

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD

LARRY WELLS (Appeal No. 2015-238) and
NICHOLAS RAY VANOVER (Appeal No. 2015-256)

APPELLANTS

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 August 2016 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated July 14, 2016, 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 Appellants' appeals are 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 17th day of August, 2016.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Catherine Stevens
Mr. Larry Wells
Mr. Nicholas Ray Vanover
Mr. Rodney E. Moore

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APPELLEE

These consolidated appeals came on for an evidentiary hearing on December 15, 2015, at the Kentucky Personnel Board, Frankfort, Kentucky, before the Hon. E. Patrick Moores, Hearing Officer. The proceedings were recorded by audio-video equipment pursuant to the authority found at KRS Chapter 18A.

The Appellants, Larry M. Wells and Nicholas R. Vanover, were present and not represented by counsel. The Appellee was represented by the Hon. Catherine Stevens, Staff Attorney for the Justice and Public Safety Cabinet, Office of Legal Services, Frankfort, Kentucky.

I. STATEMENT OF THE CASE

1. Appellants Larry M. Wells and Nicholas R. Vanover are employed as Correctional Officers at the Department of Corrections, Little Sandy Correctional Complex, located near Sandy Hook in Elliott County, Kentucky. They are jointly appealing the Cabinet's determinations on August 20, 2015, and July 24, 2015, respectively, to suspend each of them from duty and pay for 15 days for falling asleep while on duty guarding inmate Charles Ross a patient at the Saint Claire Regional Medical Center in Morehead, Kentucky. At approximately 4:30 a.m. on May 28, 2015, both guards were discovered by a hospital nurse, Tiffany Henderson, to be asleep in chairs in the inmate's hospital room while the inmate was laying in his bed, awake watching inappropriate infomercials on television showing the use of sex toys and how to pleasure a woman. Upon discovering the two guards to be asleep, Nurse Henderson rolled a medicine cart into a trash can, which failed to awaken the two guards. She reported the matter to her supervisor, RN Jetta Slone, who came into the inmate's room and observed both guards to be asleep. Nurse Slone reported the matter to the Nursing Coordinator, Delma Peters, who came into the room and found the guards awake.

2. The matter was reported by the hospital to the Warden of the Little Sandy Complex, Joseph Meko, who had the matter investigated. Following the investigation, Warden Meko gave notice to Correctional Officer Vanover on July 24, 2015, and Correctional Officer Wells on August 20, 2015, that they were being suspended for 15 days from duty and pay for violation of the Little Sandy Corrections Complex's General Post Orders PO-01, Item 23, which provides, in pertinent part: "Staff on duty shall remain alert at all times. Sleeping on duty shall result in disciplinary action that may include dismissal." Both Wells and Vanover filed appeals denying they were asleep on duty, and that the penalty was excessive, as another Correctional Officer previously charged with the same offense only received three days suspension and loss of pay.

3. Both Wells and Vanover filed separate appeals and the matters were consolidated by agreement for purposes of hearing the evidence. A pre-hearing conference was conducted on October 20, 2015, at which the appellants were present, but were not represented by counsel. Both Appellants were advised of their right to have legal counsel represent them, and were instructed in the procedures followed in the appeal hearing. The Cabinet was represented by the Hon. Catherine Stevens. The consolidated appeals were set for hearing on December 15, 2015, with instructions to submit witness and exhibit lists no later than December 9, 2015. By agreement, a video deposition of Nurses Tiffany Henderson and Jetta Slone of the Saint Claire Regional Medical Center in Morehead, who were unable to appear at the evidentiary hearing, was scheduled (following the hearing) on March 21, 2016, for purposes of introducing their testimony into the record. The video deposition of the nurses was submitted on April 21, 2016.

II. SUMMARY OF WITNESS TESTIMONY

1. **Paul Crouch** is a Captain and Internal Affairs Investigator for the Department of Corrections. He testified that Deputy Warden James Green received a call from the Saint Claire Regional Medical Center informing him of the incident involving Officers Larry Wells and Nicholas Vanover being asleep in the hospital room where they were supposed to be guarding a prison inmate sent to the hospital for treatment. Warden Meko asked him to investigate the matter.

