

**48TH JUDICIAL CIRCUIT
FRANKLIN CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 2021-CI-806
– Electronically Filed –**

KENTUCKY DEPARTMENT OF PUBLIC ADVOCACY,
et al.

PLAINTIFFS

vs.

The KENTUCKY DEPARTMENT OF CORRECTIONS,
through COOKIE CREWS, COMMISSIONER, in her
Official Capacity, *et al.*

DEFENDANTS

AGREED ORDER OF SETTLEMENT

This Agreed Order of Settlement (“Agreement”) is entered into between Plaintiffs (as defined below), and Defendants (as defined below) in settlement of the above-styled lawsuit.

IT IS HEREBY AGREED by the Parties as follows:

A. Definitions

As used in this Agreement, the following terms have the following meanings:

1. “**ACN**” means Attorney Control Number.
2. “**ACN Software**” means a computer program designed to facilitate the use of an ACN system, as defined herein.
3. “**ACN system**” means a system in which licensed attorneys apply to the DOC for a confidential number to be affixed to Privileged Mail to identify it as having been sent by an approved attorney.
4. “**Best Efforts**”, when referring to action by the Organizational Plaintiffs,

refers to good faith efforts, but does not include any action which would require the expenditure of funds by the Organizational Plaintiffs.

5. **“Copying”** means any type of duplication or reproduction, whether photocopying, scanning, photographing, video recording or any other means by which an identical or similar version of an original is created.
6. **“CPP”** means Corrections Policy and Procedure.
7. **“Department”** refers to the Commonwealth of Kentucky, Department of Corrections.
8. **“Defendants”** means:
 - a. Kerry Harvey, Secretary, Justice and Public Safety Cabinet, in his official capacity;
 - b. Cookie Crews, Commissioner, Department of Corrections, in her official capacity;
 - c. Brandy Harm, Warden, Bell County Forestry Camp, in her official capacity;
 - d. Abby McIntire, Warden, Blackburn Correctional Complex, in her official capacity;
 - e. James David Green, Warden, Eastern Kentucky Correctional Complex, in his official capacity;
 - f. Kevin Mazza, Warden, Green River Correctional Complex, in his official capacity;
 - g. Vanessa Kennedy, Warden, Kentucky Correctional Institution for Women, in her official capacity;
 - h. Scott Jordan, Warden, Kentucky State Penitentiary, in his official capacity;
 - i. Anna Valentine, Warden, Kentucky State Reformatory, in her official capacity;
 - j. Daniel Akers, Warden Lee Adjustment Center, in his official capacity;
 - k. Larry Chandler, Warden, Little Sandy Correctional Complex, in his official capacity;
 - l. Amy Robey, Warden Luther Luckett Correctional Complex, in her official capacity;
 - m. Anna Valentine, Acting Warden, Northpoint Training Center, in

- his official capacity;
 - n. Jessie Ferguson, Warden, Roederer Correctional Complex, in his official capacity;
 - o. Belinda Sanchez, Acting Warden, Southeast State Correctional Complex, in her official capacity; and
 - p. Bobbi Jo Butts, Warden, Western Kentucky Correctional Complex, in her official capacity.
9. **“Individual Plaintiffs”** means Christopher Koteris, Michael Fugate, James Huffman, and Shelmontay Adams.
10. **“Organizational Plaintiffs”** means the Kentucky Department of Public Advocacy and the Kentucky Association of Criminal Defense Lawyers.
11. **“Parties”** means the Defendants, the Organizational Plaintiffs and the Individual Plaintiffs.
12. **“Privileged Mail”** has the same meaning as set forth in CPP 16.2.
13. **“Secondary Code”** means a secondary code generated by the system, which must also be affixed to privileged mail.

B. Implementation of System

14. The Department agrees to conduct a pilot project for the implementation of an ACN system based on the Ohio system currently in place, in which attorneys register, receive an “ACN” and then receive a secondary code, which is intended to be confidential. Both the ACN and the secondary code must be accurate and present on any piece of privileged mail. Given the time necessary to install and modify the ACN software, train the personnel operating the system, and approve attorneys and assign ACN numbers, the pilot project will start August 1,

2022 and conclude on December 31, 2022. All Department facilities and the Lee Adjustment Center will participate in the pilot project.

