

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-301**

LLOYD FETZER

APPELLANT

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

**CABINET FOR HEALTH AND FAMILY SERVICES
J. P. HAMM, APPOINTING AUTHORITY**

APPELLEE

*** **

The Board at its regular November 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated September 30, 2015, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be, and they hereby are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **DISMISSED**.

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

SO ORDERED this 24th day of November, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Kathleen Hines
Hon. Clayton B. Patrick
J. P. Hamm

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VS.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
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APPELLEE

** ** ** ** **

This matter came on for evidentiary hearing on June 29, 2015, at 10:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Geoffrey B. Greenawalt, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Lloyd Fetzer, was present at the evidentiary hearing and was represented by the Hon. Clayton B. Patrick. The Appellee, Cabinet for Health and Family Services, was present at the evidentiary hearing and was represented by the Hon. Carrie Cotton.

The issue at the evidentiary hearing was propriety of the suspension of the Appellant from his position as a Correctional Officer with the Department for Behavioral Health Developmental and Intellectual Disabilities, Kentucky Correctional Psychiatric Center (KCPC), from duty and pay for a period of three days effective November 18, 2014, through November 20, 2014. The burden of proof was upon the Appellee to demonstrate by a preponderance of the evidence that said penalization was neither excessive nor erroneous under the circumstances and was taken for just cause.

BACKGROUND

1. The Appellant, Lloyd Fetzer, was suspended from duty and pay from his position as a Correctional Officer with the Department for Behavioral Health Developmental and Intellectual Disabilities, Kentucky Correctional Psychiatric Center (KCPC), for a period of three working days effective November 18, 2014, through November 20, 2014.

2. The Appellant timely filed his appeal with the Personnel Board on November 14, 2014, appealing from said suspension.

3. The first to testify at the hearing was **Officer Horace Klinglesmith, Jr.** Officer Klinglesmith has been a Correctional Officer at KCPC for approximately eight years and has been on the third shift for approximately four years. He testified that the third shift begins at 11:00 p.m. and ends the following morning at 7:00 a.m. Officer Klinglesmith stated that the incident in question took place in the Baker Unit, which contained twelve cells to the right and twelve cells to the left of the control panel, which is a big open space with windows and monitors that allows the control panel Officer to see the entire unit, hallway, and intensive care room. Officer Klinglesmith stated that the control panel was also wired for sound and is fairly secure so that if for some reason the sound is off in the control panel you cannot hear what is going on outside of it.

4. According to Officer Klinglesmith, the control panel officer's duty is to watch the monitors, answer the phone and keep track of the patients and employees going on and off the unit. According to Officer Klinglesmith, the panel officer's head must be moving in order to properly keep an eye on the unit. He stated that he has known the Appellant for approximately three years and has no ill will towards him.

5. Appellee's Exhibit 1 was introduced into the record and is Officer Klinglesmith's written statement regarding the occurrence which took place on September 11, 2014, between the hours of 4:00 a.m. and 5:45 a.m. Officer Klinglesmith stated that the statement contained on Appellee's Exhibit 1 is correct. According to him he caught the Appellant sleeping on a couple of occasions that evening. On one occasion, he resorted to hitting the control panel wall with his flashlight in order to get the Appellant's attention. Later in the morning at approximately 4:45 a.m. a second incident occurred. On this occasion, Officer King was bringing patients back from the lab and had difficulty getting the Appellant's attention in order to let them back in the unit. According to Officer Klinglesmith, he was making his rounds at the time and only is aware of the fact that Officer King had problems getting into the unit after radioing the Appellant to allow her in.

6. At this juncture of the hearing, the Appellant conceded the second allegation contained on his suspension letter, marked as Appellee's Exhibit 12. This allegation resulted from the Appellant's unsatisfactory performance of his duties and concerned the Appellant's failure to accurately record his observations when he was assigned to a one-on-one suicide level watch on October 13, 2014.

7. Finally, Officer Klinglesmith testified that a Correctional Officer carries keys and cuffs and can open up cell doors, but only the panel officer can open the panel door and the doors leading in and out of the unit and into the hallway.

8. On cross-examination, Officer Klinglesmith admitted his written statement marked as Appellee's Exhibit 1 did not specifically indicate that he used his flashlight to gain the attention of the Appellant. Officer Klinglesmith could not explain why he failed to note the same but reiterated he actually did use his flashlight (along with calling out to the Appellant) on that occasion in order to get the Appellant's attention. According to Klinglesmith, he was standing on the right side of the control panel where the Appellant should have been able to see and hear him. Officer Klinglesmith stated he called out "Mr. Fetzer," then hit the wall with the end of his flashlight. Eventually the Appellant, who had been sitting in his chair, slumped over with his eyes closed, jerked up and unlocked the door.