2. Cpt. Crouch testified that the incident involved inmate Charles Ross, who fell out from a handball game at the Little Sandy Corrections Complex with possible heat exhaustion and had to be transported to Saint Claire Regional Medical Center in Morehead. Based on the inmate's security risk classification, he required two officers to be with him at all times. Officers Wells and Vanover were assigned to guard Ross, and were found asleep by a nurse, Tiffany Henderson, when she went into the room at approximately 4:30 a.m. to give Ross an injection of Heparin medication. Henderson reported to Cpt. Crouch that she found the inmate watching a television infomercial about sex toys, the two security officers asleep and Officer Vanover was snoring. Cpt. Crouch testified that Nurse Henderson informed him that after she observed the two sleeping security officers assigned to guard the inmate, she attempted to waken the officers by rolling her medicine cart into a garbage can, making loud noises. When this did not rouse the sleeping officers, Henderson became very alarmed, left the room and immediately reported the

matter to her supervisor, Jetta Slone. She told Slone she did not want to go back into the inmate's room.

3. Cpt. Crouch testified Nurse Slone informed him she then went into the inmate's room and observed him watching the inappropriate television program about sex toys and that she observed the two security officers sleeping. She further identified Wells and Vanover as the two officers from their photographs.

4. Cpt. Crouch testified that Nurse Slone informed him that she immediately reported the incident to the hospital's Nursing Coordinator, Delma Peters, who then went to the inmate's room to verify the situation. Ms. Peters told Cpt. Crouch that when she entered the inmate's room she found both officers awake, but Officer Wells was stretching as if he had just awakened.

5. Cpt. Crouch testified that he subsequently interviewed both Wells and Vanover, who denied they had fallen asleep on duty while guarding inmate Ross at the hospital. He said that Vanover admitted he could have "dozed" while in the room with Ross, and that, at times, he was looking at his personal cell phone (which Cpt. Crouch testified that the prison's regulations states the guards are not allowed to possess while on duty). Cpt. Crouch said that Wells informed him there was "no way" he was asleep, and he always catches himself if he is about to doze off. He said Wells referred to the nurses as "lying son-of-a-bitchs." (sic)

6. **Wilburn "Butch" Adkins** is the Internal Affairs Specialist at the Little Sandy Corrections Complex. He testified that there are six levels of security classification of inmates at the prison complex, and any inmate classified as level 4 or higher required two armed guards to accompany them on any transport matter. He described inmate Ross as a "very disreputable character" who is recorded in the prison system's database, known as Kentucky Offender Management System (KOMS), which documented his extensive criminal record and described his history as a very violent person, including the assault of a police officer. He was also described as schizophrenic and bi-polar, with only a ninth-grade education. He described inmate Ross as a "high risk," and the reason for the requirement of two armed Correction Officers to guard such prisoners on any transport outside the prison is that they never know what might be waiting to confront them once outside the prison confinement area. Adkins stated that all the Officer has to guard the prisoner (and protect himself and others) is himself and his weapon. Adkins testified being transported under an emergency situation involved a threat and required a higher security level. He said that when the ambulance arrived on the scene where Ross had passed out from apparent heat exhaustion, he had recovered; however, the Nurse determined that an abundance of caution required him to be transported to the hospital to be "checked out" and observed.

7. Adkins testified that not all inmates are treated as violent offenders and the guard requirements for all transport situations are based on the risk assessment. He said every officer assigned to transport duty has an obligation to check out the KOMS record information about who they are transporting, assigned to guard and the risk assessment concerning the inmate. He further testified that it is not just the inmate that is of concern, but the possibility of someone attempting to break out the prisoner from custody during the transport, and the Correctional Officers assigned to guard the inmate had to be alert to what may be coming into the hospital.

8. Adkins acknowledged that he was aware of a Correctional Officer who was previously disciplined for falling asleep while guarding inmate Terrance Zitter. The inmate had severe heart disease and several other major disabilities which rendered him permanently disabled and unable to perform any physical activity. Adkins stated he was the Control Officer in 2012 when Zitter had to be transported to the hospital. William Preston, the Correctional Officer who was assigned to transport and guard the inmate, was found asleep on duty while guarding the inmate and was disciplined with a three-day suspension without pay. Adkins said inmate Zitter was classified as a "C-1 Custody," meaning low minimal security risk, and that the inmate was too disabled and lacking physical stamina and did not require restraints.

