

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-229

CHARLES WEBB

APPELLANT

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

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

APPELLEE

** ** ** ** **

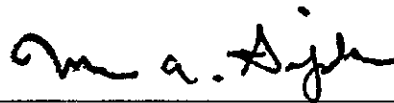
The Board at its regular July 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated June 4, 2015, and being duly advised,

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 **DISMISSED**.

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

SO ORDERED this 14th day of July, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. William Codell
Charles Webb
Joslyn Olinger Glover

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This matter came on for an evidentiary hearing on April 28, 2015, at 10:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and authorized by virtue of KRS Chapter 18A.

Appellant, Dr. Charles Webb, was present and not represented by legal counsel. Appellee, Justice and Public Safety Cabinet, Department of Juvenile Justice, was present and represented by the Hon. William Codell. Also present was Ms. Ivory Glenn, Paralegal, and Mr. Bob Hayter, Agency representative.

The issue concerns the suspension of the Appellant from duty and pay from his position as Certified Psychologist/Psychological Associate II, at Green River Youth Development Center, for one (1) working day, effective September 10, 2014, for alleged poor work performance and misconduct. The burden was on the Appellee to prove by a preponderance of the evidence that the disciplinary action was taken with just cause and was neither excessive nor erroneous.

The parties waived presentation of opening statements. The rule separating witnesses was invoked and employed throughout the course of the proceedings.

BACKGROUND

1. The first witness for the Appellee was **Eugene Wade**. Mr. Wade has been employed by the Department of Juvenile Justice more than seventeen years. For the past three years he has been a Superintendent II and during the incident in question held that position at Green River Youth Development Center (GRYDC). He gave a brief description of his job duties including oversight of the facility's day-to-day operations. Youth development centers house juveniles ages thirteen to eighteen who have been committed by the courts for treatment.

2. Mr. Wade had worked with Dr. Webb for about seventeen years. Appellant is the Staff Psychologist and Treatment Director at GRYDC who oversees treatment programs for all residents, and conducts crisis intervention, as well as some counseling. Mr. Wade identified Appellee's Exhibit 1 as the Kentucky Personnel Cabinet's Position Description for Appellant's employment position.

3. All employees are made aware of the Department's policies. They sign a receipt acknowledging their awareness and that they will be responsible to follow such policies. He identified Appellee's Exhibit 2 as the receipt signed by the Appellant on January 22, 2013.

4. He identified Appellee's Exhibit 3 as Justice Cabinet, Department of Juvenile Justice, Policy and Procedures, Policy No. DJJ 104 – Employee Code of Conduct. He stated Dr. Webb's acts violated Section IV., Procedures, F. and Q.

5. He identified Appellee's Exhibit 4 as Justice Cabinet, Department of Juvenile Justice, Policy and Procedures, Policy No. DJJ 208 – Youth Rights. He stated Dr. Webb had violated Section IV., Procedures, H.

6. He identified Appellee's Exhibit 5 as Justice Cabinet, Department of Juvenile Justice, Policy and Procedures, Policy No. DJJ 318, Behavior Management. It is up to staff members to model appropriate behavior and use proper language in dealing with youths. They are not to use profanity or belittle the residents. Appellant by his acts violated Section IV, Procedures, G. All three policies were in full force and effect during the time of the events herein.

7. He identified Appellee's Exhibit 6 as p. 13 of 28 pages of a sample center agreement that is presented to and signed by youth residents. Each resident is explained their rights, the procedures, expectations, and treatment goals. Under "Respect For Others and Pride in the GRYDC Program," No. 4., is stated "There will not be any cursing or street slang at GRYDC."

8. Mr. Wade became aware Appellant had used profanity with a youth resident at a treatment team meeting on July 9, 2014. He heard comments made outside his own office and started to look into the matter. He spoke to staff members who were present at that meeting as well as with the Appellant. Dr. Webb confirmed his use of the offensive language. Mr. Wade also spoke to the affected youth, "T.H.," who provided a written statement.

9. Wade then asked Walter Wright, the Ombudsman, to begin an investigation. Mr. Wright conducted the investigation and found the charges to have been substantiated. Wade then made a written request for discipline which he identified as Appellee's Exhibit 7 (sealed in the record for confidentiality purposes). On p. 8 of Appellee's Exhibit 7, "T.H." had provided a written statement relating his observation of the event. "T.H." represented that when he went to Dr. Webb to complain of a fellow resident having called him names that made him angry, Dr. Webb advised him to state back to that resident in group, that he was helping "T.H." with the anger problem by calling him that name and that "T.H." should request the resident call him stronger worded profanities. The language Dr. Webb used included profanities and a racial slur. The resident believed he could not follow Appellant's advice and use profanity in Mr. Street's group.

