

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-067

ADAM ARANDA

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

*** **

The Board, at its regular February 2019 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated January 18, 2019, 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 13th day of February, 2019.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Scotty McFarlan
Mr. Adam Aranda
Mr. Rodney E. Moore

**COMMONWEALTH OF KENTUCKY
KENTUCKY PERSONNEL BOARD
APPEAL NO. 2018-067**

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

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

APPELLEE

** ** ** ** **

This matter came on for evidentiary hearing on October 19, 2018, at 9:30 a.m., at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before Brenda D. Allen, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Adam Aranda, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, Justice & Public Safety Cabinet, Department of Corrections, was present and was represented by the Hon. Scotty. McFarlan, III. Also present was agency representative former warden Aaron Smith and Deana Smith, paralegal.

The issue before the Hearing Officer is whether or not there was just cause for the three-day suspension of the Appellant and whether that penalty was excessive or erroneous. The Appellee had the burden of proof by a preponderance of the evidence and, therefore, proceeded first in the presentation of evidence.

BACKGROUND

1. On March 8, 2018 the Appellant, Adam Aranda (hereinafter "Aranda" or "Appellant") was suspended for three (3) days for misconduct for an alleged violation of the Department of Corrections' policy on Use of Force when he used an electrified Nova Shield on a restrained inmate after an inmate was extracted from a cell and placed in a chair restraint. Appellant filed his appeal with the Personnel Board on April 9, 2018, contending his suspension was improper because Department of Corrections staff assigned him the Nova Shield equipment and the duties of cell entry without proper training or certification in violation of Department of Corrections' policies.

2. A pre-hearing conference was held on July 12, 2018, at 10:00 a.m., to establish the issues and was attended by the Hon. Scotty McFarlan, who appeared on behalf of the Cabinet, and Appellant Aranda, who was not represented by counsel. The Hearing Officer pointed out to the parties that one of the elected employee Personnel Board Members was Heather Wagers, an employee of the Justice and Public Safety Cabinet, who normally recuses from these cases. No questions or comments were raised by the parties. There was discussion of Personnel Board procedures for an evidentiary hearing and the Appellant was advised to study the Interim Order that the Hearing Officer would issue as a result of the day's proceeding, and to retain it to use as needed. After the prehearing conference, a discovery request was made by the Appellant and responded to by the Appellee.

3. On the day of the hearing, the Appellee made an opening statement followed by the Appellant. **John Harrison** was the first witness to testify on behalf of the Appellee. After being sworn, he stated that he is employed at the Central Region Training Center and has worked for more than twenty-nine years for Corrections. He testified that he serves as a Training Instructor Coordinator II and oversees the Academy and implementation of lesson plans. He testified that use of force is taught during the initial training of Correctional Officers. The witness identified Policy 9.1 of the Kentucky Corrections Policies and Procedures (CPP), entitled *Use of Force and Mechanical Restraints*, and it was entered into the record as Appellee's Exhibit 1 (under seal) without objection.

4. The witness testified that during initial training, the employees are provided thirty (30) hours of training in three weeks, portions of which include use of force and restraints. He testified that the Appellant received this training during his first two weeks of employment in 2017 and that there is also an annual training on use of force. He stated that each officer is taught to use the least amount of force necessary and that there are a series of steps that they must go through to determine the appropriate amount of force to use. He identified Appellee's Exhibit 2, the *Institutional Pre-Service Academy 2017 Program Summary*, which outlined the training, and it was entered into the record without objection.

5. The Appellee then introduced a twelve and a half minute video of the extraction of the inmate from his cell and the interactions between the Appellant and the inmate thereafter, which includes the incident at issue. The video was entered into the record without objection as Appellee's Exhibit 3 (under seal). During the hearing, the video was reviewed by the witness and he testified regarding it. At the request of the Hearing Officer, he testified regarding what a Nova Shield is and how it is used. Mr. Harrison stated that a Nova Shield is a polycarbonate shield 28 to 30 inches wide and 36 to 48 inches high. He testified that it has tape on the exterior connected to a battery that emits a five second volt of electricity that, when applied to the inmate, allows the

officers to get control. He stated that during cell entry it is used for an officer to protect himself or others.

