

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 **LASHAWN WEBSTER VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF JUVENILE JUSTICE (APPEAL NO. 2019-112)** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 22nd day of April, 2020.



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

Copy to Secretary, Personnel Cabinet

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2019-112

LASHAWN WEBSTER

APPELLANT

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

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

APPELLEE

*** **


The Board, at its regular April 2020 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated January 29, 2020, Appellee's exceptions and request for oral argument, Appellant's response, oral arguments, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **SUSTAINED 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 22nd day of April, 2020.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Jamhal Woolridge
Hon. Thomas Clay
Ms. Cynthia Watson

BACKGROUND

1. The Appellee's first witness was **Steve Donoghue**. He is employed by the Agency at the Audubon facility in Louisville, Kentucky. He testified that he is the Information Systems Supervisor, which means that he monitors the video cameras contained in the various DJJ centers, including the one in McCracken County, where the alleged incident occurred.

2. The witness testified that each camera has a 60-day video retention time and he proceeded to introduce Appellee's Exhibit 1, a video taken on the day of the incident on December 5, 2018, at the McCracken Regional Juvenile Detention Center.

3. The Appellee's next witness was **John Moore**. He is employed as a Youth Worker III at the McCracken Regional Juvenile Detention Center and has been employed there for 13 years. He is in charge of transporting the youth in the centers to various places. The witness testified that he is required to occasionally restrain youths and has been a trainer in the Aikido restraint procedure for the previous seven years. He stated that this type of training is given to the youth workers once per year in a three-day training session. He added that this method of restraint is to be used when the youth is a danger to himself or others.

4. The witness further stated that it is DJJ policy for employees to undergo some type of training at least once per month. There are sign-in sheets kept for this training. He also added that each employee is trained twice per year on the use of mechanical restraints (handcuffs).

5. The witness introduced Appellee's Exhibits 2 and 3, which are sign-in sheets showing the Appellant attended training on mechanical restraints on January 7, 2017, and Aikido training on January 14, 2018.

6. The witness related that on December 5, 2018, he was witness to an incident involving a youth. He stated that the youth had been removed from a classroom and taken to an isolation room.

7. On cross-examination, the witness was asked what documents he had reviewed in preparation for the hearing. He responded that he had seen the handwritten part of pages one through four, but not the typed portion, of the investigative report. (**Hearing Officer Note:** The handwritten portions which the witness was apparently referencing were the various incident reports filed by staff who were present or witnessed the alleged incident.) (Appellant's Exhibit 10.) It is noteworthy that among the pages of incident reporting forms was a finding by the Facility Superintendent, Matt Harned, that, after review, "proper procedure was followed." This was dated December 10, 2018.

8. The witness further went on to detail that this incident began when the youth had to be removed from the classroom for disruptive behavior. He then testified that the removal and initial escort from the classroom was handled by Greg Lindsey. The youth was initially taken to Room 693, where he lodged himself under a bed and refused to come out, resulting in additional staff being called to assist in the transport.

9. After the youth was dislodged from under the bunk, at some point he was handcuffed and the Appellant then appeared and was seen walking the youth (who was still handcuffed) backwards down a hallway to Room 691. He testified that the youth was screaming the entire time while being walked down the hallway and after entering Room 691. The witness stated he had removed a thin mattress from the bunk in Room 691, and the Appellant then slammed the youth onto the bed, facedown.

10. The witness then confirmed that on a nurse's report, it was indicated there was "no report of injury."

11. The Appellee's next witness was **Bryan Bacon**. He has been a Facilities Regional Administrator at the Agency's Western Region for the past two and one-half years. His job is to supervise the Facilities Superintendents in his region, where McCracken County is located.

12. He explained the chain-of-command in a typical youth detention center as: Youth Worker reports to a Youth Worker Supervisor, who reports to a Youth Services Program Supervisor, to a Superintendent I and, eventually, a Superintendent II, if applicable. His job includes reviewing and approving disciplinary actions that are sent to him after an investigation has been completed and he has a superintendent's recommendation. A Request for Major Disciplinary Action comes to him from the applicable facility and then is sent on to Division Director Tim Corder. The witness testified that he received his packet concerning the investigation into this alleged incident from Superintendent Matt Harned, and then passed it on up the chain-of-command. The witness then introduced Appellee's Exhibit 4, 5, and 5A.

