

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-131**

BARBARA G. WHITNEY

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 January 2016 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated December 21, 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 13th day of January, 2016.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Angela Cordery
Barbara G. Whitney
Bobbie Underwood

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DEPARTMENT OF CORRECTIONS**

APPELLEE

This matter came on for an evidentiary hearing on October 1, 2015, at 9:30 a.m., at the offices of the Kentucky Personnel Board, Frankfort, Kentucky, before Hearing Officer E. Patrick Moores. The proceedings were recorded by audio-video equipment pursuant to the authority found at KRS Chapter 18A.

The Appellant, Barbara G. Whitney, was present and was not represented by legal counsel. The Appellee, the Department of Corrections (hereinafter DOC), was represented by the Hon. Angela Cordery, of the Justice and Public Safety Cabinet, Office of Legal Services.

I. STATEMENT OF THE CASE

1. **Barbara G. Whitney** appeals the DOC's decision of June 2, 2015, to suspend her from duty and pay for five days from her services as a Correctional Officer at the Western Kentucky Correctional Complex (hereinafter WKCC). The notice of the disciplinary decision was issued by letter from Steve R. Woodward, Warden, stating that she had improperly removed restraints from an inmate she had transported to a hospital without notifying and obtaining permission from the correctional institution. Pursuant to KRS 18A.095 and 101 KAR 1:345, Section 1, she was charged with Misconduct and violation of WKCC Policy and Procedures.

2. The letter from Warden Woodward informed Ms. Whitney that the DOC found sufficient evidence that on May 1, 2015, she and another Correctional Officer transported two inmates on a medical trip to the Crittenden County Hospital to undergo routine medical screenings. She had failed to retrieve the required state issued cell phone with the hospital bag for the transport of the two inmates, and as a result she did not make the required contact with the institution on their arrival, when she could have used the one of the hospital's landline phones. Further, she was charged with failing to obtain approval from her supervisor to remove the belly chain and black box from one of the inmates, to allow her to undergo ultrasound and mammogram procedures, as she could not assume the supervisory captain would have given his approval.

3. The Warden's letter stated she failed to comply with the requirements under WKCC Transportation Post Order #17, which requires the correctional officer performing an inmate transport to contact the institution upon arrival at the destination and again upon departure from the destination. Warden Woodward also noted in his letter informing Ms Whitney of his disciplinary action that she violated Policy and Procedures Order 9.9(III)(A)(1)(e) that requires "All transportation officers shall be equipped with a state cell phone," and WKCC Policy and Procedure 9.9(III)(F)(7) that requires all restraints "Once applied, shall not be removed unless planned, such as in . . . hospital treatment and unless adequate security is ensured. Any removal of restraints shall only occur with approval from the warden or his designee, unless an emergency and a life-or-death situation exists."

4. Ms. Whitney filed a timely appeal with the Kentucky Personnel Board on June 25, 2015, in which she claimed she was receiving unfair punishment and unfair due process. She alleged a violation of time constraints and that the evidence of the charges against her was based on hearsay evidence.

5. A Pre-Hearing Conference was held before a Hearing Officer of the Kentucky Personnel Board on August 19, 2015, and the issue presented was whether the DOC's decision to suspend Ms. Whitney was taken with just cause and that the penalty of termination was neither excessive nor erroneous. The Appellee had the burden of proof, which is by a preponderance of the evidence.

6. The Evidentiary Hearing was conducted on October 1, 2015. Opening Statements were made by both parties. At the conclusion of the presentation of the evidence, the matter was submitted to the hearing officer for a finding of facts, conclusion of law and recommended order.

II. STATEMENT OF FACTUAL EVIDENCE PRESENTED

1. **Kimberly Balentine** is a Correctional Officer who also works in security for WKCC. This incident involved her first hospital transportation. She testified that medical trips involve dealing with people and equipment, and provides more opportunities for inmates to do something and to pick up something to injure themselves or other people. As a result the inmates are required to be restrained with handcuffs, shackles on their legs, and a belly chain connecting with the cuffs and shackles.

