

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-249

LEROY THOMAS III

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 2017 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 14, 2017, 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 19th day of April, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Adam Adkins
Mr. Leroy Thomas III
Mr. Scott Whitaker

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**V. FINDINGS OF FACT, CONCLUSION OF LAW,
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DEPARTMENT OF JUVENILE JUSTICE,**

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** ** * * *

This matter came on for an evidentiary hearing on January 26, 2017, at 9:30 a.m., at the office of the Personnel Board, 28 Fountain Place, Frankfort, Kentucky before the Hon. Darren L. Embry, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Leroy Thomas III, was present at the evidentiary hearing and was not represented by counsel. Appellee, Justice and Public Safety Cabinet, Department of Juvenile Justice, was present at the evidentiary hearing and represented by the Hon. Adam Adkins. Representative for the Department of Juvenile Justice, Division Director, Kris Mann, was present along with Paralegal, Lori Pool.

The Hearing Officer notes this appeal was filed with the Personnel Board on September 6, 2016. Appellant was suspended for two days without pay by letter dated July 7, 2016, for allegations of poor work performance. In this appeal, Appellant does not deny the allegations, but feels the punishment was too harsh. As relief, Appellant seeks to have the matter expunged from his record and to receive any back pay due.

This matter came on for a pre-hearing conference at 10:00 a.m., ET, on October 24, 2016. Following the pre-hearing conference, an Interim Order was issued directing the parties to mediation through the Personnel Cabinet.

The Interim Order following the pre-hearing conference, dated November 1, 2016, scheduled the evidentiary hearing to be held January 26, 2017, at 9:30 a.m., ET. The issue set forth in the Interim Order was the disciplinary action taken against the Appellant. The Appellee was assigned the burden of proof, which is by a preponderance of the evidence, to demonstrate the disciplinary action taken was neither excessive nor erroneous and was taken with just cause.

BACKGROUND

1. The Appellant has worked for the Department of Juvenile Justice for 17 years, and is currently working as the Juvenile Facility Superintendent I at the Frankfort Group Home. [Appellee's Exhibit 1]
2. The Appellant received a letter, dated July 7, 2016, indicating he was to be suspended from employment for 2 days: July 28 and July 29, 2016. The letter stated that the Appellant's suspension was pursuant to KRS 18A.095(1) and (8) and 101 KAR 1:345, Section 4. [Appellee's Exhibit 4]
3. The letter of suspension specifically alleges that the Appellant failed to send signed Commissioner's Warrants to the Kentucky State Police after two residents went AWOL on May 24, 2016. The letter states, "following the two residents going AWOL, you failed to send a signed copy of the Commissioner's Warrants and the DJJ Wanted-Absconder Notice Request for NCIC Entry and Cancellation Forms via facsimile to the Kentucky State Police Headquarters Communications Center for entry into LINK/NCIC. As required by DJJ policy, within two (2) hours of the escape, you failed to provide the Deputy Commissioner of Program Operations, Regional Division Director, Facilities Regional Administrator and Communications Director with the names of the youth, identifying information, narrative regarding the escape and youth's offense history." [Appellee's Exhibit 4]
4. The Appellant filed a timely appeal, received on September 6, 2016, alleging that his two-day suspension was not proper because: 1) he did not remember ever receiving a Commissioner's Warrant from the acting Commissioner, LaDonna Koebel; 2) he believes that the Commissioner's Warrant should be accessible somewhere on the DJJ portal; 3) he did not have access to his e-mail and he assumed that Mr. Barnes would send the proper emails; 4) he has not received any disciplinary or major corrective action in his 17 years with the Department of Juvenile Justice. [Appellee's Exhibit 1]
5. After the Appellee's opening statement¹ the Appellant, Leroy Thomas III, was sworn in

¹ Appellee's counsel made a brief opening statement where he stated that he did not believe that there was a dispute as to whether or not a violation occurred, but rather as to the severity of the punishment. He stated that the situation involved two youth going AWOL from the facility where Appellant was Superintendent. The two youth tested positive for drugs in the middle of the night, and were taken to the Frankfort Regional Hospital for testing. They went AWOL from the facility at approximately 1:00 a.m. Appellee states that there is a superficial understanding of the case, and the proper response to any youth going AWOL is to issue a Commissioner's Warrant within two hours. Appellant could not locate a Commissioner's Warrant. Appellant made 31 calls in an attempt to locate a Commissioner's Warrant. Another employee went to the facility to attempt to handle the situation, so the Appellant went to bed. Appellee states that the Commissioner's Warrant was in the Appellant's possession for months, and he did not properly pass it on to the channels he was supposed to - which was the direct cause of the confusion and

to testify. The Hearing Officer asked the Appellant to relay the facts surrounding the suspension as he understood them. Appellant stated that the cause of the suspension was related to the failure to complete a Commissioner's Warrant. He stated that Appellee's opening statement reflected, "pretty much what happened." Appellant stated that there were two youth who had allegedly taken drugs at the school, and were taken to the hospital where they went AWOL. He received the first call from Joey Caskey about what had happened. He stated that several calls were made to get the Commissioner's Warrant, locate the kids, and make sure the proper people were notified. Appellant stated that he was home. Appellant stated that every time he is sent a new Commissioner's Warrant he sends it to YSPS and the counselor there, and a lot of times the administration person. Appellant stated that Mr. Barnes was present at the group home that night, and he had dealt with AWOL situations in the past. He stated that Mr. Barnes could not locate the Commissioner's Warrant on his computer, and that one youth was apprehended soon after leaving the hospital, while the other remained at large.