9. **William Sparks** is the Little Sandy Correctional Complex's Training Officer responsible for preparing the training curriculum for the Correction Officers and Nurses working in the facility. The institution requires not only initial training, but annual in-service training on a face-to-face basis in classes and online. He presented the institution's Employee Training records showing that both Wells and Vanover had completed the initial in-service training. He further described the training program requirements relating to transportation and hospital guard duties and the safety protocol involved in those situations.

10. Sparks stated that the greatest problem in transportation and hospital guarding duties is the Officer becoming complacent and lowering his alertness and awareness while involved in the risk situation. Sparks described examples of videos used in the training that show various escape situations where Correctional Officers became careless and lost their weapons to inmates. He described one incident in Kentucky where the Correctional Officer was overpowered, lost his weapon and was killed by the inmate being guarded.

11. **Joseph Meko** is the Warden at the Little Sandy Correctional Complex. He has served 28 years with the Federal Bureau of Prisons and has been the Warden at Little Sandy Correctional Complex for the past eight years. He testified that he was informed by Deputy Warden David Green of the situation of Correction Officers Wells and Vanover being reported falling asleep at the hospital while guarding an inmate. He testified that Deputy Warden Green had received a call about the matter from Larae Wilson, the hospital's Vice-President of Patient Services, who was very upset and told him she was very concerned about continuing the hospital's contract for providing medical services to the inmates. Warden Meko testified he called Ms. Wilson and assured her that he deemed it an absolute necessity that the medical treatment relationship be continued. He told her he would have the matter investigated and evaluated, and that disciplinary action would be taken. He testified that he assigned Cpt. David Crouch to open the investigation.

12. Warden Meko said he reviewed Cpt. Crouch's investigation report and that he was very upset that both officers were found asleep by two nurses at the hospital while on guard duty. He said he believed the nurses' statements, as they were too specific. He said the world today is very different, in which threats are greater. He stated that considering the inmate's risk situation, the guards' weapons and amount of ammunition in their possession, the potential exposure was so great that he considered terminating the two guards. He testified that he had seen the training video of the risks in transportation and hospital guarding situations with

inmates. He said that he met with both men, and after considering Wells and Vanover's records as employees and the fact they had no prior disciplinary action, he determined the severity of the offense justified disciplinary action consisting of a 15-day suspension from duty and pay for both men. Warden Meko testified he needed to send a message to the staff and the public that this type of conduct would not be tolerated.

13. Warden Meko said he considered the Appellants' statements that the disciplinary actions were too harsh, as they alleged a previous offense by a Correctional Officer of falling asleep while on hospital guard duty had only received three days' suspension. However, Warden Meko stated that the inmate being guarded in the previous offense was virtually incapacitated from a severely disabling heart condition that made any physical activity impossible and, therefore, was considered a very low risk.

14. Appellant **Larry Wells** is a Correctional Officer at the Little Sandy Corrections Complex. He testified he was not guilty of the charges against him. He stated he cared about public safety, and that in his eight years of service he had received a commendation for responding to a hospital trip. He said he wanted to be treated fairly under the charges falsely brought against him. He stated that although there were written statements from the nurses describing their finding him and Vanover asleep, he protested there was no photographic evidence that would prove his guilt or innocence. He further claimed he was being unfairly disciplined, as a previous incident involving disciplining a Correctional Officer caught sleeping while guarding an inmate at a hospital resulted in only a three-day suspension.

15. Wells said that although the previous incident involving a sleeping guard and a minimum security risk, the inmate was still a convicted felon. However, Wells admitted the prisoner he was assigned to guard was a high risk. Wells also claimed he was never told about the criminal record and risk factors concerning the inmate he was guarding, and did not know those facts until they were presented in this hearing. He said he had been assigned countless hospital guard details and never received the type of information described by Wilburn Adkins as their duty to obtain in order to find out who they were guarding and the risk factor of the inmate. Wells testified he normally worked the third shift from midnight to 8:00 a.m., but was called in early for this duty. He stated he had worked 30 hours overtime that week, but he was not tired when he came on duty. He further admitted having his personal cell phone with him, which was against the rules and regulations of the Correctional Complex.

