



B. 22

STATE OF NEW JERSEY

In the Matter of Wade Gushard,
Edna Mahan Correctional Facility

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket Nos. 2015-614

Minor Discipline Appeal

ISSUED: ~~SEP~~ 17 2015 (SLK)

Wade Gushard, a Senior Correction Officer with the Edna Mahan Correctional Facility (EMCF), Department of Corrections, appeals his five-day suspension.

By way of background, on December 24, 2013, the appellant was assigned to Hillcrest North at the EMCF. After the fire alarm activated and could not be reset, the appellant requested an additional officer be assigned to assist with fire watch duties. When the appellant was advised that an additional officer was not readily available, he contacted the shift commander requesting to go home sick, claiming he was in imminent danger due to the non-functioning fire system.

Subsequently, the appellant was charged with conduct unbecoming a public employee, other sufficient cause, and violation of a rule, regulation, policy, procedure, order or administrative decision. Specifically, it was asserted that he manipulated his assignment by utilizing sick leave to go home after being told by his superiors that a fire watch officer was not needed.

The appellant did not call any witnesses to testify at the departmental hearing that was held on August 4, 2014. The appellant presented an x-ray that he had on the date of the incident as evidence that he legitimately requested sick leave. The appellant stated that he filed a grievance against management and claimed that the charges were in retaliation for grievances related to the subject incident as well as his testifying against a Correction Lieutenant in a separate incident. The appellant also objected to Correction Lieutenant Dvorak testifying,

claiming he was not given advance notice, and stated that he was not provided in advance a decision by the appointing authority in response to another grievance that he filed seeking an extra officer when the fire system was disarmed. Further, the appellant stated that their contract required that a hearing be conducted within 20 days of an incident, but this hearing was held eight months after the incident without his consent to a postponement.

Dvorak, the shift commander, testified that on the date of the subject incident, the appellant contacted him asking for an additional officer and he told him that one was not needed and to conduct a fire watch. Subsequently, the appellant called Dvorak and stated that he needed to go home sick because he was in "imminent danger," which left the facility with reduced response capability in case of an emergency. The hearing officer found that the appellant was aware that Dvorak would be testifying and that the prior grievance decision that was not in the original package had no bearing on his decision. The hearing officer found Dvorak's testimony was credible and that the appellant had admitted that he was going home sick "due to being placed in imminent danger" and the medical documentation had nothing to do with why he left. Therefore, the hearing officer upheld the five day suspension.

On appeal, the appellant states that the fire alarm was disabled and, in addition to watching the inmates, he was given the task of conducting a fire watch. The appellant notes that the facility previously had a fire and he felt that the inmates and he were in imminent danger since the fire alarm had been disabled. Consequently, he contacted his supervisor for assistance. However, he was told that no other officer was needed for the fire watch and he remained stationed alone. Thereafter, the appellant states that he had to leave work early due to a preexisting illness. The appellant submits documentation from a hospital dated December 24, 2013, indicating that he had been examined and can return to work and documentation from his doctor on December 26, 2013 indicating that he can return to work on January 2, 2014. The appellant maintains that he cannot be disciplined for leaving work early since he submitted documentation for his leave. Further, after filing two grievances related to the subject incident where he maintains that management criminally placed him in danger, he received a five day suspension. Accordingly, the appellant claims that the charges were in retaliation for him filing the grievances. Further, the appellant maintains that the hearing was not timely, that he was not given the appointing authority's witness list and discovery with sufficient advance notice, that the hearing officer had preconceived thoughts as he was the hearing officer from his prior grievances, that the hearing officer ignored his procedural objections, and that his medical documentation was ignored.

In response, the appointing authority states that this matter does not meet the standard for the Civil Service Commission (Commission) to review a minor disciplinary appeal. The appointing authority submits, among other

documentation, the appellant's Special Custody Report that he wrote on the date of the incident where he states that he requested assistance after the fire alarm was disabled and was left in "imminent danger." Additionally, the appointing authority submits a December 24, 2103 statement from Dvorak indicating that the appellant phoned him stating that he was in imminent danger since the fire alarm was disabled and that he requested to go home sick. The appointing authority also provided documentation from the Fire Marshall dated December 1, 2013, indicating that if the fire alarm was disabled, the shift officers should conduct a fire watch.