9. Officer Klinglesmith admitted that someone could have their eyes closed and not be asleep. However, he then stated that a panel control officer should not be doing that and must be keeping his eyes on things at all times. According to Officer Klinglesmith, he observed the Appellant on this particular evening with his eyes closed for two or three minutes at a time. It well could have been longer, but since he had rounds to make, he could not just stand there to be certain. He also advised the Appellant to stand up and move around a couple of times to help him stay awake. Again, Officer Klinglesmith stated he witnessed the Appellant sitting in his chair with his head down, his arms crossed and his eyes closed. He could not state exactly how long he remained in that position as the unit was full and he had rounds to make.

10. The next to testify was **Officer Glenda King**, who was also a Correctional Officer at KCPC. Ms. King is now retired. On September 11, 2014, Officer King was working the third shift at KCPC. On this particular evening she had trouble getting into the Baker unit with three patients she was walking back from the Alpha or "lab" unit. Officer King testified that it is protocol for a control Officer in the departure unit (Alpha) to radio ahead to the control Officer in the destination unit (Baker) informing him that an officer and patients were on their way to the (Baker) unit. By "calling out" Officer King, the control Officer in the lab unit was making everyone (including the Appellant) aware that three patients were on their way to Baker unit from the lab with one officer. The purpose of calling out an officer is to let everyone (including the control panel officer) know they were coming and to keep an eye on them in case anything happened.

11. It is noted that Officer King is a small person. She noted the three patients she was escorting from the lab unit to Baker unit were all male and some were new which meant she was not aware of their particular habits. It was her duty to pat the patients down then seek entry into the Baker Unit. Officer King signaled the Appellant to let her in the Baker unit by waving her hands over her head. Some of the patients also started waving over their heads to the Appellant because it was the middle of the night and they wanted to get back to bed. Officer King stated that it could have been seven to ten minutes or longer before the Appellant let her in the Baker unit. She noted this was her best estimate and that she was not wearing a watch.

Officer King stated that eventually Captain Griffin got a hold of the Appellant via radio and instructed him to allow Officer King and the three patients into the Baker unit. Later that evening, Captain Griffin asked Officer King about what had happened and why she could not get into the unit. She instructed her to write the statement which is marked as Appellee's Exhibit 2.

12. Officer King also testified regarding the first instance during the evening in question in which the Appellant was allegedly asleep. According to her, on this occasion, she was seeking entry into the Baker unit but could not get the Appellant's attention. Finally, Officer Klinglesmith came up to the panel, tapped it with his flashlight and eventually got the Appellant's attention so that she could enter into the unit.

13. On cross-examination, Officer King testified the Appellant copied the radio call that she and the inmates were on their way from Alpha to Baker. She then stated it could have taken three to four maybe five minutes at the longest to get there, but again noted she never timed it. During this incident Officer King could see the Appellant in the Baker unit control panel. According to her, once called out, the control officer at the destination unit is supposed to be on the lookout for her arrival and it should never have been necessary for her to do anything extraordinary to get his attention. Finally, Officer King testified that during both the alleged occurrences, she could only see the back of the Appellant's head and could not state whether or not he was asleep.

14. The next to testify was **Ms. Jennifer Saroka** who is the Director of Human Resources and Staff Development at KCPC. Appellee's Exhibits 3, 4, and 5 were entered into the record. It should be noted that Appellee's Exhibit 5 was entered over the Appellant's objection that the same was not noted on the suspension letter marked as Appellee's Exhibit 12.

15. Appellee's Exhibit 6, 7 and 8 were introduced into the record. Appellee's Exhibit 6 and 7 had to do with the sleeping incidents Ms. Saroka was working on at the time Captain Darlene Brown came to her regarding the second alleged incident involving the one-on-one suicide watch and the Appellant's alleged failure to properly document the same. Again, at this time, the Appellant stipulated that the suicide watch issue noted on the suspension letter marked as Appellee's Exhibit 12 did in fact occur.