6. The Appellee's first witness was the Appellant, **Leroy Thomas III**. The Appellee presented the Appellant with his personal statement about the events of May 24, 2016, which was admitted as Appellee's Exhibit 1. Appellee first addressed the Appellant's statement that he did not remember receiving a Commissioner's Warrant with LaDonna Koebel's signature. The Appellant agreed that he received a Commissioner's Warrant in February or March. The Appellant acknowledged that it was his responsibility to give the Commissioner's Warrant to Mr. Barnes. He had passed along the Commissioner's Warrant in the past. Appellant agreed that if he passed it along Mr. Barnes would have had access to it. Appellant also agreed with Appellee that he would not have needed access to his email if the Commissioner's Warrant had been disseminated. Appellant agreed that he had the ability to access his email remotely, and he had the ability to go into the facility that evening to deal with the issue. The Appellant agreed that Mr. Barnes had correctly followed procedure in past AWOL situations, but he felt that Mr. Barnes could have sent a statement without the Commissioner's Warrant. Appellant agreed that it was his ultimate responsibility to send the proper documentation in AWOL situations.

7. The Appellee then presented the Appellant with the Justice and Public Safety Cabinet, Department of Juvenile Justice Policy and Procedures, Policy No. DJJ 327, which was admitted as Appellee's Exhibit 2.

8. Appellee stated that, according to the disciplinary letter, Appellant was charged with violating Policy 327. Appellant stated that he acknowledged that he was in violation at the time of the event, and affirmed that acknowledgement at the hearing.

policy violation. Appellee stated that each time a new Commissioner is appointed the new Commissioner prepares a Commissioner's Warrant then passes it on to the Division Director, who then passes it on to the Superintendent, who is supposed to pass it on to whoever needs it at the facility. DJJ has undergone Commissioner changes in the Appellant's tenure. The Appellee states that the Appellant had inadvertently forgotten to pass on the new Commissioner's Warrant. Appellee states that the community and two youth were put at risk by the Appellant's mistake.

9. The Appellee then presented the Appellant with the Commissioner's Warrant, which was admitted as Appellee's Exhibit 3. Appellant agreed that the Commissioner's Warrant was a critical piece of information that needed to go to the Kentucky State Police. The Appellant stated that he did not know what an alternative disciplinary action should have been.

10. The Appellee then presented the Appellant with the disciplinary letter sent to the Appellant, which was admitted as Appellee's Exhibit 4. The Appellant agreed that he was in violation of policy and, as a result, was suspended for two days. The Appellee then concluded questioning.

11. The Appellant was given an opportunity to rebut or respond to any questions or statements by the Appellee, but chose to proceed with questioning from the Hearing Officer. The Hearing Officer then asked if the Appellant remembered why he did not pass along the Commissioner's Warrant. The Appellant responded stating that he thought it was just an oversight and that it was in no way intentional. The Hearing Officer asked the Appellant if he had ever been disciplined, which he responded saying no.

12. The Appellee then called **Kris Mann**, the East Region Director of the Department of Juvenile Justice, as their second witness. Mr. Mann stated that he has held his current position since September 2013, and has been with the Agency for 15 years and 7 months total. He stated that he was familiar with the policy and procedures for AWOL situations. He stated that AWOL is defined as a situation where a youth is considered to be outside of the authority or supervision of the department or agency without prior permission or consent. Mr. Mann stated that the DJJ Policy 327 is the guiding procedure for AWOL situations. Mr. Mann stated that per policy the Superintendent is to contact the Division Director to get the Commissioner's Warrant. Mr. Mann stated that in order to expedite the procedure he provides facilities with a signed Commissioner's Warrant ahead of time. He stated that from there the Superintendent is to contact the Kentucky State Police, the authority from youth's home community, and the authority from the area where the youth has gone AWOL. They then launch a collaborative search for the youth.

13. Mr. Mann stated that he had a specific memory of going over the importance of the AWOL procedure with the Appellant. Mr. Mann stated the Appellant had overseen six other AWOL situations that were handled correctly. Appellee then asked Mr. Mann what his understanding about the two youths. He stated that the youth appeared to be intoxicated and, upon the Contract Nurse's advisement, the youth were taken to the local emergency room. Two staff transported the youth to the Franklin Regional Medical Center, where they tested positive for benzodiazepine. The two youth were discharged from the hospital and, while in the parking lot preparing to return to the Group Home, they went AWOL. Mr. Mann stated that he learned of the situation the next morning around 6:50 a.m. when he awoke to missed calls on his personal and work cell phones. Mr. Mann stated that it was appropriate for the Appellant to contact him. He stated that there is to be verbal communication, but to Appellant's defense he had attempted to contact himself and Mr. Gilliam. Mr. Mann stated that the contact is supposed to be made regardless of the need for the Commissioner's Warrant.