CONCLUSION

N.J.A.C. 4A:2-3.7(a) provides that minor discipline may be appealed to the Commission. The rule further provides:

1. The [Commission] shall review the appeal upon a written record or such other proceeding as the [Commission] directs and determine if the appeal presents issues of general applicability in the interpretation of law, rule or policy. If such issues or evidence are not fully presented, the appeal may be dismissed and the [Commission's] decision will be a final administrative decision.
2. Where such issues or evidence under (a)1 above are presented, the [Commission] will render a final administrative decision upon a written record or such other proceeding as the [Commission] directs.

This standard is in keeping with the established grievance and minor disciplinary procedure policy that such actions should terminate at the departmental level. In the present matter, while this appeal provides an issue of general applicability in the interpretation of law, rule, or policy, which is further discussed below, there is no basis on which to grant the appellant's appeal.

In considering minor discipline actions, the Commission generally defers to the judgment of the appointing authority as the responsibility for the development and implementation of performance standards, policies and procedures is entrusted by statute to the Department of Corrections. The Commission will also not disturb hearing officer credibility judgments in minor discipline proceedings unless there is substantial credible evidence that such judgments and conclusions were motivated by invidious discrimination considerations such as age, race or gender bias or were in violation of Civil Service rules. *See e.g., In the Matter of Oveston Cox* (CSC, decided February 24, 2010).

In regard to the appellant's assertion that the investigation and hearing violated contractual agreements, alleged violations of specific procedures governing disciplinary actions which may be controlled by the labor agreement negotiated

between the employer and majority representative cannot be addressed by this agency. *See In the Matter of Jeffrey Sienkiewicz, Bobby Jenkins and Frank Jackson*, Docket No. A-1980-99T1 (App. Div., May 8, 2001). Further, with reference to the appellant's claims that the hearing was not timely or that he was not provided the appointing authority's discovery with sufficient advance notice, there is no evidence that the appellant was prejudiced by this delay or the discovery process in this matter and an untimely hearing is not a sufficient basis to warrant dismissal of charges. *See In the Matter of Ritchie Ortiz* (CSC, decided October 16, 2013) Moreover, any other procedural flaws in the minor discipline process that are not material to the facts or resolution of an appeal are not sufficient to warrant dismissal of the charges.

With respect to the appellant's assertion that the charges and the penalty were in retaliation for his filing grievances in regard to this matter or for him testifying in another matter, without substantial credible evidence in support of such allegations, these claims are not sufficient to meet the Commission's minor discipline standard in this circumstance. The mere fact that the appellant has filed grievances related to this incident, without more, is not sufficient to demonstrate retaliation. Similarly, without more, the mere fact the hearing officer was also the same hearing officer on the appellant's previously filed grievances, which were denied, does not evidence that the hearing officer was biased.

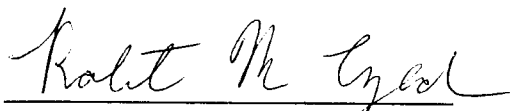
In the instant matter, the appellant did not provide any substantive evidence to show that the departmental hearing was improperly conducted. In this regard, the appellant did not provide any information to show that the hearing officer did not consider all of the testimony and evidence that was presented. In fact, in reviewing the hearing officer's decision, the hearing officer did consider that the appellant had "provided medical documentation that indicates that he had an x-ray and a series of medical issues." However, the hearing officer determined that the shift commander on duty credibly testified that the appellant informed him that he was going home sick because he was in "imminent danger." In this regard, the medical documentation on December 24, 2013 only indicates that he reported the Easton Hospital Department and that he could return to work. It does not specify his condition or evidence that he was unable to work on December 24, 2013. The other documentation only indicates that he was seen by his physician on December 26, 2013, but does not specify his condition or that he was unable to work due to his condition on December 24, 2013. Further, as the appellant has not provided credible evidence that such judgments and conclusions were motivated by invidious discrimination considerations such as age, race or gender bias or were in violation of Civil Service rules, the hearing officer's determination must not be disturbed. Accordingly, no further review will be conducted in this matter.

ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 16th DAY OF SEPTEMBER, 2015



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