13. Appellee's Exhibit 4 is DJJ Policy 713, relating to RESTRAINTS. Item IV.A.(3) states as follows:

Physical restraint shall not be used as punishment and shall be applied with the least amount of force possible.

14. Appellee's Exhibit 5 is the Standard Operating Procedure regarding the policy of using restraints. This states, on page 2, Item 5:

Physical restraint will never be used as punishment and will be applied with the least amount of force necessary (3A-30).

15. Witness Bacon stated that, after reviewing the video and incident reports, he felt that the Appellant's actions in slamming the youth onto the bed, face first while handcuffed, clearly violated these policies.

16. The witness then went on explain a "Critical Incident Report." He stated these reports are filled out by those involved in or witnessing a particular incident. These reports are supposed to be completed by the first person involved and others as well. He has seen no incident report filed by the Appellant regarding this matter.

17. Appellee's Exhibit 5A is a statement from the Appellant dated February 28, 2019, submitted in response to the previously-substantiated investigation surrounding his restraint of the youth in question. In his statement, the Appellant confirms his actions of walking the youth backward into Room 691 and turning the youth quickly to prevent him from spitting on other staff. The Appellant then claims that at no time did he ever let go of the youth and, therefore, did not throw him as previously cited. He further added that he did not feel the youth was harmed by the way he put him on the bed because the bed was a "suicide bed." [Hearing Officer Note: Apparently this type of bed is one where the resident (youth) is unable to harm himself because the bed is supposedly anathema to self-inflicted injuries.]

18. On cross-examination, the witness stated he had reviewed the video footage in its entirety beginning from the classroom until the youth's placement in Room 691. He opined that, at first, he felt the youth was obstinate, but not out of control. At that point, the youth was being escorted from the classroom by Lindsey and was not restrained. He is not sure when the handcuffs were applied or by whom. The witness also confirmed that Lindsey had been investigated for his conduct in this incident. This witness's initial concern was whether the youth had actually needed to be removed from the classroom because of his behavior. Regardless, the witness confirmed Lindsey had received a suspension of several days for his part in the incident.

19. The witness further detailed that the youth had refused medical treatment and was interviewed. When asked whether the youth was injured, he replied that whether he was or not, the policy is important to prevent future injuries.

20. When asked whether he viewed the Appellant's actions in placing the youth on the bed in the manner that he did as punishment, the witness remarked he thought it was "a little above normal." The witness then added that when he received the incident report from Superintendent Harned who had signed off that "proper procedures were followed," he questioned Harned on this conclusion. The witness indicated that, when speaking with Harned after the report had been filed, Harned had told him a different story about his true feelings of the Appellant's actions. The witness did confirm that on the Medical Inspection Report filed by the nurse, the "no injury" box had been checked regarding the youth.

21. The witness then confirmed that an investigation was done by an Agency investigator, Daniel Sparks, which was inconsistent with the findings furnished to him by Superintendent Harned. He added that he then talked to various facility staff members about these inconsistencies and he had the feeling that perhaps some of the staff were apprehensive to speak out at the facility. However, this can only be seen as speculation.

22. On redirect examination, the witness opined that he felt the relationship between Harned and the Appellant was somewhat skewed, as he felt Harned was intimidated by the Appellant. In the chain of command, the witness confirmed that Lindsey was the Appellant's first-line supervisor and Superintendent Harned was his second-line supervisor.

23. The witness then cited the evaluation scores the Appellant had received on his 2016, 2017, and 2018 year end evaluations. The year-end score for each was 450, an "Outstanding" rating.

24. The witness also acknowledged that the 450 rating was given for the 2018 calendar year when the December 2018 use of force incident occurred.

25. The Appellee's next witness was **William Campbell**. He has been employed by the Agency for 16 years. For the past two years, he has served as the Interim Director for Professional Development and, prior to that, has served as an Academy Branch Manager. His division is responsible for providing training for all DJJ employees, including a seven week initial training for new employees.