10. On p. 14 of Appellee's Exhibit 7 is a copy of the July 18, 2014 e-mail Appellant sent to Mr. Wade stating his side of the matter. In that e-mail Dr. Webb admitted using profanity.

11. Dr. Webb violated Department policies by using that particular language. If the youth were allowed to use such language, it would lead to peer conflicts, fights and other problems. He considered this matter to be more egregious as Dr. Webb was the Treatment Director for the entire facility. Wade believed a one-day suspension was appropriate.

12. Prior to this incident, Dr. Webb's conduct has been good. Wade has never known him to use profanity.

13. "T.H." was in the group run by a relatively new staff member, Mr. Street. Street had a history of being strong-willed and strong-headed. Appellant had made known to Wade that Street would not follow through on Appellant's directives. Wade was also aware of resident complaints against Street. Street had been placed on a Performance Improvement Plan (PIP) by the Appellant. Street eventually left the employ of GRYDC.

14. An exception to the use of profanity would apply for example if a youth were working at the woodpile and smashed his finger with a hammer. If the youth then cursed in response, that would be understandable. So long as the profanity is not directed at another individual. Wade understood that Appellant's reason for over-exaggerating the trigger words was his attempt to use a desensitizing technique. "T.H." reported to Appellant he was being called names by his peers. Appellant advised him to invite them to call him exaggerated curse words. Appellant's approach was a violation of policy. Alternative counseling methods were available and could have been used without the use of profanity. Use of profanity as a counseling technique cannot be done in a DJJ facility as it would probably escalate, rather than de-escalate conflicts.

15. Appellant had no prior disciplinary action against him.

16. The next witness was **William Heffron, M.D.** Dr. Heffron is employed by the University of Kentucky and assigned to the Department of Juvenile Justice. For the past 17.5 years he has served as the Department's Chief of Mental Health Services. He recited his degrees and accreditations and stated he is basically a Child Psychiatrist.

17. He identified Appellee's Exhibit 8 as his Curriculum Vitae. Dr. Heffron oversees mental health services for the Department and recommends the services to be administered.

18. He has read the suspension letter and Appellant's appeal document. Under Kentucky Rules of Evidence 702, Dr. Heffron was qualified by the Appellee as an expert in the treatment of children in the field of child psychiatry.

19. Dr. Heffron is aware of the Department policy prohibiting the use of profanity around youth. He does not believe that policy unreasonably limits treatment availability for the youth residents. The purpose of the policy is to prevent exposure of such language to kids who have been abused. It is also to prevent people from directing anger toward the youth. This is particularly so because of the different backgrounds of the people working for the Department. It is a better practice to prohibit the use of such language.

20. The purpose of the youth development centers is to take youth who are at high risk to re-offend criminally. The centers are to build up their skills and lower the risk factors of recidivism. There are treatment techniques available to help in a situation like the one that involved "T.H.," but it would take awhile and involve individual therapy. Dr. Heffron described some of the alternative available techniques.

21. He believed if one encourages the use of profanity in a setting such as the GRYDC, it would raise the level of anger which could lead to "a riot." Anyone who disrespects you is fair game for an assault, and that is not what they want to do in the facility. The majority of the residents in the facility have anger problems.

22. The policy is very clear and Dr. Webb violated it. He should not have used profanity. The youth was offended by Dr. Webb's statement and did not understand Webb's concept. Webb's use of profanity had also spread around the facility so everyone knew he did it. When the youth in the facility learned about it, they knew he violated a rule. The staff also got upset. It does not matter what the intent was, the result was very upsetting. In this context, his use of profanity was not in the best interest of the resident. In private practice, if a patient gets upset at being called a name, one could use desensitization which is done several ways using a

variety of techniques. He described how to use a hierarchy of different words that would set off the individual.

23. Dr. Heffron also described the use of "Implosion Therapy." This is a high-risk therapy that is used with someone who first has a very trusting relationship with the counselor. He gave an example. A counselor must have worked with the patient for several months before using this therapy. It is used between the patient and the therapist only. Theoretically, one could use Implosion Therapy with a youth resident, but under conditions of trust in a relationship established over several months.

24. Dr. Heffron believed Appellant's intent was to try to help the resident deal with his anger by exposing him to it and the trigger word. Staff are to de-escalate someone when their anger is triggered. If the counselor repeats profane words back to the youth, it would be improper in the context of the institution. It may help the resident, but it may create a fight by angering other youths. It would be interpreted as a sign of disrespect. It would escalate the situation with the other residents. Dr. Heffron stated if he were doing it, it could possibly be done in individual therapy, but not in a group setting.

25. There are other therapies available for use to deal with an individual's anger. Appellant's approach would be very low on such a list. The institution has made a decision that they are not to use this option as shown in the fore-stated policy.