6. Mr. Harrison testified that in reviewing the video, the inmate was already extracted from the cell and was seated in a chair with hand and leg restraints when the Appellant used the Nova Shield. He testified regarding the three incidents of contact that he witnessed between the Appellant and the inmate. The first contact with the inmate was when the corner of the shield ran across the inmate's face, whether intentional or accidental. The second contact was a strike on top of the head. The third contact was a slap in the face with the shield, combined with the use of the shield's button to electrify the shield while it was on the inmate's face.

7. The witness was asked about the Appellant's contention that the inmate had taken hold of the Appellant's foot with his own during the incident. The witness testified that, while that can be possible under some circumstances, it was not in this case because, in looking into the issue of Appellant's use of force, the witness had sat in that chair, had his staff bind him with the restraints and took off his shoe to simulate the mobility of the inmate during the incident. He stated that he was unable to lift his heel and, therefore, it was not possible for the inmate to have pressed his foot on an officer's foot to warrant the Appellant's use of force with the shield.

8. The witness then testified that reactive force is an immediate response to a threat. He stated that if the inmate had pressed on the Appellant's foot with his own, then the Appellant's first tap of the shield to the inmate's face may have been the use of reactive force. However, he stated that neither the second tap with the shield nor the engagement of the shield's electricity was reactive force. He testified that everything he witnessed on the video was acceptable to a degree except for the engagement of the electricity.

9. The witness testified that ideally, because cell entries are common at the Kentucky State Reformatory, the Appellant should have been trained on cell entry/extractions and use of the Nova Shield. He stated that in this case, the Appellant was not trained on either, although the staff member bears some responsibility to say what they need. He testified that at the Academy they are taught to maintain composure and professionalism and to avoid the head and neck when using force. However, at the point the Appellant used the electrified Nova Shield to make contact with the inmate, the inmate had already been extracted from the cell and was fully restrained in a chair.

10. The next witness to testify on behalf of the Appellee was **Aaron Smith**, Director of Kentucky Correctional Industries (KCI). After being sworn, he stated that this was his thirty-first year at Corrections and, at the time of the incident, he was the Warden at the Kentucky State Reformatory and had been for four years. Prior to serving as the Warden, he was the Deputy Warden for two institutions. He identified: 1) Appellee's Exhibit 4, the Notice of Intent to Suspend the Appellant, 2) Appellee's Exhibit 5, the Letter of Suspension, 3) Appellee's Exhibit 6, a 2017 letter reducing an intention to suspend to a written reprimand, and 4) Appellee's Exhibit 7

(under seal), Kentucky Corrections Policy 9.17 entitled *Cell Extractions*. Mr. Smith testified that, with regard to this incident, he felt suspension was appropriate rather than dismissal. He provided that the Appellant's contention was that he was not properly trained on cell entries; however, the witness stated that he did not view this as a cell entry violation. The cell entry was over and the Appellant was fully restrained. Warden Smith stated that it was simply a use of force violation on an inmate who was fully restrained.

11. The Appellee rested.

12. The first witness to testify on behalf of the Appellant was **Jody Wade**, who has served as a Lieutenant at the Kentucky State Reformatory since March 2016 and has been employed with Corrections for more than four years.

13. After being sworn, he testified that on the day of the incident, February 18, 2018, he served as the shift supervisor in charge of overall operations, that he created the team for the cell extraction, and that he prepared the Extraordinary Occurrence Report documenting the incident. He testified that he is not aware of a list of those trained for cell extractions, but he believes that there are only two to three people who have been trained. He stated that cell extractions occur routinely without training for the officers and that there is a staff shortage.