16. According to Ms. Saroka, she spoke only with Captain Brown and Captain Griffin regarding the Appellant's alleged sleeping events. After investigating the incidents, she forwarded the requests for discipline to Shawn Estep asking that action be taken against the Appellant. She noted it is not her duty to determine or recommend the level of disciplinary action to be taken. She also noted that she reviewed the coaching log for the Appellant, which notes the informal coaching done with employees before any formal disciplinary action is taken. Appellee's Exhibit 9 was introduced into the record and is a copy of the Appellant's Coaching

Log. According to Ms. Saroka, it appeared that the Appellant had some difficulty adhering to the rules. Ms. Saroka also viewed the video disc from the early morning hours of September 11, 2014, which disc was eventually marked as Appellee's Exhibit 17.

17. Appellee's Exhibit 10 was introduced into the record and is "still" pictures taken directly from the video of the morning in question. According to Ms. Saroka these pictures demonstrate that the Appellant did not move for over twenty minutes during which time he was slumped forward. Ms. Saroka also reviewed the Appellant's Training Log which was marked and entered into the record as Appellee's Exhibit 11. The Training Log demonstrates the Appellant was trained on the rules regarding sleeping while at work and suicide precaution. Based upon her review of the documents and the video in question, it was Ms. Saroka's opinion that the Appellant failed to promote the safety of his coworkers and residents at KCPC.

18. On cross-examination, Ms. Saroka admitted that although the Appellant appeared to be sleeping on the video disc, she never personally observed the Appellant sleeping during the morning hours of September 11, 2014. Ms. Saroka also testified it is approximately fifty yards between Alpha Unit and Baker Unit and rather than five to seven minutes, it would take more like one minute to traverse between the two.

19. Appellee's Exhibit 12 was introduced into the record and is a copy of the Appellant's suspension letter. Also, Appellant's Exhibit 1 was introduced into the record and is a copy of the written statement from Correctional Officer Rose indicating he never observed the Appellant sleeping on September 11, 2014.

20. The next to testify was **Mr. Jack C. Barnett**, who has been a Human Resource Administrator with the Cabinet for Health and Family Services for approximately four and a half years. Mr. Barnett was assigned to the Appellant's case. He reviewed the documents requesting the major disciplinary action. He noted that the suspension letter, which is Appellee's Exhibit 12, was prepared by himself for Howard J. Klein's approval and signature. Mr. Barnett could not remember reviewing the Appellant's Training Log, but did review several hours of the videotape of the morning in question. He also reviewed the policies marked as Appellee's Exhibits 3, 4, and 5; the statements marked as Appellee's Exhibits 1 and 2; and Appellant's Exhibit 1. Mr. Barnett noted that he never spoke to Officer Klinglesmith, Officer King, or Officer Rose regarding this incident. He also reviewed the documents marked as Appellee's Exhibits 6, 7 and 8. According to Mr. Barnett he considered comparable actions and attempted to recommend consistent disciplinary action against the Appellant. Appellee's Exhibits 13, 14 and 15 were introduced into the record and according to Mr. Barnett, were documented disciplinary action taken under similar circumstances. According to Mr. Barnett, the three-day suspension of the Appellant was both fair and consistent with previous disciplinary actions taken by the Appellee.

21. On cross-examination, Mr. Barnett admitted the Appellant's suspension letter referenced a violation of KCPC's Standard Practice, HR-16, while the disciplinary actions taken under Appellee's Exhibits 13, 14, and 15 did not. He also admitted the disciplinary action taken under Appellee's Exhibit 14 involved an employee who had a written reprimand prior to his suspension. Mr. Barnett further admitted this was the Appellant's first disciplinary action and that he did not receive a warning or a reprimand as a result of this incident. However, Mr. Barnett stated that a three-day suspension was fair and consistent because it occurred in the psychiatric facility where safety is paramount. He noted that a control officer who is inattentive puts everyone in danger and constitutes a serious offense. According to Mr. Barnett, progressive disciplinary action is not necessarily applicable when there are major safety concerns.

22. Mr. Barnett admitted that the recommended suspension was based upon the fact the Appellant had been asleep on more than one occasion during the morning hours of September 11, 2014. According to Mr. Barnett, had the Appellant not actually been asleep, he was being inattentive so the disciplinary action was still warranted. Mr. Barnett testified that he relied upon the videotape of the incident along with the employees' statements marked as Appellee's Exhibits 1 and 2. Upon further review, Mr. Barnett admitted that none of the statements stated conclusively that the Appellant had been asleep.

23. On redirect, Mr. Barnett noted the suspension letter marked as Appellee's Exhibit 12 reflected the Appellant was being suspended as a result of two separate allegations. According to Mr. Barnett, the second "suicide watch observation" charge did not influence his decision regarding the Appellant's suspension. According to Mr. Barnett, as a result of the "suicide observation" charge, he considered adding another day of suspension, but after discussing the matter with Howard J. Klein, it was decided to stay with the three day suspension based principally upon the sleeping incidents.