26. **Bob Hayter**, Commissioner for the Department of Juvenile Justice, was the next witness. Commissioner Hayter has held this position since May of 2014. He previously was the Department's Deputy Commissioner and has been with the Agency since 2006. He briefly described his job duties which included involvement in the discipline of employees.

27. Recently, and subsequent to the subject incident, the disciplinary process involved superintendents sending the Commissioner a request for disciplinary action with a recommendation for the type of discipline. In Appellant's case, the recommendation for the level of discipline came from DJJ's personnel office. The Commissioner read the entirety of documents sent to him and made a decision on discipline. He employed the Department's practice of progressive discipline, that is, to solve a problem with the use of the lowest possible level of discipline.

28. He read through the information provided to him and asked follow-up questions. Originally he thought a three-day suspension was appropriate because it involved a staff member in upper management. The recommendation from DJJ's personnel office was one day. Commissioner Hayter agreed since the Appellant had no prior discipline.

29. Appellant had committed a violation of policy. Also, he failed to go through his chain of command to request to do something outside the policy. Even had Appellant made that request, the Commissioner testified he would have said "no."

30. He identified Appellee's Exhibit 9 as the August 29, 2014 letter he authored notifying Dr. Webb of his suspension from duty and pay for a period of one working day. What Dr. Webb had done was not a technique commonly used in the setting of a juvenile institution. A number of people in the institution found his act to be an objectionable violation of policy.

31. Appellee's case was closed.

32. The sole witness for the Appellant, was Appellant, **Dr. Charles Webb**. For the past seventeen years, Dr. Webb has been employed by the Department of Juvenile Justice at the GRYDC in the position of Treatment Director and Psychologist. He has worked thirty years as a Psychologist. He described his education, work experience, and certifications. Dr. Webb had also interned with a specialization in children and adolescents.

33. Resident "T.H." came to Appellant with a problem. Appellant tried to help him with the matter that triggered his anger. He told him the good thing was "T.H." knew what the trigger was. He tried to help him deal with his own trigger. Dr. Webb would not have used the words he did had "T.H." not brought the initial profane words to him. In treatment, one helps the residents with the problem they bring to the counselor. What Dr. Webb did was attempt a desensitization technique using the word that is the trigger for the individual.

34. Upon his examination of the policy contained in Appellee's Exhibit 3, Dr. Webb acknowledged that policy prohibits the use of profane language. He stated, however, that the use of profanity was done correctly here in a therapeutic setting to help "T.H." Dr. Webb had also suggested that "T.H." not respond, raise his hand in the group, and ask the staff member for a timeout where he could be by himself.

FINDINGS OF FACTS

1. At the time of imposition of the one-day suspension, Appellant, Charles Webb, was a classified employee with status. He was employed as a Certified Psychologist/Psychological Associate II at the Green River Youth Development Center (GRYDC) in Cromwell, Kentucky. He is also the Treatment Director who oversees treatment for all facility residents.

2. GRYDC houses juveniles, ages 13 to 18, who have been committed by the courts for treatment.

3. In early July of 2014 a youth resident, "T.H.," had approached Appellant to complain that another youth resident had called him names that made him angry. Appellant counseled "T.H." telling him it was good "T.H." knew what triggered his anger. Dr. Webb then attempted to use what he described as desensitization technique with "T.H."

4. As reported by "T.H.," Dr. Webb's advice was to tell the other youth resident while in group, that he was helping "T.H." with his anger problems by calling him a "fag"; that "T.H." should thank him for that and tell him to call him a "motherfucking nigger" or "motherfucking fag." "T.H." told Dr. Webb he did not think the staff leader of the group would have allowed him to say those things. (Appellee's Exhibit 7.)

5. Dr. Webb had suggested to "T.H." that he use some profanity in the treatment group. (Appellant's July 18, 2014 e-mail to Eugene B. Wade, Appellee's Exhibit 7.)

6. During C-Unit's July 9, 2014 treatment team meeting, Dr. Webb told team members about the discussion he previously had with "T.H." He also told the team members he had counseled "T.H." to tell the taunting resident, "Why don't you call me a God damn fucking fag?" (July 17, 2014 e-mail of Matt Clark, Youth Service Program Supervisor; Appellee's Exhibit 7); or, as reported by Mr. L. Renfrow, "I am a God damn fucking/motherfucking fag."; or, as reported by Gloria Johnson, R.N., "'fucking faggot'. Everyone in the treatment team was shocked by this statement and began to tell Dr. Webb their opinions why that was not an appropriate thing to tell the youth." (Appellee's Exhibit 7.)

7. During July of 2014, the following policies were in full force and effect:

- Justice Cabinet, Department of Juvenile Justice, Policy and Procedures, Employee Code of Conduct, Policy No. DJJ 104 (Appellee's Exhibit 3);
- Justice Cabinet, Department of Juvenile Justice, Policy and Procedures, Youth Rights, Policy No. DJJ 208 (Appellee's Exhibit 4); and
- Justice Cabinet, Department of Juvenile Justice, Policy and Procedures, Behavior Management, Policy No. DJJ 318 (Appellee's Exhibit 5).

