

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2016-279

JAY WHITFIELD

APPELLANT

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

JUSTICE AND PUBLIC SAFETY CABINET,  
DEPARTMENT OF CORRECTIONS

APPELLEE

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The Board, at its regular June 2017 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 19, 2017, 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 **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 15<sup>th</sup> day of June, 2017.

KENTUCKY PERSONNEL BOARD



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MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Oran S. McFarlan  
Mr. Jay Whitfield  
Mr. Rodney E. Moore

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**APPELLEES**

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This matter came on for an evidentiary hearing on February 27, 2017, and March 9, 2017, at 9:30 a.m., ET, each day at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Jay Whitfield, was present and was not represented by legal counsel. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Oran S. McFarlan III. Accompanying Mr. McFarlan was Ms. Elisha Mahoney. Also present as Agency representative was Warden Scott Jordan.

The first issue considered was the suspension of the Appellant from his position as Correctional Unit Administrator II at the Luther Luckett Correctional Complex for a period of three (3) days, effective October 26, 27 and 28, 2016, based on an allegation of misconduct. The burden of proof was on the Appellee to show by a preponderance of the evidence that the 3-day suspension was issued with just cause and was neither excessive nor erroneous.

The second issue considered was whether Appellant was penalized by having been placed on investigative leave and whether Appellee followed the procedures outlined in 101 KAR 2:102. The burden of proof was on the Appellee to show by a preponderance of the evidence that Appellant was not so penalized, and that it followed the procedures of 101 KAR 2:102. Should the evidence show Appellant was penalized, then the Appellee must show by a preponderance of the evidence that the action was taken with just cause and was neither excessive nor erroneous.

The rule separating witnesses was invoked and employed throughout the course of the hearing. The Appellee presented its opening statement. Appellant waived presentation of an opening statement.

### BACKGROUND

1. The first witness for the Appellee was **Sherri Cole**. For approximately four (4) years, Ms. Cole has been employed by the Department of Corrections at the Luther Lockett Correctional Complex (LLCC) as a Human Resource Administrator Institutional. Her job duties include disciplinary and payroll functions. She testified Appellant was not placed on investigative leave due to the September 8, 2016 Security Challenge incident.

2. She identified Appellee's Exhibit 1 as a print-out from the KRONOS timekeeping record for September 2016. The timeline she prepared is based on the KRONOS scans. Incident #1 is the matter of the security challenge from September 8, 2016. Incident #2 is the exchange Appellant had with the Deputy Warden on September 14, 2016. Although Appellant was sent home early on September 14, 2016, he was never placed on investigative leave. Appellant returned to work on September 23, 2016.

3. Ms. Cole attempted a few times to contact Appellant while he was away from work. She sent emails to his business email address on September 14 and 15, 2016. (Appellee's Exhibit 2.) She received no response. Thereafter, she sent a certified letter requesting Appellant return to work to meet with the Warden. Appellant received the letter and came back to work as directed. No discipline had been issued to Appellant for not being present at work.

4. Appellant's normal shift consists of eight (8) hours. Appellee's Exhibit 1 shows when Appellant worked, his regular days off, and the type of leave taken. If he had been placed on administrative leave or investigative leave, these events have specific pay codes which would show up on these records. She identified Appellant's Exhibit 1 as 101 KAR 2:102. Classified Leave and General Requirements. Pursuant to this regulation, any employee placed on special leave for investigative purposes is required to be given notice in writing.

5. **Tim Crutcher**, who for the past two years has been employed as a Senior Captain at LLCC, offered his testimony. He testified that a Security Challenge is a technique to help staff improve their job performance and proficiency in different scenarios and emergencies. Security Challenges are to be conducted at least once a month at the institution. Any staff member can suggest ideas for a Security Challenge. A Security Challenge has to first be approved before it is performed. At the time of the September 8, 2016 incident, it was Senior Captain Crutcher who had authority to approve Security Challenges. Today, however, that authority is solely with the Deputy Warden of Security.