26. Regarding the use of mechanical restraints, the witness stated this is covered during the first week of Aikido training. Various techniques for mechanical restraints are covered, including for both combative and non-combative youth. He added that when handcuffs are applied from behind, the youth is told in advance.

27. The witness introduced Appellee's Exhibit 6, a Certificate of Completion for completing initial training awarded to the Appellant on April 5, 2001. He also introduced Appellee's Exhibit 7, a training schedule for January through March 2001, when the Appellant attended training.

28. The witness then testified that all employees must have ongoing training in the use of mechanical restraints. This occurs twice per year. The witness concluded by stating that the policy that his division provides does not teach placing a youth on the bed while handcuffed, as did the Appellant.

29. The Appellee's next witness was **Daniel Sparks**. He has been employed in the Special Investigations Branch within the Agency for the previous two and one-half years. Prior to that, he served with the Lexington Police Department. His duties include investigating allegations of abuse and excessive force. In doing this, he reviews any documents and video available and conducts necessary interviews with those involved.

30. He introduced Appellee's Exhibit 9, a transcript of an interview conducted with the Appellant on January 24, 2019. In this interview, the witness states that the Appellant threw the youth on a "suicide bed" to prevent him from spitting on himself and other staff. The Appellant related that the mat on this bed had plenty of "give" to it and would prevent anyone from hurting themselves.

31. Asked about whether he received an addendum from the Appellant after the other incident reports had been filed, the witness stated that the Appellant claimed no one had asked him to fill out an addendum. The witness also advised the Appellant related to him that the nurse had never talked to the youth. The Appellant explained to this witness that he had never been trained

on how to place the youth on a bed while handcuffed. The witness stated he later went to the room in question and tested the mattress, finding it hard and unyielding.

32. On cross-examination, the witness confirmed that he had interviewed employee Ben Cook who told him that the youth had threatened him and others. The witness also confirmed that Lindsey had been the subject of an investigation regarding this matter. The witness then confirmed his investigation showed that the youth was first taken to Room 693 after having been handcuffed by Cook and John Moore. In that room, the youth lodged himself under a bed and it took three employees to get him out and to begin the escort to Room 691. The youth was escorted to that room by the Appellant by being walked backwards in handcuffs.

33. The witness also testified that he had later interviewed the youth regarding the incident, and the youth had told him that he was placed on the bed on his back. Obviously, it did not happen that way.

34. On redirect, the witness confirmed that, during his interview of the Appellant, he was told that the Appellant had no prior knowledge of the morning's earlier disturbance in the classroom or the youth's treatment of staff.

35. The Appellee's next witness was **Cynthia Watson**. She has been the Agency's Human Resource Branch Manager since 2015. A part of her official duties are to receive disciplinary requests and draft appropriate letters for the Commissioner's signature. She added that various factors are taken into account in deciding the level of discipline to be imposed; namely, performance, tenure, job responsibility, and safety concerns.

36. The witness introduced Appellee's Exhibit 13, Justice Cabinet, Department of Juvenile Justice, Policy and Procedures, DJJ 104 regarding "Code of Conduct." In pertinent part, this policy reads:

I. POLICY

Staff, volunteers, interns, and contract personnel shall conduct themselves in a professional manner. All persons shall be aware that their personal conduct reflects on the integrity of the agency and its ability to provide services to youth.

37. DJJ 104, Section IV, Subsection U states:

Staff shall protect the individual safety of youth and themselves through the use of approved controlling techniques utilizing no more than the absolute amount of force necessary to diffuse a confrontational situation. Staff shall only use controlling techniques in which they have been certified by the Division of Professional Development.

38. The witness confirmed she had discussions with the Commissioner concerning the appropriate discipline herein. However, she testified that she was not familiar with the evaluations of the Appellant and did not recall whether he had any previous disciplinary actions or, if so, when. (**Hearing Officer Note:** However, the dismissal letter which her office supposedly drafted refers to a one-day suspension in 2004 for poor time and attendance and a three-day suspension in 2004 for poor time and attendance.) The witness concluded by stating that at some point in her review, she had observed a report from Superintendent Harned stating “he saw no issues.”

39. Under further cross-examination, the witness was evasive as to who had actually made the decision to terminate the Appellant and was unable to recall the answers to several questions that an employee in her position, being involved in this matter, should recall.