8. Eugene Wade, Superintendent, became aware of this incident on July 9, 2014. He spoke to staff members who had been present at the team meeting, to the Appellant and to "T.H." Dr. Webb confirmed to him that he had used the offensive language. Mr. Wade then requested the Ombudsman, Walter Wright, conduct an investigation.

9. Mr. Wright conducted his investigation and compiled a report (a part of Appellee's Exhibit 7). In his report, Wright found the allegations against Dr. Webb had been substantiated.

10. When Mr. Wade received Wright's report, he sent a major corrective action request to acting Commissioner Bob Hayter on July 25, 2014. Mr. Wade also concluded the allegations against Dr. Webb had been substantiated. (A part of Appellee's Exhibit 7.)

11. DJJ's personnel office recommended issuance of a one-day suspension. Commissioner Hayter, after reviewing all of the documents, taking into consideration the recommendation of DJJ's personnel office, and the fact that Dr. Webb had no prior disciplinary action, agreed a one-day suspension was appropriate.

12. On July 29, 2014, Commissioner Hayter issued a letter to Dr. Webb advising him he was to be suspended from duty and pay for a period of one working day, effective September 10, 2014, for poor work performance and misconduct. (Appellee's Exhibit 9.)

13. Appellant timely filed his appeal of this disciplinary action with the Kentucky Personnel Board.

CONCLUSIONS OF LAW

1. A classified employee with status shall not be suspended except for cause. [KRS 18A.095(1)] Appointing authorities may discipline employees for lack of good behavior for the unsatisfactory performance of duties. [101 KAR 1:345, Section 1.] A suspension shall not exceed thirty days. [101 KAR 1:345, Section 4(1).]

2. Appellee issued Charles Webb a one-day suspension by letter of July 29, 2014 (Appellee's Exhibit 9). That suspension was based on an allegation of poor work performance and misconduct for violating Department of Juvenile Justice policy #104, Employee Code of Conduct, Department of Juvenile Justice policy #208, Youth Rights, Department of Juvenile Justice policy #318, Behavior Management, and Department of Juvenile Justice policy #908, DJJ Response to a Report of a PREA Violation, and Department of Juvenile Justice #912, Sexual Orientation and Gender Identity. During the course of the hearing, the Hearing Officer was presented evidence pertaining to DJJ Policy Nos. 104, (Appellee's Exhibit 3), 208 (Appellee's Exhibit 4), and 318 (Appellee's Exhibit 5).

3. It is clear from the evidence that in July 2014, Green River Youth Development Center resident "T.H." approached the Appellant to complain that another youth resident had made him angry by calling him certain derogatory names. The evidence also showed Appellant, in response, encouraged "T.H." to, in a group meeting, thank the offending youth resident for calling him names and to request he use certain, stronger derogatory and defamatory language. Regardless of the technique employed by Dr. Webb, it was clear that such was not an acceptable technique to use in the setting of a juvenile institution such as GRYDC.

4. By his actions in responding to "T.H.," Appellant violated the following policies and procedures:

- Justice Cabinet, Department of Juvenile Justice, Policy and Procedures, Employee Code of Conduct, Policy No. DJJ 104, Section I.V. Procedures, F., and Q; and (Appellee's Exhibit 3)
- Justice Cabinet, Department of Juvenile Justice, Policy and Procedures, Behavior Management, Policy No. DJJ 318, Section I.V. Procedures, G. (Appellee's Exhibit 5).

The evidence does not show that Dr. Webb in any way treated "T.H." in an inhumane manner, nor did he exploit, neglect, conduct physical sexual or emotional abuse of the youth resident. Therefore, there was no violation of Justice Cabinet, Department of Juvenile Justice Policy No. 208, Youth Rights, I.V., Procedures, H. (Appellee's Exhibit 4).

5. Appellee employs a progressive policy of disciplinary action against employees. Dr. Webb had no prior disciplinary action against him.

6. Appellee has shown by a preponderance of the evidence that there was just cause for disciplinary action against the Appellant, based on the incident involving the content of his advice to "T.H." in July of 2014. Appellee employs progressive discipline, and, therefore, it has shown by a preponderance of the evidence that the disciplinary action taken in the nature of a one-day suspension was neither excessive nor erroneous.

RECOMMENDED ORDER

Based on the foregoing, the Hearing Officer recommends to the Personnel Board that the appeal of **CHARLES WEBB VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF JUVENILE JUSTICE (APPEAL NO. 2014-229)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13.B.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).

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 Merkel** this 4th day of June, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. William Codell
Dr. Charles Webb