6. Inmates are never involved as active participants in a Security Challenge, with the exception of holding an inmate back for purposes of a delayed count Security Challenge.

7. On September 8, 2016, Appellant approached Captain Crutcher with a request to perform a Security Challenge. He proposed to sit near a picnic table or lean against the table and act like "I'm out" to see if and how someone would respond and the length of time it would take for such response. Based on that scenario, Captain Crutcher approved the Security Challenge.

8. Later that day Crutcher heard an inmate had been involved in the Security Challenge, and that the Appellant had held an inmate by the shoulders and staged a mock fight. Captain Crutcher did not approve a Security Challenge involving a fight with an inmate. He would not have approved it, nor would he have approved an inmate's participation in such a Security Challenge. He has never seen or heard of a Security Challenge that involved a mock fight with an inmate.

9. He identified Appellant's Exhibit 2 (sealed in the record) as the Kentucky Department of Corrections' Critical Incident Management Manual. Section C sets out what a Security Challenge is and its purpose. Security Challenges do not result in punishment or discipline of staff if they do not meet up to the challenge. It is used as a training tool.

10. He had examined a video of the incident involving Appellant. He had seen Appellant grab the inmate around the shoulder area and on the side of his arms. Once Crutcher found out what happened, he immediately had the inmate assessed by the Medical Department. The inmate complained of having some soreness.

11. Staff are prohibited from using deadly force in a Security Challenge. No inmate should ever be used in a Security Challenge. Appellant violated policy by placing his hands on an inmate, moving him around and falling to the ground. This action justified the issuance of discipline. The inmate or staff could have been seriously injured. The only time the use of force is allowed is when you have to use it.

12. At the time of the incident, Crutcher was assisting the Deputy Warden of Security, and had the authority to approve Security Challenge scenarios. He did not have a problem with the way Appellant explained his proposed Security Challenge. The scenario described by Appellant was not the one he performed that day. Crutcher had no prior knowledge that an inmate would be involved. The Security Challenge employed by Appellant was not what had been approved.

13. **Scott Stovall**, who, since October 2014 has been employed at LLCC as a Lieutenant in Internal Affairs, gave his testimony. His duties include narcotics investigations and interventions, dangerous contraband matters, and personnel issues directed by the Warden.

14. On the afternoon of September 8, 2016, he was asked to look for video footage of the incident involving Appellant. He was later notified that the Warden wanted Internal Affairs to perform an investigation.

15. Stovall observed the video footage and examined an Extraordinary Occurrence Report. Captain Forgy and Lieutenant Stovall called the Appellant into Forgy's office. They advised him an investigation would occur and directed him not to discuss anything with anyone. Appellant had already provided a statement to Deputy Warden Stack.

16. Stovall's report on Appellant's actions was based almost entirely on what he saw in the video. He was not looking for intent or motive. He attempted to interview Appellant on a

number of occasions, but was advised Appellant was not at the institution. He, therefore, wrote up his report without an interview. (At this point of the proceeding, the witness was shown video footage of the incident, which appears on Appellee's Exhibit 3.)

17. The incident occurred in the "Bullpen" area of the main yard. It showed Appellant and inmate Hawkins. Appellant grabbed Hawkins on top of the forearms, moved him back and forth and staged what was to be done (Footage at 53:07-49). The next section of footage (8:22-9:55) shows where the Security Challenge took place. Appellant can be seen wearing a blue shirt. The third section of footage (23:40-24:55) shows the inmate's and Appellant's feet moving back and forth.

18. Stovall identified Appellee's Exhibit 4 as Incident Report: LLCC-2016-09-010, which he turned in to Warden Scott. It contains a synopsis of the incident, summary of the investigation, interview summaries, and his findings. With reference to the Appellant, the findings stated,

In the end it was a blatant violation of CPP 9.1 USE OF FORCE AND MECHANICAL RESTRAINTS and UA II Whitfield with his time in service and range of experience cannot claim ignorance of it being so.  
(Sic)

Appellant had violated the policy by having laid hands on an inmate when there was no danger to security or staff of the institution.

