

COMMONWEALTH OF PENNSYLVANIA

Robin L. Nyberg : State Civil Service Commission
 :
 v. :
 :
 State Correctional Institution at Albion, :
 Department of Corrections : Appeal No. 30382

Robin L. Nyberg : Joseph M. Gavazzi
Pro Se : Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Robin L. Nyberg challenging her Level-One Alternative Discipline in Lieu of Suspension¹ from regular Corrections Librarian employment with the State Correctional Institution at Albion, Department of Corrections. A hearing was held January 22, 2020 at the State Civil Service Commission’s Western Regional Office in Pittsburgh, Pennsylvania before Hearing Officer Odelfa Smith Preston.

The Commissioners have reviewed the Notes of Testimony and exhibits introduced at the hearing. The issue before the Commission is whether the appointing authority had good cause to issue appellant a Level-One Alternative Discipline in Lieu of Suspension.

¹The imposed action carries the same weight as if appellant had served a one-day suspension from her position with the appointing authority. Accordingly, the appeal will be analyzed as challenging a one-day suspension.

FINDINGS OF FACT

1. By letter dated October 3, 2019, appellant was issued a Level-One Alternative Discipline in Lieu of Suspension, equivalent to a one-day suspension, from her position as Corrections Librarian, regular status. The appointing authority charged appellant with violating the Code of Ethics (hereinafter “COE”) Sections B9, B10, B14, and B29 and DOC Policy 6.3.1.² Specifically:

The investigation revealed that you were fully aware that certain inmates were suspended from their jobs in the library as noted by an email you sent to Principal Clark on May 14, 2019. However, during the fact-finding...you denied knowing anything about inmates being suspended. This behavior is a violation of the Code of Ethics as you were untruthful during a[n appointing authority] investigation. Your actions

² COE Section B9 provides in relevant portion, “Lawful orders by a supervisor to a subordinate must be executed promptly and faithfully by the subordinate even though the employee may question the wisdom of such order.”

COE Section B10 provides, “Employees are expected to treat their peers, supervisors and the general public with respect and conduct themselves properly and professionally at all times; unacceptable conduct or insolence will not be tolerated.”

COE Section B14 provides:

Employees will promptly report to their supervisor any information which comes to their attention and indicates a violation of the law, rules, and/or regulations of the [appointing authority] by either an employee or an inmate, and will maintain reasonable familiarity with the provisions of such directives.

COE Section B29 provides in relevant portion, “All employees shall comply and cooperate with internal investigations conducted under the authority of [the appointing authority], and respond to questions completely and truthfully.”

DOC Policy 6.3.1 Facility Security Procedures Manual Section 9 – Inmate Counts, Movement and Accountability is not further defined in the record.

Comm. Ex. A.

were also a direct violation of DOC Code of Ethics as Deputy Ennis gave you direction and you failed to follow it.

Further, the investigation revealed that you permitted inmate workers to come to the library despite the work suspension after May 13, 2019. You were observed permitting the inmates to come to the library even when they were not scheduled to work, permitting inmate workers to be inside your office, and allowing inmate workers to handle accountability and inmate passes.

Comm. Ex. A.

2. The appeal was properly raised before this Commission and was heard under Section 3003(7)(i) and 3003(7)(ii) of Act 71 of 2018.³
3. Appellant has been employed as the Corrections Librarian for five years. N.T. p. 147.
4. Appellant's job duties include overseeing all library functions and supervising inmates who work in the library. N.T. pp. 32, 121-122; AA Ex. 4.

³ Appellant withdrew her 3003(7)(ii) of Act 71 of 2018 discrimination claim during the hearing. N.T. p. 15.

5. The library provides computers for inmates to use. Inmates are not permitted to access the computers unless they are directly supervised. N.T. p. 28.
6. A “call out list” is when an inmate is provided with a valid pass authorizing him to move from one area of the facility to another area. N.T. p. 56.
7. A call out pass does not override a supervisory directive stating the inmate is not authorized to move within the facility. N.T. p. 57.
8. If an inmate is suspended from work, the call out list is invalid; similarly, any handwritten pass provided by a Corrections Officer allowing the inmate to work is also invalid when the inmate is suspended from work. N.T. p. 59.
9. If a suspended inmate arrives for work on either a call out pass or a handwritten pass, the appointing authority employee should have the inmate return to the population without being permitted to work. N.T. p. 59.

10. Inmates are not permitted to enter library staff offices. N.T. pp. 105-106.
11. The library computer system does not have any external internet connection. N.T. p. 28.
12. On May 13, 2019, at 6:30 a.m., Corrections Deputy Superintendent 2 Paul Ennis arrived at work. He saw an incident report alleging the library computer server had been breached; part of the breach included derogatory terms referring to appellant written directly on the computer screen. N.T. pp. 26, 35.
13. Ennis discussed the allegation with the security office and Superintendent; together they decided to immediately suspend four inmates hired to work in the library and who were responsible for assisting others with the use of the computer system. N.T. pp. 27-28.
14. Ennis spoke with appellant's immediate supervisor, School Principal Cindy Clark, and directed the four inmates be suspended from work, pending investigation. N.T. pp. 29-30.