15. If successful, the ACN system will be adopted as the method for addressing privileged mail for the Department. If the ACN software is not successful, the Department agrees to continue using the ACN system or another system while the Department seeks and implements another system for the handling of privileged mail. If another system is required, and the new system has different requirements, the parties shall agree to a modification of this agreement to reflect the requirements of the new system.

16. Regardless, by January 1, 2023, the Department will cease to copy privileged mail from licensed attorneys and staff under their authority or direction. Where privileged mail from parties other than licensed attorneys is received, and the sender does not use the ACN system, the incarcerated person shall be given the choice to return the mail to sender, preferably with a message on the outside of the envelope indicating where to register for the ACN system, or allow the mail to be copied and the copy delivered to the incarcerated person. The specifics regarding the copying of such mail shall be consistent with this agreement and shall be specified in CPP 16.2.

17. The Department will use its ACN system as part of its overall process

as outlined in CPP 16.2. CPP 16.2 will be modified through the regulatory process outlined in KRS Chapter 13A, upon the conclusion of the pilot project. The modified CPP 16.2 shall provide specific guidance about the circumstances under which privileged mail may be photocopied, if at all, and the procedure for making those copies. Those circumstances and procedures shall be consistent with this order. The modified CPP 16.2 shall specifically prohibit the routine copying of privileged mail.

18. Compliance with the ACN policies shall be sufficient to deliver the mail under ordinary mail handling protocols (i.e., reviewing the mail for contraband only and delivering to the incarcerated person), without photocopying the mail.

19. Organizational Plaintiffs will use their best efforts to collaborate with Defendants to encourage Kentucky's state courts and federal courts to agree to participate in the Department's ACN system. Organizational Plaintiffs will commence efforts immediately upon the Parties' agreement in principle. Defendants will work with Organizational Plaintiffs to publicize this new program.

20. In all other respects, the Department will use the procedures it had in place prior to June 2022 with respect to the inspection and delivery of Privileged Mail, except as provided herein.

21. The Department agrees that it will not adopt any new procedures for Privileged Mail during this trial period and subsequent evaluation without court

approval or the consent of the Organizational Plaintiffs.

C. Procedure for Registration

22. There will be an approved senders list, which will permit mail to be provided to the incarcerated person under standard mail protocols without copying if it contains the appropriate ACN and secondary code.

23. The list shall be open to all attorneys who can show proof of licensure in good standing from any jurisdiction.

24. The attorney shall provide to the Department the following: the jurisdiction of licensure and license number, a phone number, physical address, mailing address, and email address that can be used to confirm that mail sent from the attorney's office is authentic. The Department shall provide a mechanism for approved senders to update their contact information as needed.

25. As a condition of participation on the list, the attorney will be asked to acknowledge and agree to comply with all of the Department mail handling procedures and acknowledge receipt of a copy of those procedures from the Department.

26. An attorney who is responsible for sending contraband into a state facility may be permanently banned from the list and reported to the respective

licensing agency for the attorney, the procedure for which shall be set forth in CPP 16.2.

27. DOC shall develop, in conjunction with Organizational Plaintiffs, an educational document describing the importance of this policy and following it, for the purpose of educating attorneys on the precautions needed to avoid inadvertently facilitating the transmission of contraband into an institution through Privileged Mail.

28. As a condition to use of the Privileged Mail procedures, all attorneys must review the educational document referenced in paragraph 27, and must agree to take appropriate precautions to ensure that Privileged Mail sent from their account does not include contraband. If an attorney violates this condition, and the Department determines that the violation was intentional, the Department may terminate the attorney's right to use the Privileged Mail procedures. If an attorney violates this condition unintentionally, the attorney will receive a warning upon the first violation and the Department may terminate the attorney's right to use privileged mail after the second violation. Nothing in this section shall authorize the Department to review the content of Privileged Mail documents, or to require an approved sender or incarcerated person to justify how a particular document relates to a legal claim.