19. He identified Appellant's Exhibit 3 as the Notice of Confidentiality he had the Appellant sign on September 9, 2016.

20. The next witness was **Jesse Stack**. Mr. Stack has been employed by the Department of Corrections for 13 years, the last three (3) at LLCC as Deputy Warden of Programs. He is the Appellant's supervisor.

21. Senior Captain Crutcher advised him something happened between Appellant and an inmate in the living units. He watched the video playback with Crutcher. He observed Appellant and the inmate put their hands on each other and engage in a "kind of tug of war." Appellant got pushed to the ground. "It looked very odd."

22. He spoke to Appellant in the presence of Senior Captain Crutcher. They discussed the incident. That discussion did not last long, as Appellant did not want to talk about it in the presence of the Senior Captain.

23. Stark has never before seen or heard about a Security Challenge involving a mock assault on staff, or a staff member placing hands on an inmate. This was a blatant violation of the Use of Force Policy.

24. He identified Appellee's Exhibit 5 (sealed in the record) as Kentucky Corrections Policies and Procedures, Policy Number 9.1, USE OF FORCE AND MECHANICAL RESTRAINTS. It was determined that Appellant had violated this policy, as none of the exceptions for using physical force against an inmate (contained in Section II, Policy and Procedure, #6) applied.

25. He identified Appellee's Exhibit 6 as KRS 503.010, wherein subparagraph (4) defines "Physical force" as "...force used upon or directed toward the body of another person and includes confinement."

26. Deputy Warden Stack examined Appellant's act and his prior disciplinary history. He believed some disciplinary levels had to be skipped due to the nature of the violation. This act could have resulted in others reacting to a belief that the inmate was violent with the Appellant. They might have physically restrained the inmate or sprayed him. The matter could easily have escalated.

27. Stack met with Deputy Warden Strang and Warden Scott Jordan. They collectively discussed the possibility of a 5-day suspension. It was decided a 3-day suspension would be more appropriate. Such an act could easily have resulted in a 5-day suspension, but due to Appellant's light disciplinary history, the discipline was reduced to a 3-day suspension.

28. Appellant was not placed on investigative leave following this incident. Several days later, Appellant was involved in an incident with Deputy Warden Strang. There was a disturbance on the yard, and Strang ordered the yard be closed and the inmates returned to their units. Appellant made a comment in front of the inmates, that it was only going to get worse and this was just the beginning of it. It was a bad climate in which to make such a statement. The institution sent him home that day, and told Appellant they would be in touch with him. Sherri Cole was directed later that day, or the next morning, to contact Appellant. She sent emails to him, but received no response. No discipline was issued to the Appellant as a result of this particular incident, nor had he been placed on investigative leave.

29. The next witness was **Webb Strang**. For the past 18 months, Mr. Strang has been employed by the Department of Corrections at LLCC as Deputy Warden of Security.

30. Late in the afternoon on the day of Appellant's Security Challenge, he heard that incident had taken place. He learned more about the details of the event and discovered physical contact had been made between Appellant and an inmate. He concluded such contact was "problematic."

31. A Security Challenge is a small- to medium-scale drill to test the capabilities within the institution, and how to respond or deal with an incident. He identified Appellee's Exhibit 7 (sealed in the record) as Kentucky Corrections Policies and Procedures, Policy Number 8.3, CRITICAL INCIDENT MANAGEMENT. The policy defines a Security Challenge as "...a drill or exercise that is designed to test security protocol." It also requires Security Challenges be completed on each security shift once a month.

32. Any staff member can suggest a scenario for a Security Challenge, but it has to be reviewed and approved. He was not aware of this Security Challenge before it occurred. The Security Challenge actually performed by Appellant would never have been approved. Inmates have been used from time to time in a Security Challenge involving inmate counts.

33. Prior to this incident, Strang has never seen or heard of a Security Challenge involving staff placing hands on an inmate or staff and an inmate engaging in a mock assault. Any physical contact with an inmate must be for a serious reason, to protect the safety and security of the institution, the inmate or staff. Appellant violated CPP 9.1. At no time had Appellant been placed on administrative or investigative leave.