16. Appellant **Nicholas Ray Vanover** also serves as a Correctional Officer at the Little Sandy Corrections Complex. He testified he was innocent as he did not fall asleep while on duty guarding inmate Ross. He admitted he was tired that evening, and that he probably looked tired, but he was always able to respond to anything that might have happened. He acknowledged having read the nurses' written statements about him being observed sleeping while guarding the inmate at the hospital, but they were incorrect. He had no other evidence to present, and stated he agreed with everything said by Appellant Wells. Vanover also admitted having his personal cell phone in his possession.

17. The deposition of Nurse **Tiffany Henderson** was taken subsequent to the hearing. However, she gave a written statement to Cpt. Crouch (and reviewed by Warden Meko) in which

she said that when she entered the inmate's room to administer medication, she observed the guards on both sides of the inmate's bed to be asleep, and one of the guards was snoring. She described pushing her medicine cart into a trash can to make noise to wake up the guards, but both remained asleep. She reported she spoke with the inmate patient and administered his medication, following which she left the room and reported the incident to the charge nurse.

18. Nurse **Jetta Slone** also was deposed following the hearing. However, she presented a signed prepared statement to Cpt. Crouch that was reviewed by Warden Meko in making his disciplinary determination. She reported that Nurse Henderson was very upset with the events that occurred in the inmate's room, in which she encountered the inmate in shackles and two sleeping guards and she did not want to return to the inmate's room. Nurse Slone reported that she subsequently peered into the room to validate the information, and she observed that both guards had their eyes closed. She stated she was informed it was protocol to report the incident, and she proceeded to call the Nursing Coordinator, Delma Peters, who agreed to come to the floor to investigate the occurrence, and subsequently informed Slone that she (Peters) would file a complaint with the guards' employer.

III. FINDINGS OF FACT

1. Both Appellants Wells and Vanover serve as Correctional Officers at the Little Sandy Correctional Complex located at Sandy Hook in Elliot County, Kentucky. They had been trained in the procedures and safety protocol involved in the transportation and guarding of inmates, including at hospital facilities.

2. During the early morning hours of May 28, 2015, Wells and Vanover were assigned as relief guards for inmate Charles Ross who had earlier been brought to the Saint Claire Regional Medical Center in Morehead, Kentucky, from the Little Sandy Correctional Complex for treatment and observation of possible heat exhaustion.

3. Charles Ross had an extensive criminal record, a history of violence, and had been diagnosed as schizophrenic and bi-polar. He was considered to be a high security risk, requiring extraordinary security involving restraints and two armed guards to watch over him in a transport situation to the hospital and while he was being treated.

4. During the treatment of inmate Ross, Nurse Tiffany Henderson entered his hospital room in the early morning hours to administer medication to the inmate. There she found the inmate in shackles on the bed, awake and watching a television program about sex toys, and the two men assigned to guard him sleeping. Nurse Henderson banged her medicine cart into a metal waste basket in an attempt to awaken the two guards, who remained asleep.

5. Nurse Henderson became alarmed and reported the incident to her supervisor, Nurse Jetta Slone, who went to the inmate's room and verified that the inmate was awake watching a television program about using sex toys and the two men assigned to guard him were asleep.

6. Warden Meko, upon receiving the complaint of the incident from Saint Claire Regional Medical Center, assigned Cpt. Crouch to investigate the matter. Cpt. Crouch's report confirmed the incident. The Hospital Administrator had also expressed concern with continuing the arrangement of treating the inmates, if its staff would be subjected to such risk exposure.

7. Warden Meko testified he believed the reports of the two nurses because they were consistent and too specific in detail.

8. The allegations by Wells and Vanover that the disciplinary penalties were excessive, are without merit. The prior incident of disciplinary action against a Correctional Officer caught sleeping while guarding an inmate at the hospital, resulting in a three-day suspension, involved a situation of a minimal risk prisoner with a severe heart disease and the inability to engage in physical exertion. On the other hand, the inmate being guarded by Wells and Vanover was a high risk prisoner with an extensive criminal record, known violence history, and diagnosed as schizophrenic and bi-polar. Such risk demanded that Wells and Vanover be awake and alert at all times in performing their duty of guarding the high risk inmate.