40. The Appellee’s next witness was **Tim Corder**. He has been the Division Director for the Western DJJ facilities since 2017. He also previously served in several Superintendent facility positions.

41. He testified that his role in the matter herein was to review the Request for Major Disciplinary Action that came to him. He made no recommendations when forwarding the request up the chain of command. He also stated that he had reviewed the video footage herein and thought the actions of the Appellant were severe.

42. In addressing the “Outstanding” rating received by the Appellant on his 2018 year-end Annual Employee Performance Evaluation, the witness clarified that any actions that began during that period, but were not concluded, would not be reflected in the evaluation rating.

43. The witness then introduced Appellee’s Exhibit 14, Justice Cabinet, Department of Juvenile Justice, Policy and Procedures, DJJ 715, relating to Incident Reports.

44. Section I of this Policy relates, in pertinent part:

The primary staff member directly involved in or witnessing an incident shall write an incident report.

45. On cross-examination, the witness confirmed that the superintendent of the particular facility was responsible to see that all incident reports were provided. In this case, he does not know if the Appellant was asked to write such as report.

46. The Appellee rested its case-in-chief.

47. The **Appellant, LaShawn Webster**, called himself as his only witness. He has been employed for the past 18 and one-half years through the time of his termination with the Agency. He began in January 2001 and progressed from a Youth Worker I to a Supervisor to a Youth Services Program Supervisor. Previously, he served in the U.S. Marine Corps for three and one-half years.

48. The witness confirmed that he had two prior suspensions, for one day and for three days, regarding time and attendance; both were received in 2004.

49. The Appellant related that he was aware of the history of the youth involved herein. He knew there had been multiple assaults by the youth, both within and outside the facility. He testified that he was in his office and later learned that the problems with the youth had begun in a classroom, where he had been requested to be removed. The Appellant learned that someone had placed the youth in an Aikido Control 3 restraint and had taken him to Room 693. He later learned that the youth had lodged himself under a bunk and refused to come out, whereupon it took three employees to dislodge him before he was handcuffed by staff members Moore and Cook.

50. The Appellant related that, after hearing the disturbance outside Room 693, he went to see what was occurring. He was then given the job of escorting the youth back to Room 691 after he had been dislodged from under the bed and handcuffed. The Appellant testified that as he was walking the youth backwards down the hall, the youth was continually spitting and cursing at staff. The Appellant related that he wanted to put the youth on the bed so he could properly adjust the handcuffs, for if they were not properly adjusted, they would cause loss of circulation. He added that by placing the youth on the bed so the handcuffs could be adjusted, someone would not later have to uncuff and then recuff the youth.

51. The Appellant related that the mattress in question on the bunk was hollow and was called a suicide mattress because its construction would not allow anyone to hurt themselves. Lastly, when asked about the effect of this termination on his life, the Appellant testified that he has lost his house, lost custody of his children, and has been forced to move to another state.

52. On cross-examination, the Appellant denied earlier insinuations that he intimidates other staff. He identified Appellee's Exhibit 16, a February 24, 2009 supervisory conference. This was held with Superintendent Harned after certain youth complained the Appellant had advised them to change their behavior after being released, or someone would likely knock their teeth out.

53. The Appellant again reaffirmed his position that he has never been properly trained on how to take down a resistant youth who was in handcuffs. He added that his best interest has always been the safety of the youth in the facility. Regarding the incident in question, he also added that, while escorting the youth down the hallway to Room 691, he had asked him to sit down on the bed, and the youth cursed at him.

FINDINGS OF FACT

1. On December 5, 2018, at the McCracken Regional Juvenile Detention Center, an incident occurred with a youth and several staff members. As a result of his involvement in this, the Appellant was terminated from his position of Youth Services Program Supervisor by letter dated May 6, 2019.

2. The December 5 incident began when a youth was requested to be removed from a classroom because of his disruptive behavior. He was initially taken to an isolation room by Greg Lindsey. There the youth lodged himself under a bed and refused to come out. At that point, Lindsey and some additional staff were needed to control the youth. During this commotion, the youth began cursing and spitting at staff. At some point, staff members Ben Cook and John Moore handcuffed the youth.