34. He discussed the incident with Warden Jordan and Deputy Warden Stack. Appellant placing his hands on the inmate, and vice-versa, generated a lot of liability for the institution and was a breach of policy and procedure. Appellant's behavior had to be separated from the institution. The group decided a 3-day suspension was proper.

35. Appellant was involved in an incident on September 14, 2016. An inmate had threatened a female Lieutenant with violence. Staff members responded and restrained the inmate, when the inmate began to fight. Strang was in the yard at the time and saw the inmates begin to gather and watch. Enough inmates were saying things that prompted him to lock down the yard.

36. When the matter was being wrapped up, Appellant loudly said, "This is only the beginning. We don't have an ability to respond to this." Strang told Appellant to stop saying this. One cannot say such things in front of line staff or the inmates. They have to believe we have order. Strang notified the Warden of Appellant's conduct and suggested it would be best if he went home. Appellant was sent home. He was never disciplined for this incident.

37. He identified Appellant's Exhibit 5 as an email he sent to the Warden on September 9, 2016, suggesting consideration of investigative leave for the Appellant. He identified Appellant's Exhibit 6 as an email he sent to staff throughout the institution on September 8, 2016, advising that any Security Challenges would only be approved by the office of the Deputy Warden of Security.

38. Employees are not disciplined for poor performance during a Security Challenge. Employees are disciplined for a breach of policy, and that is how Appellant's incident was viewed. The incident was not viewed as anything constituting a valid Security Challenge.

39. The next witness was **Warden Scott Jordan**. Warden Jordan has been employed by the Department of Corrections since February 2001. He has served as Warden of LLCC since May 2016, and makes final decisions on matters of employee discipline.

40. Deputy Warden Stack advised him a so-called Security Challenge occurred on the yard that involved an inmate and certain force used against him. Stack advised that he was looking into it. Prior to this incident, Warden Jordan has never seen or heard of a Security

Challenge that involved a mock assault on staff by an inmate or of staff placing hands on an inmate.

41. Appellant Whitfield was of very high rank. The Warden decided that if the incident were to be investigated, it should be confidential and conducted by trained investigators. A use of force against an inmate could result in litigation from that inmate, especially when the use of force was unauthorized, as it was here. An inmate cannot agree to be involved in any kind of exercise that requires force. He decided to institute an Internal Affairs investigation.

42. Appellant was at no time placed on investigative leave or administrative leave due to any of these incidents. He came back to work the day following the September 8, 2016 incident.

43. He reviewed the Internal Affairs' report, which concluded what the Warden had seen on the video: a blatant violation of CPP 9.1. He decided discipline was proper.

44. He identified Appellee's Exhibit 8 as the October 10, 2016 letter advising Appellant of an intent to suspend him from duty and pay for a period of five (5) days. Appellant requested an interview with the Warden. That interview took place, and the Warden took such interview into consideration when he issued his October 18, 2016 letter advising Appellant he would be suspended for a period of three (3) days (Appellee's Exhibit 9).

45. Warden Jordan explained that his history of disciplining staff for violations of CPP 9.1 ranged from termination to demotion. The 5-day suspension is the lightest discipline he had ever issued for such an infraction. He took into account Appellant's length of service with the Department and that he had a written reprimand, which was not really discipline, when he reduced the suspension to three days. This was Appellant's first real disciplinary incident.

46. He decided to give a 3-day suspension as Appellant is a loyal, dedicated staff member who has been a very good employee for the Department. Violation of CPP 9.1, however, had to result in a suspension. Once cannot place his hands on an inmate for any reason. This could have created a catastrophe. Although more than a suspension was justified due to the blatant violation of policy, he issued a 3-day suspension.

47. The parties stipulated to the fact Appellant had received a prior written reprimand in June 2013.

48. When an employee is placed on investigative leave, they are notified in person, or in writing, and they must make themselves available by telephone and be able to return to the institution upon request. All of this is documented in time records. The Warden is the individual who approves investigative leave. In this instance, Appellant was never placed on investigative leave.

