If you had removed the inmates when initially instructed to, the assessments would not have been needed.

On Thursday, February 23, 2017, Captain Thomas Noonan instructed you to write a statement on the incident, per Deputy Warden James Coyne and you again refused to write a statement on why you failed to remove the inmates from the ERC's when initially instructed to by UA I Grevious.

For your information, the Kentucky Employee Assistance Program (KEAP) is a voluntary and confidential assessment and referral service for state employees. This service may help you with any personal problems that may be affecting your job performance. KEAP can be reached at (800) 445-5327 or (502) 564-5788.

In accordance with KRS 18A.095, you may appeal this action to the Personnel Board within sixty (60) days after receipt of this notice, excluding the date notification is received. Such appeal must be filed in writing using the attached appeal form and in the manner prescribed on the form.

Sincerely,


Aaron Smith, Warden

Attachment: Appeal Form

CC's: Thomas B. Stephens, Secretary – Personnel Cabinet
Rodney Ballard, Commissioner – Department of Corrections
James Erwin, Deputy Commissioner – Adult Institutions
Rodney Moore, Director - Division of Personnel Services

Received by + Date: 3-9-17 Michael A. Abbot

Witnessed by + Date: James Hogan 3-9-17

Witnessed by + Date: James Coyne 3-9-17