24. The next to testify was **Mr. Howard J. Klein**, the Division Director of Human Resources and the Appointing Authority for the Cabinet for Health and Family Services, Office of Human Resource Management. Mr. Klein makes the final decision on the appropriate level of disciplinary action taken against Cabinet employees. He relies mainly upon his human resource administrators to investigate requests for disciplinary action and to suggest the appropriate level of discipline to be taken in each particular instance. He reviews the disciplinary letters prepared by the HR Administrators and comes to a decision regarding the appropriateness of the disciplinary action suggested therein.

25. According to Mr. Klein, in this particular instance, the Appellant's three-day suspension was appropriate. He noted it could have been worse and that the Appellant was fairly lucky he stayed with the three day suspension (which according to Mr. Klein was definitely the minimum). According to Mr. Klein, there was little distinction between whether the Appellant was being grossly inattentive or had actually been asleep on the job, and that either way, he still had the same issue with the Appellant's actions. In the end, the Appellant's actions placed a Correctional Officer in the unsafe position of being trapped in a hallway outside the Baker unit while being outnumbered by prisoners. According to Mr. Klein all employees should remain awake or attentive while on duty.

26. On cross-examination, Mr. Klein reviewed the suspension letter, marked as Appellee's Exhibit 12, and acknowledged the Appellant had been suspended based upon two separate charges. According to Mr. Klein, had the sleeping incidents never occurred, he still would have suspended the Appellant for failing to properly note his suicide watch observations. However, rather than three days, the suspension would only have been for one day.

27. The next to testify at the hearing was the Appellant, **Mr. Lloyd Fetzter**. According to Mr. Fetzter he has been with KCPC for three years and is Security Officer.

28. According to the Appellant, when a Correctional Officer and/or patients are moving from one unit to the other, the panel officer from the departure unit radios ahead to the panel officer at the destination unit to let them know they are coming. The Appellant testified it is a short distance between Alpha and Baker Units. He stated that upon receiving a radio call out, he is required to accurately note the time of the patient's departure and arrival. The protocol is once the Correctional Officer and patients are back to his unit, they are supposed to radio him, travel to the front glass of the panel, pat down the patients, then give him the hi-sign and/or ring the buzzer to let him know that they are ready to safely re-enter the unit. The Appellant reviewed the pictures marked as Appellee's Exhibit 10 and stated it appeared to him as if he was simply looking down on his paperwork. Regarding the incident involving Officer King trying to gain access into the Baker unit, the Appellant testified he never saw her or the inmates she had been escorting. He also could not remember receiving a radio call out on this occasion. What he did recall and stated with certainty, is that he did not fall asleep at any time on September 11, 2014.

29. On cross-examination, upon review of Appellant's Exhibit 1, the Appellant acknowledged Officer Rose had only been on Unit B during the morning of September 11, 2014 for a short period of time and for the limited purpose of obtaining time and temperature. The Appellant testified that during said morning, Officer KlingleSmith never told him to get up and move around in order to help stay awake. He also noted that Officer KlingleSmith is very impatient, and probably did do something to get the Appellant's attention just to make him move

faster. In any event, regarding the testimony of Officer Klinglesmith, the Appellant stated he could not remember the "flashlight" incident as a lot goes on during the course of a shift. Appellee's Exhibit 16 was entered into the record and is a copy of the Appellant's statement. Finally, the videotape was marked as Appellee's Exhibit 17 and entered over the Appellant's objection.

30. This matter is governed by KRS 18A.095(1) which states:

A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause.

31. The Hearing Officer has considered the entire administrative record, including the testimony and statements therein.

FINDINGS OF FACT

1. The Appellant, Lloyd Fetzer, a classified employee with status, was suspended from duty and pay from his position as a Correctional Officer with the Department for Behavioral Health Developmental and Intellectual Disabilities, Kentucky Correctional Psychiatric Center (KCPC) for a period of three working days effective November 18, 2014, through November 20, 2014. According to the suspension letter marked as Appellee's Exhibit 12, the Appellant's suspension was based upon two separate allegations, 1) for lack of good behavior and alleging that on September 11, 2014, the Appellant had been sleeping on the job; and 2) for unsatisfactory performance of duties and alleging that the Appellant failed to properly record a suicide watch observation. The Appellant conceded his guilt as to the second allegation, the same being the unsatisfactory performance of the duties involving his failure to properly record his suicide watch observations. As for the first allegation, the same being lack of good behavior for allegedly sleeping on the job, the Appellant vehemently denies the same.