49. The Appellee closed its case. Appellant began the presentation of his case.

50. The first witness called to testify for Appellant was **Tim Forgy**. Mr. Forgy has been employed with the Department of Corrections for 18 years, the last two (2) as Internal Affairs Captain at LLCC. (Appellant played an audio recording of inmate Hawkins being interviewed by Forgy and Lt. Stovall on September 9, 2016.) Forgy testified that the inmate embellished certain parts of his story. A video showed the Appellant grabbed the inmate outside the Bullpen area by the forearm wrist area.

51. **David Herndon**, who for the past year has been employed as Administrative Captain at LLCC, gave his testimony. The matter of the Security Challenge was brought to his attention. He examined the video. He was then asked by Deputy Warden Webb Strang to write an Incident Report. When he viewed the video, he could only see basic body contact between Appellant and the inmate. He was later interviewed by Internal Affairs.

52. Appellant then showed him what was identified as Appellant's Exhibit 7, a Google map photo of a portion of the Luther Luckett Correctional Complex.

53. The next witness was **David Crawford**. For the past four years, he has been employed at LLCC as a Lieutenant. He was present on the yard at the time of the September 8, 2016 incident. After the incident, he wrote and submitted a statement by email (Appellant's Exhibit 8). Thereafter, he submitted a Staff Member Incident Statement (Appellant's Exhibit 9).

54. At the time of the incident he approached the Appellant and the inmate. When he got near, he heard the Appellant tell the inmate to go inside.

55. Appellant showed Lt. Crawford the 7A Gate view video. Crawford testified that when he approached Appellant and the inmate, he was followed by Sergeant Paul Young.

56. Appellant showed the witness Appellant's Exhibit 10, which is a Google Map photograph of LLCC at the Gate 6 area. He testified that he saw the Appellant place his hands on the inmate.

57. **Paul Young**, who has been employed the past three (3) years as a Sergeant at LLCC, was the next witness. On the day of the incident, he was the Canteen Officer. He witnessed the incident and responded to same with Lt. David Crawford. He submitted his observations of the incident in an Occurrence Report, which he identified as Appellant's Exhibit 11.

58. **Kyle Sellers**, who, for the past two and a half (2.5) years has been employed at the LLCC as a Correctional Sergeant, offered his testimony. On September 8, 2016, his assigned post was at 7M. He learned a Security Challenge had occurred in the yard that day. He was ordered by Senior Captain Crutcher to find the inmate involved in the Security Challenge and immediately send him to Building 2. Sergeant Sellers complied. He was later directed by either Captain Herndon or Captain Crutcher to submit a report. On a later date, he was interviewed about the incident by Lieutenant Scott Stovall.

59. In his experience, prior to this Security Challenge, Sergeant Sellers had never heard of a Security Challenge involving a mock assault by an inmate on staff, or a staff member placing his hands on an inmate. Staff may never place hands on an inmate for training purposes. He has never seen any policy or directive on how one is to conduct a Security Challenge.

60. **Westley Roberts**, who, for the past seven (7) years has been employed as a Lieutenant at LLCC, offered his testimony. On September 8, 2016, he was assigned as Compound Supervisor. At the time the subject Security Challenge was conducted, he was present in C Wing 7-C on the upstairs floor conducting a cell search. After the fact, he heard from Sergeant Young and Lieutenant Crawford that Appellant had conducted a Security Challenge. With this information, he called Captain Gunter and advised her of that event.

61. He had been made aware that the Security Challenge involved inmate Hawkins, and that it was made to appear the Appellant had been assaulted by the inmate.

62. He identified Appellant's Exhibit 12 as a written statement on the matter he submitted on September 9, 2016.

63. He was not aware of any policy directing one how to conduct a Security Challenge. He has conducted three or four Security Challenges, which were approved through the Captains' office. They are conducted approximately one time each month.

64. He has never heard of a Security Challenge involving a mock assault by an inmate on staff. Staff do not use inmates in Security Challenges. He has never seen a Security Challenge where a staff member placed hands on an inmate.