29. An attorney's privilege to use this system may be suspended or withdrawn for multiple instances of an incorrect ACN or secondary code or other violations of the mail policy, the procedure for which shall be specified in CPP 16.2.

30. In all cases, the Department shall notify the attorney of the violation and shall have a procedure whereby the attorney can appeal the suspension or termination of his/her right to use the Privileged Mail procedures.

31. This agreement does not impact the attorney's right to represent prisoners and to communicate with prisoners via personal visits, unmonitored telephone calls, or the use of regular mail for non-confidential communications.

D. Process for Handling Privileged Mail

32. The attorney will be required to include both the ACN and the secondary code on their envelopes for easy verification.

33. In addition to the ACN, the Department will adopt an additional verification system by which a secondary code will be requested by an approved sender and affixed on the envelope of Privileged Mail in addition to the ACN.

34. Upon receipt of the Privileged Mail, Department personnel will confirm that both the ACN and the secondary code are valid.

35. If a particular piece of Privileged Mail includes the correct ACN, but either an incorrect secondary code or no secondary code, the Department shall then

contact the sending attorney, or his/her designee or agent, to confirm that the attorney sent the Privileged Mail. The Department will establish a procedure to ensure that reasonable attempts are made by phone and email to reach the sending attorney before rejecting the Privileged Mail.

36. If the Department is not able to verify the Privileged Mail either through the active code or personal contact with the sending attorney, the Department will reject the mail and return it to the sender. If the Department is able to verify the Privileged Mail through either of these two methods, then the Privileged Mail will be processed in accordance with the other procedures outlined in this Agreement.

37. This process may be applied to other approved senders of privileged mail including courts and elected officials. The Department agrees to develop a process for the mass mailing of privileged mail and that process will be included in CPP 16.2.

E. Monitor

38. The Department and the Organizational Plaintiffs will monitor this new procedure to assess its viability and the burden it imposes on the Department, attorneys, their clients, and the courts.

39. The Department will provide to Organizational Plaintiffs a monthly report regarding the implementation of this new system. *See* paragraphs 42 and 43,

infra.

40. The Department and Organizational Plaintiffs will work together to identify issues and problems and work proactively to address those issues and make adjustments to this system.

F. Assessment of New Procedures

41. Organizational Plaintiffs and the Department will work together for a trial period of six (6) months, or longer if the parties agree, to collect data and evaluate the effectiveness of the new procedures for handling Privileged Mail.

42. If, based on this evaluation, any party believes additional steps need to be taken, the Parties will work together to identify appropriate solutions. During this trial period, the Department will share with Organizational Plaintiffs sufficient data and information to enable the Parties to evaluate the effectiveness of these procedures.

43. This data and information will include:

- a. the amount of Privileged Mail received;
- b. the amount of Privileged Mail warranting further inspection;
- c. the amount of Privileged Mail that is received with an incorrect or no ACN;
- d. the amount of Privileged Mail that is received with an incorrect or no secondary code;
- e. the amount of Privileged Mail that is rejected and returned to sender and the reason(s) therefore;
- f. the amount of Privileged Mail in which contraband was found and the identity of the contraband;

- g. the number of compromised ACNs; and
- h. any other relevant data to which the Parties agree.

44. The foregoing data will be shared monthly, both as a total for the Department and broken down by institution. For each instance where contraband is discovered, the Department will provide copies of the extraordinary occurrence report and any other investigative materials after the investigation is concluded. This information will remain confidential and is prohibited from disclosure by all parties.