2. Balentine testified that she drove the transport vehicle and it was on arriving at the hospital that they became aware they did not have the state cell phone. Once they got inside, Whitney told her not to worry and that everything would be okay. She said they then got separated and she took the inmate she was assigned to guard to get examined. She said she had to remove one cuff restraint at a time to allow the inmate to remove her garment to be examined. She said that they are required to call to get authorization to remove any restraint but they were unable to do so without the cell phone.

3. Balentine said that when they returned to the WKCC facility they got the inmates back into their Compound, returned the equipment and turned in the paperwork. She said she was later approached by Senior Captain Roland Woodrum to obtain her explanation of what happened on the trip and she also talked to Lt. Jon Tangerose. She stated that she was given more training on how to properly handle medical transportation matters.

4. **Donald Konias** is a Sergeant employed at the WKCC. On the day of this incident he was working the Sally Port entrance and when Balentine and Whitney approached in the vehicle they were required to get out and turn in their cell phone while he searched the vehicle for contraband. He had told Balentine that she could get the phone back as they were leaving but that he learned later that she apparently forgot to retrieve it.

5. Konias testified that when he discussed with Whitney what had happened at the hospital, she told him that since she did not have the phone to obtain authorization she believed that Captain Gaines would have granted her authorization to remove the restraints to allow the inmate to raise her arms for the mammogram, as he had done many times previously, so she proceeded accordingly.

6. **Brannon Gaines** is a Captain at the WKCC, and on the day of the incident giving rise to this disciplinary action he was serving as the day shift supervisor. He testified that on medical trips if it becomes necessary for a correctional officer to remove any restraints from an inmate, a call must be made to the facility for permission. He said the principal reason for this requirement was safety and security and that approval depends on the inmate's history and circumstances.

7. Gaines said he discussed the circumstances concerning the restraints issue with Sgt. Konias. He said that he then contacted Ms. Whitney and learned that she had removed a restraint on an inmate who had to be examined on a mammogram, thinking that it would be approved. He said an investigation was requested. The correctional officers were then given training regarding the procedures for operating with a restrained inmate.

8. **Jonathon Tangerose** is a Lieutenant with WKCC. He prepared the report on the investigation of the incident that occurred at the hospital on May 1. His report included statements prepared by Officers Balentine and Whitney concerning the unauthorized modification of restraints. He said his only involvement was sitting in on the investigation and preparing the report.

9. **Roland Woodrum** is a Senior Captain at WKCC and oversees the performances of all three shifts. He also does investigations into matters involving the institution's personnel and conducted an investigation into the incident of the inmates receiving restraint modification from Correctional Officers Whitney and Balentine, without receiving authorization.

10. Woodrum interviewed Whitney and Balentine, who reported to him that on May 1 they picked up the transport equipment, weapons and cell phone and placed it in the transport vehicle and brought the vehicle to the compound's Sally Port where it was inspected by Sergeant Konias. He told Balentine to put the cell phone in the compound control center where they could pick it up as they were leaving. Woodrum's report notes that the correctional officers forgot to retrieve the cell phone, which they did not realize until they were arriving at the Crittenden County Hospital. When they were confronted with the requirement of modifying the restraints so the inmates could raise their arms for the mammogram, Whitney reportedly told Balentine that it would be alright to modify the restraints, as there was a standing understanding with Cpt. Gaines if the inmates are faced with a circumstance where they required modification of their restraints. Woodrum's investigation disclosed that Cpt. Gaines had no such understanding with any officer.

11. Woodrum testified that he reviewed the investigation and all the statements and put together his report that was sent to the Deputy Warden and eventually to Warden Woodward. He said his report summarized all the evidence and the policies and procedures that were violated.

12. Woodrum concluded from his investigation and reported that Officer Whitney had violated several WKCC General Post Orders and several WKCC Policies and Procedures, in addition to DOC policy, which he enumerated in the report prepared to be presented to the Warden. At the request of the warden, Woodrum did a further review of all the evidence of the circumstances of the medical transport. He subsequently prepared an addendum to the report providing more detailed information concerning the evidence he gathered from his discussions with Officer Whitney and the other witnesses having knowledge of the events.