65. The next witness was **James Elswick**. For the past four (4) years Mr. Elswick has been employed by the Department of Corrections at LLCC as a Correctional Officer. On September 8, 2016, he was the Tower 12 Officer, and witnessed a Security Challenge occur on the yard involving Appellant and an inmate. Elswick used his binoculars and saw both participants laughing.

66. He identified Appellant's Exhibit 13 as a photograph of the view one has toward the yard from Tower 12. The distance between the tower and the subject unit is approximately 200 yards. He witnessed the inmate picking the Appellant up from the ground with his hand. The Appellant and the inmate were at the 7A Bullpen area which, in the photo, is in the background beyond the grassy area, slightly to the right of center.

67. The next witness was **Preston Morrow**. Mr. Morrow has been employed as a Sergeant at LLCC for about five and a half (5.5) years. On September 8, 2016, his assigned post was 7 Charley. He was not aware Appellant had been involved that day in a Security Challenge with an inmate. Morrow himself has been involved in Security Challenges in the past. He has never heard of a Security Challenge where a staff member placed their hands on an inmate.

68. **Patricia Gunter**, who, for the past year has been employed as a Captain at LLCC, offered her testimony. On September 8, 2016, prior to the occurrence, Appellant told her he would be involved in a Security Challenge. He said he was going to ask an inmate to assault him, to see how long it would take Security staff to respond. He advised that Senior Captain Crutcher had approved the Security Challenge. Gunter told him she would send a supervisor over to the dorm where the Security Challenge was to occur.

69. She then contacted Senior Captain Crutcher, after the occurrence of the Security Challenge, to verify approval of a scenario where an inmate would assault UA Whitfield. Crutcher told her he had approved a Security Challenge, but he had not approved the scenario she described.

70. Gunter has never known of a Security Challenge involving a mock assault on a staff member by an inmate, or where a staff member placed hands on an inmate. Appellant's acts violated policy by involving the inmate in physical contact.

71. The next witness was **Emily Scholfield**. Since May 2014, Ms. Scholfield has been employed by the Department of Corrections at LLCC as a Corrections Unit Administrator I. She works directly for the Appellant.

72. On September 8, 2016, she saw the Appellant place a telephone call and advise whomever was on the other end of the call that he [the Appellant] wanted to conduct a Security Challenge. She identified Appellant's Exhibit 14 as the written statement she had submitted pertaining to this telephone call. She understood at the time that an inmate would be involved in this Security Challenge.

73. She is aware that Security Challenges are conducted, but does not know whether there are any written guidelines on how to proceed. She has never been involved in a Security Challenge where a staff member places hands on an inmate. With reference to the telephone call, she could only hear what Appellant said. She did not hear the voice on the other end of the call.

74. The next witness was **Jennifer Bowersock**. Since October 2015, Ms. Bowersock has been employed at LLCC as a Corrections Unit Administrator I.

75. On September 8, 2016, she was in a meeting with Senior Captain Crutcher. Crutcher received a telephone call and she heard him give approval for a Security Challenge. In this instance she knew an inmate was being used, as Captain Crutcher told her this after the conclusion of the telephone call. He told her an inmate would possibly be used to lay across a table.

76. When she was a Shift Captain, she had conducted many Security Challenges. She has never heard of a Security Challenge involving a mock assault by an inmate on staff, or a staff member placing hands on an inmate.

77. The next witness was **Kimberly Mason**. Ms. Mason has been employed with the Department of Corrections for 20 years, the last 12 at LLCC as a Corrections Unit Administrator II.

78. On September 8, 2016, Appellant appeared in her office and advised he would be conducting a Security Challenge. Also present in the office at that time was Lindsay Stemle.

79. Subsequent to the Security Challenge, Ms. Mason was interviewed by Lieutenant Stovall. He asked her if she had ever been involved in or knew what a Security Challenge was. She answered that she knew what it was, but had never personally been involved. She was then asked if she ever knew of inmates being used in a Security Challenge. She responded she was not aware one way or the other.