G. Copying of Privileged Mail

45. To the extent that copying of Privileged mail continues to occur prior to January 1, 2023, and until CPP 16.2 is amended, the Defendants shall ensure that the process of copying the mail is subject to the following limitations:

- a. At all times, from the time the mail item is opened to the time it is destroyed, the incarcerated person shall be present and able to view both their legal mail parcel and the face of the person handling the mail within a distance of six (6) feet or less, to ensure that that the person handling the mail is not reading the mail.
- b. After the item is copied, the person handling the mail shall go through the item and the copy page by page, in the presence of the incarcerated person, to ensure all pages of the copy are substantially similar to the original, including readability. The person handling the mail shall ensure adequate time for the incarcerated person to review each copy for quality and accuracy. Any page where the quality of the copy is not substantially equivalent to the original shall be recopied, if the incarcerated person objects.
- c. The original shall be destroyed immediately after the incarcerated person confirms that they have a completed copy of

the item.

- d. All copies shall be made on a machine with no internet or server connection and no capacity to retain images of copied material.
- e. Each facility shall designate a single area of the institution for copying legal mail. The area must be free of visual obstructions and permit the required viewing by all inmates, regardless of physical condition. For inmates in areas from which the inmate cannot go to the mailroom, the institution will purchase a portable copier, shredder, and rolling cart and take them to the inmate's cell so that the inmate may observe the opening and shredding of the mail.
- f. Privileged mail handled under this procedure shall otherwise be handled according to the current policy.
- g. If the document is a document which has a watermark or other proof of its status as an original document, or if the document is a document that cannot be accurately reproduced using the Department's equipment, such as a color map or chart, the inmate may request that the original document be retained. The original document shall be securely stored in a location not accessible to other inmates or unauthorized staff. Material so stored may not be reviewed by staff for any purpose, unless there is probable cause to believe that it contains contraband.
 - i. An inmate who wishes to review securely stored documents or media shall make the request to staff.
 - ii. Staff shall not inquire of the inmate about contents of the document(s) or media, or the inmate's reason for viewing it.
 - iii. The inmate shall be granted access to the materials within 48 hours of the receipt of the request, exclusive of weekends and holidays.
 - iv. The inmate shall be permitted to view the materials privately, away from other inmates and staff, subject only to visual supervision by program staff.

46. If CPP 16.2 is amended to permit copying Privileged Mail in any circumstance, the provisions of paragraph 45 shall be incorporated into that policy.

H. Other Provisions

47. The Court will retain jurisdiction to enforce this Agreement, and address any violations thereof, during the period of a pilot project, and until the completion of the process to amend CPP 16.2 as set forth in this Agreement, whichever ends later, subject to the provisions herein regarding extensions of that term.

48. If either party has a reasonable basis to believe that the other is failing to comply with any material provision of this Agreement, the party will notify the other party in writing of the specific issues. This notice will identify, with particularity, the basis of their noncompliance claim and the specific provisions of the Agreement that are implicated.

49. Within fifteen (15) calendar days of receipt of the notification, the other party will provide a written response to the notification with a full factual explanation as to why that party believes it is complying with the Agreement, or an explanation of its plans to achieve full compliance with the Agreement. Within five (5) calendar days of the receipt of the response, the other party may provide a reply. Prior to seeking Court intervention, the parties shall meet to attempt to resolve the dispute.

50. If the Parties are unable to resolve the dispute, the Parties may seek intervention from this Court by filing a motion for specific performance and for other

appropriate relief, including an extension of the term of this Agreement.

51. Neither this Agreement nor anything in this Agreement shall be deemed an admission or concession of liability or evidence respecting any liability on the part of the Department or the Defendants.

52. The Department will not retaliate against any person because that person has provided information or assistance related to the above-captioned litigation.

53. Any notices under this Agreement will be sent by email to the following:

54. If to the Plaintiffs: to Tim Arnold at tim.arnold@ky.gov; to Heather Gatnarek at heather@aclu-ky.org; to Corey Shapiro at corey@aclu-ky.org; and to Kaili Moss at kaili@aclu-ky.org, or their successors.

55. If to Defendant Daniel Akers, Warden Lee Adjustment Center, to: G. Edward Henry, II at ehenry@hwrmlaw.com, or his successor. If to all other Defendants: to Leah Cooper Boggs at lboggs@ky.gov; Angela Dunham at angela.dunham@ky.gov; and Allison Brown at allison.brown@ky.gov, or their successors.