2. Human Resource Administrator Barnett stated on the record that the Appellant was suspended because he was caught sleeping on the job. The Appellee's Appointing Authority, Howard J. Klein, stated that for the most part, he relies upon his human resource administrators' investigations and recommendations when determining the appropriate level of disciplinary action to be taken, although he does not rubberstamp the same. According to Mr. Klein, he reviews the proposed suspension letters prepared for his signature, and signs the same only after discussing them with his associates.

3. Howard J. Klein testified the Appellant would have received a one-day suspension for his failure to properly record the suicide watch observations as noted under allegation two set forth on the suspension letter, marked as Appellee's Exhibit 12. He further testified that based upon his understanding of this matter, the Appellant's three day suspension from duty and pay was not only reasonable but was the minimum suspension he could have received.

4. The written statement and testimony of Officer Klinglesmith demonstrates that he was unable to state conclusively that the Appellant was asleep on September 11, 2014. Further, the testimony of Officer King does not demonstrate the Appellant was asleep on September 11, 2014. In fact, she testified she could only see the back of his head and never saw his face during the incidents in question. Finally, the video marked as Appellee's Exhibit 17 is inconclusive as to whether or not the Appellant was actually asleep, although it does demonstrate the Appellant was not moving for a good portion.

5. However, Officer Klinglesmith testified he witnessed the Appellant sitting in the control panel with his arms folded in his lap, his head slightly down and his eyes closed. As stated above, the videotape marked as Appellee's Exhibit 17 demonstrates the Appellant was in a similar position for an extended period of time (but does not verify that his eyes were closed at the same time). In addition, through the testimony of Officer Klinglesmith and Officer King, it is clear Officer King had to resort to unusual measures in order to gain access into the Baker unit, which access was controlled by the Appellant, on two occasions during the morning hours of September 11, 2014. In one instance, Officer Klinglesmith helped Officer King gain entry into the Baker unit by banging the butt end of his flashlight against the panel wall in order to get the Appellant's attention and in the other instance, having failed to notice Officer King and her patients jumping up and down and waving their hands over their heads, a supervisor finally got the Appellant's attention by way of radio. Although there is no direct or indisputable evidence the Appellant was sleeping at some juncture during the morning in question, it is apparent the Appellant was grossly inattentive to his duties as the control panel officer on the morning in question on at least two occasions.

6. Appellee's Exhibit 4 plainly states an employee shall not sleep either on or off duty while on facility grounds. Said rule does not prohibit an employee from being inattentive while either on or off duty. As such, technically speaking, it was incumbent upon the Appellee to demonstrate by a preponderance of the evidence that the Appellant was asleep at some point during his September 11, 2014 shift as the Baker unit Panel Officer.

7. Taken as a whole, the Appellee has demonstrated the Appellant was grossly inattentive on at least two occasions during his September 11, 2014 shift as the Baker unit Panel Officer. Being no other reasonable explanation for his prolonged inattention, and based mainly upon Officer Klinglesmith's personal and direct observation that the Appellant was sitting slumped over in his seat with his hands folded in his lap and his eyes closed, it is found that the Appellant was in fact asleep during his shift on the morning of September 11, 2014.

8. Given the vital role a control panel officer plays in conducting the flow of traffic in and out of his/her particular unit, and given the safety of the employees and residents of the Kentucky Correctional Psychiatric Center is paramount and the number one consideration of the institution, a control officer found sleeping while on duty is grounds for major disciplinary action, including a three day suspension from duty and pay.

CONCLUSIONS OF LAW

1. The Appellant, a classified employee with status, filed his appeal with the Personnel Board on November 14, 2014, appealing from his three-day suspension from duty and pay from his position as a Correctional Officer with the Department for Behavioral Health Developmental and Intellectual Disabilities, Kentucky Correctional Psychiatric Center (KCPC) for a period of three working days effective November 18, 2014, through November 20, 2014.

2. The Appellee has demonstrated by a preponderance of the evidence that the disciplinary action taken against the Appellant, the same being a three-day suspension from duty and pay from his position as a Correctional Officer, was neither excessive nor erroneous and was appropriate under the circumstances.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **LLOYD FETZER VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2014-301)** 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 Geoffrey B. Greenawalt** this 30th day of September, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPERKO
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Carrie Cotton
Hon. Clayton B. Patrick