14. The next witness to testify was **Coleman Morrell**, who appeared at the hearing telephonically. After being sworn, he testified that he is the Director of Private Prison Operations and has served for ten years as a Correctional Officer, Sergeant, Training Officer and Assistant Director at KCI. He stated that in 2013 he was responsible for developing a cell entry training policy to reflect the training's incorporation into policy. He stated the policy is that staff who use electronic devices shall have current credentials and that CPP 9.1 states that staff should be trained in approved methods and that cell entry is an approved method. He stated that if the inmate was not engaged in an aggressive act, it would be inappropriate to utilize the Nova Shield and engage the electricity. He stated that it is appropriate to use force to get the inmate in the chair and restrained with two leg, two ankle, and two wrist straps, but once in the chair the placement was successful. If the inmate had put his foot on top of the Appellant's while the inmate was restrained, then the Appellant only needed to step backwards.

15. The next witness to testify was **Lieutenant Jeffrey Royalty**. After being sworn, Mr. Royalty stated that he has been employed with Corrections for six years, including two and a half years as a supervisor. He stated that there was no cell entry training for the team until August 28, 2018, several months after this incident, and that, prior to the August training, it was essentially on-the-job training. He stated that he was present for the incident on this date, that they were short-staffed, and he did not see the inmate's foot on Appellant's. He testified that he received a written reprimand for this incident for failure to correct the Appellant's behavior.

16. The final witness to testify was **Captain Joshua Shank**. After being sworn, he testified that he has been a captain for two and a half years and spent 3 years as a relief officer. He stated that with use of force, all staff are taught to use the minimum amount of force necessary. He testified that the Appellant had informed him that he needed Cell Entry Training. Prior to the incident, he had not been trained and the witness had discussed the training needs of the staff multiple times with the Deputy Warden. On August 11, 2018, there was finally a week-long training for staff. The Appellant's August 11, 2018 Training Card for Cell Extractions, his Training Transcript, and the Shift Roster for February 18, 2018, were admitted as Appellant's Exhibits 1, 2, and 3, respectively without objection

17. The Appellant rested.

18. Each party made a closing statement. The Hearing Officer considered the entire administrative record.

FINDINGS OF FACT

1. The Appellant, Adam Aranda, was employed as a Correctional Officer with the Justice and Public Safety Cabinet, Department of Corrections, and was assigned to Kentucky State Reformatory. (Appellee's Exhibit 4)

2. Upon hiring with the Department of Corrections, the Appellant was provided initial training on Use of Force as a part of his initial three week Pre-Service Academy. (Appellee's Exhibit 2, Testimony of Harrison.)

3. The Department of Corrections established detailed policies regarding employee conduct, specifically Corrections Policies and Procedure (CPP) 9.1, *Use of Force and Mechanical Restraints*. (Appellee's Exhibit 1, Testimony of Harrison.)

4. A key provision of this policy is that "Only the minimum amount of force necessary shall be used to accomplish the purpose for which the use of force was required." (Appellee's Exhibit 1, Testimony of Hughes and Morrell.)

5. On February 18, 2018, the Appellant participated in the extraction of an uncooperative, belligerent inmate from his cell. (Appellee's Exhibit 3, Testimony of Hughes.)

6. As a part of his role with the extraction, the Appellant was provided a Nova Shield, a polycarbonate shield approximately 2 feet by 3 feet used to protect the employee and others from dangerous acts of non-compliant inmates. The outside of the shield has a tape that can be electrified by the user to shock an inmate to gain control. (Testimony of Hughes.)

7. Upon removal from the cell, the inmate was placed in a restraint chair with his wrists, arms, and ankles securely bound. (Appellee's Exhibit 3.)

8. While he was in the restraint chair, the inmate yelled, cursed, and insulted the Appellant for several minutes. After he was restrained and checked by medical staff, the inmate continued to insult Aranda, who remained in front of the inmate with his shield up, at which point one of the officers said, "We're good? Alright, guys let's go down here and debrief." (Appellee's Exhibit 3 at 9:25.)

9. The Appellant and other Correctional Officers turned and walked away from the inmate, but the inmate continued to berate the Appellant, and, after a few steps, the Appellant returned to the inmate, followed by the others. The Appellant positioned his right leg between the inmate's legs and pressed the shield onto the inmate's forehead while the inmate continued to insult the Appellant. The inmate then called the Appellant a derogatory name and told him to "Back up!" (Appellee's Exhibit 3 at 11:06).