13. **Steve Woodward** is the Warden of WKCC, having served more than 25 years with the DOC with 15 of those years in an administrative role. He testified that when he reviewed the investigative reports, he considered the factors of Whitney's previous disciplinary five-day suspension and that WKCC has previously sought termination of her, and that DOC practices progressive discipline, all of which led him to believe that the ten-day suspension was appropriate. After he sent Whitney a letter of Notice of Intent to suspend her, he offered her an opportunity to an interview and to provide a statement of her actions, which she accepted. Following the interview with Whitney, Warden Woodward said he had a "moment of clarity" and after requesting a follow-up to the investigation from Senior Cpt. Woodrum, he decided to reduce the suspension to five days. He said she had two years of a good employment record since her previous five-day suspension.

14. Warden Woodward said he believed the five-day suspension was appropriate and not excessive or erroneous. He testified that Officer Whitney had the responsibility to know the DOC General Orders and the Policies and Procedures. He noted that she chose to modify the restraints without obtaining authorization. Warden Woodward described how the transportation trip escorting inmates is the most dangerous exposure of risks of danger to the officers and to the public, who are put at risk that something could happen and someone could get shot. He said the

consequences of such an incident would be heavy. Thus he adjusted his original determination of the discipline to be meted to Officer Whitney, modifying the suspension to five days, which he felt was justified. He also concluded that Officer Balentine deserved a written reprimand.

15. The Appellant, **Barbara Whitney**, testified that when she received the order to transport two inmates for a medical trip, she then prepared to perform the trip. She described how she picked up the equipment and hospital bags, weapons, keys and cell phone, and showed where the equipment picked up was noted on the WKCC Firearm and Equipment Issuance logs, which included the hospital bag and the cell phone. She said they transported the inmates in a minivan and everything they needed was in the vehicle, which she thought included the cell phone that she placed in the vehicle. Whitney said she then went to get one of the inmates from another compound and met Balentine with the vehicle at the Sally Port. On the way to the hospital, Whitney said that Officer Balentine told her that when she took the vehicle through the Central Sally Port she had to turn in her cell phone while the vehicle was searched and she forgot to retrieve the phone. She said Balentine expressed concern about obtaining authorization if they had to modify the inmate's restrictions. Whitney advised her that they would have to wait until they find out the examination procedures at the hospital, at which time they would decide what to do.

16. Whitney said that they worked under a captain who was very adamant that he controlled everything about the handling of inmates, and that everything had to be run by him for approval. She said that the officers could not make any decisions concerning the handling of inmates without his approval. She said that she worked under four previous captains and that none of the policy requirements for obtaining authorization from the institution for any modification of restraints were required until Cpt. Gaines began enforcing the policy procedure. However, Whitney explained the reason that she did not use the hospital's phone to call the institution for authorization to remove the belly chain was because she did not consider that act of removing the belly chain to be a security modification as the inmate was still restrained at the hands and feet. She said when she returned to the center and discussed the issue with Cpt. Gaines she was made fully aware that the belly chain and black box was part of the whole restraint system and that any change in the manner of restraining the inmate was a modification that required authorization. She said that it was after her interview with Cpt. Gaines that she was then trained for the first time on the restraint policy that had been issued in June 2014.

17. Whitney admitted that she did remove the belly chain and black box from the inmate she was controlling so the inmate could raise her arms for the mammogram examination. Whitney explained that in a previous medical transport with Officer Tammy Elkins, the institution's Transportation Officer, Elkins had said that Cpt. Gaines always recognized the medical need and gave permission to modify the restrictions. She said that on previous medical transports she attended with senior officers, she observed them modify the restraints when the inmate had to undergo examination. Whitney said she removed only the belly chain and black box to allow the inmate to raise her arms during the mammogram examination, but that the cuffs and shackles were still on the inmate and that she believed the inmate was still adequately

restrained. She said that when she and Officer Balentine were re-united, the inmate she was guarding was fully restrained.

18. Whitney said she did not learn that they were subject to disciplinary action on their handling of the medical transport situation until she returned to the institution, turned in her equipment and subsequently bumped into a very upset Officer Balentine, who told her that they were in trouble and were going to be fired. She said she tried to calm down Balentine, telling her not to worry. However, after Whitney was interviewed she subsequently received a letter from the Warden giving her notice of the intent to discipline her and that she requested that she be allowed an interview with the warden.