80. **Lindsay Stemle**, who, for the past 12 and a half years has been employed at LLCC as a Corrections Unit Administrator I, offered her testimony.

81. On September 8, 2016, she was the assigned Unit Administrator I in "7 Adam." The Appellant came into her office and advised he was going to conduct a Security Challenge. UA Stemle has experiences with Security Challenges and knows that each shift conducts such a drill at least once each month. She is not aware of there being any policy or guidance on how to conduct a Security Challenge.

82. In her experience, she is not familiar with nor had she been involved in a Security Challenge of a mock assault by an inmate, or where a staff member has placed hands on an inmate.

83. Appellant closed his case. Appellee did not offer rebuttal testimony. The parties each presented their respective closing arguments. The matter was then submitted to the Hearing Officer for his recommended order.

### **FINDINGS OF FACT**

1. Jay Whitfield, the Appellant, is employed as a Corrections Unit Administrator II at the Luther Luckett Correctional Complex (LLCC) by the Justice and Public Safety Cabinet, Department of Corrections. He is a classified employee with status.

2. A "Security Challenge" is a training tool used to help staff improve their job performance and proficiency in situational scenarios and emergencies. It is a drill or exercise designed to test security protocol (Appellee's Exhibit 7).

3. Security Challenges are conducted no less than once a month at LLCC and ideas for scenarios may be suggested by any staff member. A Security Challenge must first be approved before it is performed. Inmates are never active participants in a Security Challenge, with the exception of a scenario when an inmate is held back for a delayed count.

4. On September 8, 2016, Appellant described to Senior Captain Tim Crutcher a scenario he proposed to use for a Security Challenge. Appellant proposed to sit at or near an outdoor picnic table, act like he was “out,” and determine how long it would take for someone to respond to his situation. Captain Crutcher approved this scenario for a Security Challenge.

5. On September 8, 2016, Appellant enlisted inmate Christopher Hawkins to participate in the Security Challenge. The Security Challenge took place in the “Bullpen” area of the main yard, and had been recorded on video footage of the yard. Appellant placed his hands on inmate Hawkins, and they engaged in what was termed a “mock fight,” resulting in Appellant falling to the ground. Inmate Hawkins helped Whitfield get up and the Security Challenge ended. The incident was witnessed by several staff members.

6. The Security Challenge performed by Appellant was not the scenario previously approved by Senior Captain Crutcher.

7. At the time of the incident, Kentucky Corrections Policies and Procedures, Policy #9.1, USE OF FORCE AND MECHANICAL RESTRAINTS, was in full force and effect.

8. Warden Scott Jordan directed Internal Affairs to investigate the matter. Lieutenant Scott Stovall conducted the investigation and, on September 20, 2016, he issued his report. He concluded Whitfield’s actions were “...a blatant violation of CPP 9.1 USE OF FORCE AND MECHANICAL RESTRAINTS and UA II Whitfield with his time in service and range of experience cannot claim ignorance of it being so.” (Appellee’s Exhibit 4.)

9. On October 10, 2016, Warden Jordan issued Appellant a letter advising of the intent to suspend him from duty and pay for a period of five (5) days. Appellant was alleged to have violated CPP 9.1, Section II(A)(6). (Appellee’s Exhibit 8.)

10. Appellant requested an interview with the Warden. He met with the Warden on October 12, 2016. As a result of that meeting, Warden Jordan altered his prior intent and reduced the length of Appellant’s suspension to three (3) days. This was memorialized in the Warden’s October 18, 2016 suspension letter issued to the Appellant (Appellee’s Exhibit 9).

11. Prior to this three-day suspension, Appellant had received a written reprimand on June 20, 2013.

12. Appellant timely filed an appeal of the suspension 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 or the unsatisfactory performance of duties. 101 KAR 1:345, Section 1. A suspension shall not exceed 30 days. 101 KAR 1:345, Section 4(1).

2. Appellee issued Appellant Jay Whitfield a three-day suspension by letter of October 18, 2016. (Appellee's Exhibit 9.) That suspension was based on an allegation of misconduct, citing authority of 101 KAR 1:345, Sections 1 and 4, by violation of policy CPP 9.1 II.(A.)(6.).