3. Appellant Webster heard the commotion outside his office and went to see if he could be of assistance. He was tasked with escorting the youth to Room 691. The Appellant did so by walking the youth (still handcuffed behind his back) backwards, to better control the youth, and to prevent him from spitting at other staff. A review of the video of this incident shows the youth cursing and screaming during the escort. (Appellee's Exhibit 1).

4. Upon arrival at Room 691, Moore removed a mattress from the bed. At that point, staff members Cook and Moore were still in the room with the Appellant and the youth. The Appellant then placed the youth, still handcuffed, facedown on the bed. A review of the video does not convince the Hearing Officer that the youth was "slammed" onto the bed. Rather, the Hearing Officer finds the Appellant's explanation of being in a confined space with two other staff members while trying to prevent the youth from spitting at them, and that the Appellant had little choice but to force the youth down as he did, plausible. The Hearing Officer finds the placement of the youth on the bed, as it occurred, was not punishment within the meaning of the DJJ policies.

5. The Hearing Officer also finds the incident on December 5, 2018, was confrontational, as referenced in DJJ Policy IV.U., beginning with the removal of the youth from the classroom. In fact, it became increasingly confrontational at each step. The Hearing Officer finds the Appellant did not use more force than was necessary to diffuse the situation.

6. There is no question that an unnamed nurse checked that there was "no injury" on her form. There is some question as to whether she even saw the youth.

7. Cynthia Watson's testimony had no benefit for the Hearing Officer. Although she indicated several discussions with the Commissioner of the Department of Juvenile Justice, it remains unclear who made the final decision of termination. Although her office drafted the dismissal letter, she was unaware of the Appellant's prior evaluations or previous disciplinary history. Neither Facilities Regional Administrator Bacon nor Division Director Corder made any recommendations as to discipline. Therefore, the person actually making the final decision never had to appear and explain their reasoning.

8. The Hearing Officer finds credible the testimony of William Campbell that employees are provided training on how to properly place a youth on a bed. As a long time employee, the Appellant should have been aware of this training, as the record shows he received training on mechanical restraints in January 2017.

CONCLUSIONS OF LAW

1. The Hearing Officer finds the physical restraint applied by Appellant was not punishment as referenced in DJJ Policy 713 and, under the circumstances, was applied with the least amount of force possible. As a result, the Hearing Officer concludes as a matter of law that the Agency failed to carry its burden of proof that the Appellant violated this provision. The Hearing Officer also finds this same reasoning applies to the alleged violation of Juvenile Detention Center SOP, Section 1, Page 2, Subsection 5.

2. The Hearing Officer also finds that Appellant used no more than the absolute amount of force necessary as cited in DJJ Policy 104, Section IV, and, therefore, concludes as a matter of law that the Agency failed to carry its burden of proof as to this alleged violation.

3. As a result of the findings and conclusions stated above, the Hearing Officer concludes as a matter of law that the Agency failed to carry its burden of proof to show the Appellant was guilty of misconduct, under 101 KAR 1:345, sufficient to warrant termination of Appellant.

4. The Hearing Officer concludes the Long v. Personnel Board case cited by the Agency is not persuasive under the circumstances herein. Long involved the use of three restraints by an employee non-certified in the controlling technique. Also the Appellant failed to have his incident report reviewed by a higher level supervisor. In the instant case, the Appellant's second-line supervisor, Matt Harned, reviewed the incident and signed off that "proper procedures were followed."

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **LASHAWN WEBSTER V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF JUVENILE JUSTICE, (APPEAL NO. 2019-112)** be **SUSTAINED to the extent** that the dismissal of Appellant is set aside. However, Appellant shall be given a 10-day suspension for failing to use the proper technique when placing the youth on the bed. Appellant shall be reinstated to his former position with back pay, less the 10-day suspension, benefits, and otherwise be made whole. Further, the dismissal shall be expunged from Appellant's personnel records. (KRS 18A.105 and 200 KAR 12.030.)

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure

to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

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

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

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

ISSUED at the direction of **Hearing Officer R. Hanson Williams** this 29th day of January, 2020.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Jamhal Woodridge
Hon. Thomas Clay