19. Following the interview with Whitney, the warden requested a follow-up to the investigation by Senior Captain Woodrum. Following the re-investigation and addendum submitted by Woodrum, Warden Woodward reconsidered his decision on the disciplinary action and reduced the penalty from ten to a five-day suspension. Yet, Whitney testified that she felt she was prejudiced that the final decision was not made within five days as mandated by the statute.

III. FINDINGS OF FACT

1. On May 1, 2015, Correctional Officers Barbara Whitney and Kimberly Balentine were instructed to transport two inmates from the Western Kentucky Correctional Complex in Fredonia, Lyon County, Kentucky, to the Crittenden County Hospital in Marion, Kentucky, for routine medical tests.

2. This was the first medical transport for Correctional Officer Balentine; however, Officer Whitney had been on at least four previous medical transports.

3. The officers performing the transport duty are required to obtain several items of equipment, including a weapon, a hospital bag, documentation on the inmates taking the medical trip, and a cell phone for each officer that is responsible for an inmate. The inmates are required to be restrained with handcuffs, leg shackles and a belly chain with a black box that is connected to the cuffs and shackles. Since the order was to transport two inmates to the hospital, the two officers were assigned to perform the transport, and each officer was required to have a cell phone.

4. Officer Balentine drove the minivan to transport the inmates to the Sally Port at the Central Command, while Officer Whitney went to pick up an inmate from the Segregation Unit. At the Sally Port, Balentine was directed to place the cell phone in the central office while the vehicle was inspected. After the vehicle was cleared to proceed, and the inmates were placed in the van, Balentine forgot to retrieve the cell phone from the central office.

5. During the drive to the Crittenden County Hospital, Balentine disclosed to Whitney that she forgot to retrieve the cell phone and began to ask Whitney what they would do if they needed to get authorization to modify the restraints on the inmates. Whitney responded that they would have to wait until they saw what was required by the hospital to examine the inmates.

6. Upon arrival at the hospital, the correctional officers did not report to the institution that they had arrived, as is required by the policies and procedures. Additionally they did not report when they were leaving to return to the institution, despite the fact they could have used the hospital's phones since they did not have access to their cell phone.

7. The two inmates were sent to separate examining rooms for their examinations, and each of the officers stayed with one of them. Whitney did not know what occurred with Balentine and her inmate concerning the restraints. Officer Whitney was faced with removing the belly chain and black box, which was attached to both the handcuffs and leg shackles, in order to allow the inmate under her control to be able to raise her arms around the mammogram machine.

8. Officer Whitney determined that she did not need to call the institution for authorization to remove the belly chain and black box, based on what she had observed on previous trips with WKCC's transportation officer modifying the restraints on those medical transportations and that she also believed the inmate was still adequately restrained with the cuffs and shackles.

9. It was not until Whitney and Balentine returned to WKCC that they were made aware that they had violated the institution's policy and procedures. Whitney was informed by Cpt. Gaines that the entire system of restraints was considered as a single restraint and that any modification to that system of restraining an inmate required authorization. Both Officers Whitney and Balentine were given additional training on the proper methods of restraining inmates and the hazards presented on transporting an inmate.

10. An investigation was conducted and numerous witnesses were interviewed and a report was assembled by Senior Captain Roland Woodrum and sent to the office of the warden with his analysis. Senior Captain Woodrum concluded that Whitney had violated the WKCC policies and procedures by not having a cell phone with them, failing to contact the institution on their arrival and departure from the hospital, and modifying the restraints of the inmates without authorization.

11. Upon reviewing the report, Warden Woodward forwarded notice to Officer Whitney that she would be suspended without pay for ten days. The notice allowed Whitney to be interviewed for her position on the matter, which she requested. Following the interview, Warden Woodward remanded the matter to Senior Captain Woodrum for a follow-up investigation. After receiving Woodrum's addendum to his report, Warden Woodward reduced the suspension of Officer Whitney from ten days to five days.