3. The evidence shows that on September 8, 2016, Appellant requested Senior Captain Crutcher approve a Security Challenge he proposed be conducted in the Bullpen area of the main yard at the Luther Lockett Correctional Complex. There are conflicting accounts of whether such requests included a description of the use of an inmate (see: testimony of: Tim Crutcher, Kimberly Mason, Lindsay Stemle, Patricia Gunter, Emily Scholfield, Jennifer Bowersock) as well as the specific scenario.

4. Senior Captain Crutcher testified Appellant had described a scenario where Appellant was to sit at or lean on a picnic table, act like he was "out," and see how long it took for someone to respond and in what manner.

5. The overwhelming testimony of the witnesses presented by both parties have commonality in the assertions that (a) with the exception of a delayed count scenario, inmates are never used in a Security Challenge, and (b) unless the safety or security of staff, inmates or the facility is threatened, staff shall never place hands on an inmate. Prohibition of physical force with an inmate is also set out in Policy #9.1, USE OF FORCE AND MECHANICAL RESTRAINTS, with specific exceptions set out in Section II, 6(A-G). (Appellee's Exhibit 5.)<sup>1</sup>

6. When Captain Gunter contacted Captain Crutcher after the occurrence of the Security Challenge and attempted to verify approval of the scenario described to her earlier by Appellant (that he intended to enlist an inmate to "assault" him to test the response times of others), Captain Crutcher told her he had approved a Security Challenge proposed by Appellant, but not the scenario described by Gunter.

7. Based on the commonalities in testimony of various witnesses (described above in paragraph 5), and the consistency of Captain Crutcher's testimony, the Hearing Officer has placed greater credibility on the testimony of Senior Captain Crutcher. He testified he had approved a scenario that did not involve an inmate and did not involve a mock assault by an inmate on a staff member.

8. The issue, however, concerns whether Appellant violated Policy #9.1, by having placed his hands on an inmate in a mock fight with that person, and not whether the use of an inmate in a Security Challenge violated policy.

9. Appellant, having had physical contact with an inmate in a Security Challenge conducted on September 8, 2016, violated Policy #9.1, USE OF FORCE AND MECHANICAL RESTRAINTS.

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<sup>1</sup> None of the listed exceptions apply to this case.

10. Appellee has shown by a preponderance of the evidence that there was just cause for disciplinary action against the Appellant, and has also shown by a preponderance of the evidence that issuance of a three-day suspension was neither excessive nor erroneous.

11. None of the witnesses testified Appellant had ever been placed on investigative leave. Sherri Cole, LLCC Human Resource Administrator Institutional, testified that when an employee is placed on administrative or investigative leave, these events have their own specific pay codes; such pay codes would appear on KRONOS timekeeping records; no such codes appeared on Appellant's KRONOS timekeeping records for September 2016. (Appellee's Exhibit 1.) She was among the witnesses who testified Appellant had not been placed on investigative leave.

12. "If approved by the Secretary, an appointing authority may place an employee on special leave with pay for investigative purposes, pending an investigation of an allegation of employee misconduct." 101 KAR 2:102, Section 9(3).

13. "The employee shall be notified in writing by the appointing authority that the employee is being placed on special leave for investigative purposes, and the reasons for being placed on leave." 101 KAR 2:102, Section 9(3)(b).

14. In this case, the appointing authority, Warden Scott Jordan, testified Appellant was not placed on investigative leave or administrative leave due to either of the incidents of September 8, 2016, or September 14, 2016.

15. Appellee has shown by a preponderance of the evidence that Appellant was not penalized as he had never been placed on investigative leave. There having been no investigative leave, the procedures outlined in 101 KAR 2:102 did not apply to this case.

### **RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **JAY WHITFIELD V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS, (APPEAL NO. 2016-279)** 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).

**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 19<sup>th</sup> day of May, 2017.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Oran S. McFarlan  
Mr. Jay Whitfield