56. This Agreement contains the entire Agreement between the Parties with respect to the matters set forth herein, and there are no written or oral understandings or agreements, directly or indirectly connected with this Agreement, that are not

incorporated herein.

57. This Agreement is binding upon and inures to the benefit of the successors and assigns of each of the Parties throughout the duration of the agreement.

58. The Parties may jointly agree to a modification of this Agreement, but only in a writing signed by all Parties. This Agreement may not be modified except upon written consent of all Parties.

59. This Agreement will be construed and interpreted in accordance with the laws of the Commonwealth of Kentucky.

60. Each Party has cooperated and participated in the drafting of the Agreement, and in any construction to be made of this Agreement, each Party shall be deemed to have cooperated and participated in the drafting and preparation of this Agreement.

61. Each of the Parties had the opportunity before signing this Agreement to make whatever investigations it deemed necessary and to obtain the advice of legal counsel of its own choosing, and each of the Parties has entered into this Agreement voluntarily.

62. If any provision or term of this agreement is held to be invalid, illegal, unenforceable, or in conflict with the law in any jurisdiction, the validity and legality

of the remaining provisions will not be affected or impaired thereby.

63. The Parties understand and agree that the Court will maintain jurisdiction of this action as set forth in paragraph 47 herein. While the Court has jurisdiction, all terms of this Agreement are enforceable in the same manner as any other order of this Court. When the Court’s jurisdiction is to cease according to the provisions of paragraph 47 (including any extension thereof), the Parties will sign and submit a joint stipulation of dismissal of this action with prejudice.

64. This Agreement may be executed in counterparts, and a facsimile or PDF signature shall be deemed to be, and have the same force and effect as, an original signature.

IT IS SO ORDERED this the _____ day of _____, 2022.

Thomas D. Wingate, Judge
Franklin Circuit Court

Have Seen and Agreed:



7/20/2022

Timothy G. Arnold, Department of Public Advocacy
Counsel for Department of Public Advocacy and individual plaintiffs

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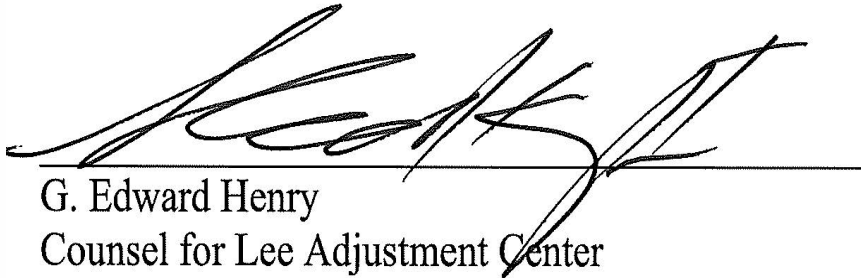
Corey Shapiro, ACLU of Kentucky Foundation
Counsel for Kentucky Association of Criminal Defense Lawyers



Leah Cooper Boggs, General Counsel
Counsel for Defendant, Justice and Public and Safety Cabinet



Allison Brown, Assistant General Counsel
Counsel for Defendants, Department of Corrections,
and all individuals in their official capacity



G. Edward Henry
Counsel for Lee Adjustment Center

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order was mailed, this _____, day of _____, 2022 to the following:

Hon. Timothy G. Arnold
Department of Public Advocacy
5 Mill Creek Park
Frankfort, Kentucky 40601

Hon. Heather Gatnarek
Hon. Corey Shapiro
Hon. Kaili Moss
American Civil Liberties Union of Kentucky
Foundation 325 W. Main Street, Suite 2210
Louisville, Kentucky 40202

Hon. Leah Boggs
Hon. Angela T. Dunham
Hon. Allison R. Brown
Hon. Robert Chaney
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Justice & Public Safety Cabinet
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Hon. G. Edward Henry
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Amy Feldman, Franklin Circuit Court Clerk