14. Appellee presented Mr. Mann with a copy of the email exchange containing the Commissioner's Warrant, which was admitted as Appellee's Exhibit 5. He stated that the Commissioner's Warrant was sent to Appellant and was received by the Appellant on February 23, 2016. Mr. Mann stated that he woke on May 24, 2016, panicked, but was comforted by the fact that the Commissioner's Warrant should have been completed. He stated that, at that time, one youth had been apprehended, but the other was still at large. Mr. Mann stated that he was surprised that the apprehended youth was returned to the facility, because, per the Commissioner's Warrant, he should have been detained.

15. Mr. Mann stated that he had a hard time understanding whether or not the Appellant understood the magnitude of the oversight. Mr. Mann stated that it is the Superintendent's ultimate responsibility to complete the procedure requirements. Mr. Mann stated that he did not copy others on the dissemination of the Commissioner's Warrant because it is the Superintendent's discretion who is or is not given the Commissioner's Warrant.

16. Mr. Mann stated that he has worked as the Appellant's supervisor since 2012, but he has known the Appellant since he began with the Agency. Mr. Mann stated that the Appellant has not been disciplined prior to this incident. Mr. Mann stated that he felt that this issue warranted the two-day suspension because the Appellant went back to sleep after attempting to locate the Commissioner's Warrant. Mr. Mann stated that he does not weigh in on the actual discipline for employees. He stated that he only has the ability to initiate major corrective action requests. He stated that those who do make these disciplinary decisions consider the totality of the circumstances, and award discipline that is commiserate to violation. Mr. Mann stated, in his opinion, if one of the youth had been harmed, the discipline could have been dismissal, etc. He stated that, as a result, the two-day suspension was completely appropriate, and was neither excessive or erroneous.

17. Mr. Mann testified that the Commissioner's Warrant is important because the peace officers depend on the Warrant to take youth into their custody, and that the detention centers require the Warrant to detain youth. He stated that without the Commissioner's Warrant, law enforcement would have no jurisdiction to pick up the youth. He stated that it put the staff in a difficult position to have to handle the youth that was attempting to go AWOL in a facility that was not equipped to do so. He stated that he felt that the Appellant should have been present to assist his staff that evening.

18. The Hearing Officer then asked Mr. Mann who was responsible for making the decision regarding the Appellant's suspension. Mr. Mann stated that these actions go up the chain of command through his Deputy Commissioner and, from there, the DJJ Personnel Branch looks at it, the Commissioner's office signs off on it, and, at some point, the Legal office reviews it. The Hearing Officer asked if this was the standard punishment for this situation. Mr. Mann stated that he was not sure because this situation had never occurred. The Hearing Officer asked if there was anything comparable to this disciplinary action. Mr. Mann stated that he was not sure.

19. The Appellant declined to question Mr. Mann. The Appellee then began redirect, with Mr. Mann showing what had been marked as Appellee's Exhibit 4. The Appellee asked how the disciplinary letter had been signed. Mr. Mann stated that the letter had been signed by Mark Cook, Deputy Commissioner, Program Operations. Mr. Mann stated that something like this had never happened before because the Superintendents take these types of situations so seriously.

FINDINGS OF FACT

1. Appellant, Leroy Thomas III, was the Facility Superintendent I at the Frankfort Group Home on May 24, 2016, when two youth went AWOL.
2. Appellant was notified that the youth had gone AWOL at 1:15 a.m. Appellant made several calls in an effort to locate the Commissioner's Warrant, but was not successful. Appellant did not send a signed Commissioner's Warrant to the Kentucky State Police within two hours of escape as required by Department of Juvenile Justice Policy 327.
3. Appellant received said Commissioner's Warrant on February 23, 2016, and failed to pass it along to the proper employees within his facility at that time.
4. Proper procedures were not followed on May 24, 2016, violating Department of Juvenile Justice Policy 327.
5. Prior to this incident, Appellant had never been disciplined by the Department of Juvenile Justice.
6. As a result of the May 24, 2016 policy violation, Appellant was suspended from work for two days: July 28, and July 29, 2016.

CONCLUSION OF LAW

The Hearing Officer concludes as a matter of Law that Appellant committed misconduct per 101 KAR 1:345 so egregious as to justify a two-day suspension without pay.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **LEROY THOMAS III V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF JUVENILE JUSTICE, (APPEAL NO. 2016-249)** 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 part 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 Darren L. Embry** this 14th day of March, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Adam Adkins
Leroy Thomas III