9. Warden Meko determined the nature of the risk exposure from the actions of Wells and Vanover was so great it justified their termination; however, on reviewing their employment records and finding no prior violations of policy by either of the Officers, Meko elected to reduce each of their disciplinary penalties to a 15-day suspension from work and pay.

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, staff, and the inmates, but also to the protection of the citizens of the Commonwealth of Kentucky who might be exposed to such risks.

2. A correctional facility is routinely required to transport inmates to a medical facility or hospital. William Sparks, Training Officer for the Little Sandy Correctional Complex, testified that overseeing the security of inmates on transportation trips by Correctional Officers who escort and guard the inmates is considered one of the most dangerous duties for a Correctional Officer. These trips expose risks of danger to the officers and to the public, who are at 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 policies and procedures in place to safeguard from perils during the transportation and guarding of the inmates outside the correctional complex.

3. Relevant to the circumstances applicable to this hearing is LSCC Policy No. 03-01-01, General Guidelines For LSCC Employees. Section K.8 prohibits conduct in which the employee fails to properly perform the duties of the employee's position, including making

reasonable effort to prevent the escape of an inmate. Little Sandy Correctional Complex, General Post Order #PO-01, Item 23, provides, in pertinent part, "Staff on duty shall remain alert at all times. Sleeping on duty shall result in disciplinary action that may include dismissal." It also provides personal cellular phones are prohibited. The evidence clearly established that these provisions were violated by Appellants Wells and Vanover.

4. The policies and procedures are put into place for the safety of the staff, the inmate and the citizens of the Commonwealth of Kentucky. The officers guarding the inmate had a duty of utmost care for the safety of the inmate, the hospital staff, themselves and the citizens of the Commonwealth of Kentucky, for whom they were entrusted with their position.

5. The preponderance of the undisputed evidence established Warden Meko had just cause to take the disciplinary action against Correctional Officers Larry Wells and Nicholas Ray Vanover. In fact, both officers were the beneficiary of additional consideration the Warden applied to their circumstances, who decided that instead of terminating Wells and Vanover with just cause, he reduced the disciplinary actions to a 15-day suspension without pay.

6. Appellants Wells and Vanover complained the disciplinary action was too harsh, as a previous situation involving a Correctional Officer who fell asleep while guarding an inmate in the hospital was only suspended three days. However, the testimony of Wilburn Adkins and Warden Meko established a totally different set of circumstances of a severely disabled low risk inmate in the previous matter, whereas Wells and Vanover were assigned to guard a high risk inmate with an extensive criminal record and a history of violent conduct. In fact, the risk that the situation Wells and Vanover presented justified their termination. According to Warden Meko, the risk of their sleeping while on guard duty, verified by two nurses employed at the hospital, exposed the risk of the inmate obtaining their weapons and bullets. This not only exposed the nurses, hospital staff and the public to danger, but also created a situation that so concerned the hospital administration that they threatened to cancel the contract with the Little Sandy Correctional Complex to provide future medical treatment to its inmates. The Warden rightfully considered that their termination was the just disciplinary action, but Wells and Vanover benefitted from the Warden's review of their employment record and reconsideration of their penalties.

7. This Hearing Officer concludes the Appellee, Department of Corrections, met its burden of proof to establish that the conduct of Appellants Wells and Vanover constituted misconduct in the performance of their duties, and pursuant to 101 KAR 1:345 and KRS 18A.095, just cause was established for the disciplinary action of suspending Appellants Wells and Vanover from duty and pay for fifteen 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, it is the recommendation of the Hearing Officer that the Personnel Board enter an Order affirming the decision of the Justice and Public Safety Cabinet, Department of Corrections, suspending Appellants, Larry Wells and Nicholas Ray Vanover, for fifteen days from work and pay. The

Hearing Officer recommends to the Personnel Board that the appeals of **LARRY WELLS (APPEAL NO. 2015-238) AND NICHOLAS RAY VANOVER (APPEAL NO. 2015-256)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13.B.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, § 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, § 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 E. Patrick Moores**, this 14th day of July, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Catherine Stevens
Mr. Larry Wells
Mr. Nicholas R. Vanover