10. The Appellant stood there for several seconds, then scraped the shield across the inmate's head, raised it, slapped the inmate on the head with the shield, and then lowered it again to press the electrified metal portions of the shield on the inmate's forehead. The Appellant then electrified the shield to administer an electrical current to the inmate while turning the shield from its existing vertical position to a horizontal position, which resulted in greater areas of contact between the Appellant's face and the electrified metal portions of the shield. The Appellant maintained the electrical shock to the inmate for approximately 5 seconds. (Appellee's Exhibit 3 at 11:10.)

11. Prior to February 18, 2018, the Appellant had not been trained in the use of a Nova Shield, but had been trained in Use of Force. (Testimony of Royalty, Shank, Appellant's Exhibit 1, 2.)

12. On February 27, 2018, Warden Aaron Smith issued the Appellant a notice of intent to suspend the Appellant for three (3) days for violation of CPP 9.1, *Use of Force and Mechanical Restraints*. The Appellant was provided an opportunity to respond with an interview, after which the Warden determined that a three (3) day suspension was appropriate and a letter of suspension was issued on March 8, 2018. (Testimony of Smith, Appellee's Exhibits 4 and 5.)

13. CPP 9.1, Section II provides, in pertinent part:

A. 4. Only the minimum amount of force necessary shall be used to accomplish the purpose for which the use of force was required;

...

G. Levels of Force

The degree of force applied in any given situation shall be in accordance with this policy and consistent with the degree of severity of the particular situation encountered

....

4. g. If an inmate is being subdued, care shall be exercised to avoid serious injury to an inmate's head, neck and any unprotected internal organs.

(Appellee's Exhibit 1.)

14. Appellant's witness Morrell and Appellee's witnesses, Hughes and the Warden, each testified that the Appellant's use of force in this incident was in violation of the Use of Force Policy. (Testimony of Morrell, Hughes, Smith.)

15. In reviewing the video of the incident, the Hearing Officer is troubled by the fact that the encounter with the restrained inmate had concluded and the Appellant and all other officers had walked away from the inmate at the direction of one of the officers. While the inmate continued to insult the Appellant, the Appellant made a conscious decision to re-engage the inmate by returning to him when no threat of physical force existed. The Appellant then placed his foot between the inmate's feet, scraped and hit the inmate's face with the shield. He then held the shield against the inmate's face and neck and electrified the shield for several seconds while turning it from a vertical position to a horizontal one to provide a greater area of contact between the inmates face and the electrified metal strips.

16. The Hearing Officer finds that the Appellant's actions were not the result of a lack of training, but a desire to punish the inmate for his cursing, insulting, and taunting the Appellant.

CONCLUSIONS OF LAW

1. The Appellant, Adam Aranda, engaged in misconduct in violation of 101 KAR 1:345 and Kentucky State Reformatory's *Use of Force and Mechanical Restraints* Policy 9.1 when he returned to a restrained inmate, and used a Nova Shield to scrape, hit the inmate in the head and applied an electric shock to the inmate's face for approximately five seconds.

2. The evidence of record reveals that the Appellant had previously been issued a written reprimand for a prior act of misconduct.

3. The Hearing Officer concludes that the Cabinet has met its burden of proof that the three-day suspension imposed upon Appellant was for just cause and was neither excessive nor erroneous.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the case of **ADAM ARANDA VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2018-067) BE DISMISSED.**

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen 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 exception 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 the 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 Brenda D. Allen this 18th day of January
2019.

KENTUCKY PERSONNEL BOARD

A handwritten signature in blue ink, appearing to read "Mark A. Sipek", is written over a horizontal line. To the right of the signature, the initials "MAS" are written in blue ink.

**MARK A. SIPEK
EXECUTIVE DIRECTOR**

A copy this day mailed to:

Hon. Oran S. McFarlan
Adam Aranda