IV. CONCLUSIONS OF LAW

1. A detention facility is a unique place fraught with serious security dangers. *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S.Ct. 1861, 60 L.Ed.2d 447, 481 (1979). Correctional Officers are responsible for the care, custody, and control of individuals who have been convicted of a crime and sentenced to serve time in a prison or jail. *State v. Shepherd*, 577 S.E.2d 341, 344 (N.C. App 2003). The duty of safety not only extends to the facility and staff, and the inmates, but also to the citizens of the Commonwealth of Kentucky who might be exposed to such risks.

2. A correctional facility is routinely required to send inmates for appearances in court or transport them to a medical facility or hospital. The transportation trips by correctional officers escorting inmates is considered one of the most dangerous exposures to risks of danger to the officers and to the public, who are put a risk that something could happen and someone could get shot. The occurrence of such an incident would have severe consequences on the Corrections institution and the Commonwealth of Kentucky. As a result of the threat of such possibilities, the Corrections institution has in place policies and procedures to safeguard from perils during the transportation of the inmates.

3. Relevant to the circumstances applicable to this hearing is DOC Policy and Procedure No 9.9 pertaining to "Transportation of Offenders." Section III.A.1.e. provides that "All transportation officers shall be equipped with a state cell phone." Section III.F. pertains to administrative matters in transporting inmates, and subsection 7. requires that "Once applied, restraints shall not be removed unless planned . . . and unless adequate security is ensured." The policy provision further mandates that, "Any removal of restraints shall only occur upon approval from the warden or his designee, unless an emergency and a life-or-death situation exists." The evidence clearly establishes that these provisions were violated by Appellant Whitney.

4. In addition to the DOC policy cited, *supra*, WKCC has its Post Orders pertaining to Transportation, stating that the Transportation Officer shall be responsible for the transportation of inmates in and out of the institution and shall perform this responsibility in accordance with Corrections and Institutional Policies and Procedures. Post Order, No. 6 requires the officer to check out a cell phone from the Control Center, to be used for official business only. Post Order, No. 15 mandates that the officer must contact the shift supervisor if requested to remove the restraints from an inmate for permission prior to removing the restraints. Post Order, No. 17 directs the correctional officer to call the WKCC upon arrival at the destination and then again upon departure from the destination. The evidence clearly establishes that these provisions were violated.

5. The warden testified concerning the seriousness of the charges concerning the loss of communication with the officers during the medical transport of the inmates, and the modification of the restraints without authorization. The policies and procedures are put into place for the safety of the staff, the inmate and the citizens. The officer guarding the inmate was not vested with the discretion to make decisions concerning modifying such protective measures without obtaining authorization, but rather she had a duty of utmost care for the safety of the inmate, the hospital staff, herself and the citizens of the Commonwealth of Kentucky for whom she was entrusted with her position. Compounding the risk of Officer Whitney's actions without obtaining authorization was the fact that she was out of communication with WKCC, which exposed the situation to even further risk. Even though Officer Whitney could have used the hospital's phone system to call the institution to give notice of the situation, she deliberately chose not to do so. What was worse was WKCC had no means of communication to Officer Whitney.

6. The preponderance of the undisputed evidence established that Warden Woodward had just cause to take the disciplinary action against Officer Whitney. In fact, Officer Whitney was the beneficiary of additional consideration the warden applied to her circumstances, who upon receiving additional information, reduced the disciplinary action from ten day to five days without pay. Although Whitney complained that the time to reconsider her penalty took beyond the required statutory time, she was unable to show any prejudice from the delay. In fact, she benefitted from the time taken to reconsider her penalty, which was reduced from ten to five days.

7. The Hearing Officer concludes that the DOC met its burden of proof to establish that the conduct of Appellant Whitney constituted misconduct in the performance of her duties, and that pursuant to 101 KAR 1:345 and KRS 18A.095, just cause was established for the disciplinary action of suspending Appellant Whitney from duty and pay for five days.

IV. RECOMMENDED ORDER

Having considered and weighed all the evidence and the laws of the Commonwealth of Kentucky, and based upon the foregoing Findings of Fact And Conclusions of Law, the Hearing Officer recommends to the Personnel Board that the appeal of **BARBARA G. WHITNEY V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2015-131)** 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).

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).

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

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 E. Patrick Moores** this 21st day of December, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Angela Cordery
Barbara G. Whitney