15. Ennis called Inmate Employment and notified them the inmates were suspended from work. As a result, the four inmates were “laid in” which means they could not come to work and would not get paid. N.T. pp. 30-31.
16. On either May 13 or 14, 2019, Ennis went to the library; he spoke with appellant to ensure she understood why the four inmates were suspended from work and knew there was an investigation underway. N.T. pp. 32, 34-35; AA Ex. 1.
17. During their conversation, appellant informed Ennis she had allowed one of the suspended inmates to come into work earlier in the day. N.T. pp. 33, 35.
18. Ennis explained the inmate should not have been at work and should not be in the library going forward.⁴ N.T. pp. 33, 35.
19. Ennis also explained the appointing authority was not certain which inmates were involved in the computer breach, therefore none of the four suspended inmates could be near the computers. N.T. p. 34.

⁴ The disciplinary action at issue is not the result of this incident. N.T. p. 36.

20. Appellant stated she really needed the four inmates to help her to run the library. Ennis reiterated the inmates could not be in library for security reasons. N.T. pp. 36-37.
21. On May 14, 2019, shortly after their conversation, appellant emailed Clark stating Ennis had informed her about four inmates who were suspended from the library. Appellant stated she had checked with Inmate Employment, which reiterated the four inmates were suspended. She then stated she had sent the one inmate back to the population, but allowed the other three inmates to work because she needed assistance. N.T. pp. 40, 51; AA Ex. 1.
22. Clark forwarded appellant's email to Ennis and asked if appellant's staffing request was acceptable. N.T. p. 42; AA Ex. 1.
23. Ennis replies to Clark stating, in relevant portion, "No. She needs to follow the direction given until we have more information." N.T. p. 42; AA Ex. 1.
24. Clark forwarded the entire email chain, including Ennis' response, to appellant. AA Ex. 1.

25. On May 30, 2019, Corrections Teacher James Booker informed Ennis one of the suspended inmates reported for work and all four of the suspended inmates were continuing to work in the library. N.T. pp. 44-45, 52-53.
26. Ennis requested, and received, a witness statement from Booker. N.T. pp. 45, 47-48; AA Ex. 2.
27. Ennis spoke with security and the Superintendent. Security and the Superintendent began an investigation to determine if appellant was insubordinate by allowing the four suspended inmates to work. N.T. p. 46.
28. On May 30, 2019, Ennis sent an email to Lieutenant Bashor and clerical employees Valerie Kusiak and Cynthia Hawley, advising Bashor to schedule a fact-finding conference to determine, in relevant portion, if appellant was violating his directive by permitting the suspended inmates to come to work. N.T. pp. 48, 69; AA Ex. 2.

29. Bashor investigated, in relevant portion, whether appellant was aware the inmates were suspended and whether she allowed the suspended inmates to report to work. N.T. p. 72; AA Ex. 3.
30. Bashor conducted a fact-finding interview with appellant, who stated:
- a. she did not know the inmates were suspended. Later in the interview, appellant stated she believed Inmate Employment informed her of the inmates' suspension
 - b. she allowed the suspended inmate workers to come to the library on their days off work to "volunteer"
 - c. she permitted inmates to enter the staff offices in the library
 - d. she allowed an inmate to help with processing call outs

N.T. pp. 77-81, 94-95, 99, 111-112; AA Ex. 3.

31. Bashor interviewed inmates who verified they worked in the library during their suspension. N.T. pp. 81-82, 104; AA Ex. 3.
32. In relevant portion, Bashor concluded appellant:
- a. clearly knew the inmates were suspended based upon the email between herself, Clark, and Ennis, even though she initially denied any knowledge.

- b. knowingly and willingly defied Ennis' order and admitted allowing the suspended inmates to come into the library
- c. admitted an inmate helped her with the call out process
- d. defied the direction that inmates are not permitted in the staff office area of the library

N.T. pp. 105-106, AA Ex. 3.

- 33. On September 10, 2019, appellant was scheduled for a Pre-Disciplinary Conference. She did not attend and no evidence was presented on her behalf. N.T. pp. 129, 128, 131, 153.
- 34. After the Pre-Disciplinary Conference, the panel concluded the charges were substantiated and provided the information for the supervisor to recommend an appropriate level of discipline. N.T. pp. 128, 131.
- 35. The Superintendent recommended a ten to fifteen day suspension with final warning. The union interceded and appellant was issued a Level-One Alternative Discipline in Lieu of Suspension. N.T. pp. 139-140.

DISCUSSION

At issue before the Commission is whether the appointing authority had good cause to issue appellant a one-day suspension. The appointing authority charges appellant with violating multiple provisions of the Code of Ethics and the appointing authority's security procedures by allowing inmates to work in the library while they were suspended, initially denying knowledge of the inmates' suspension, allowing inmates to enter the library staff offices, and allowing an inmate to work on the call out process.

In an appeal challenging the suspension of a regular status employee, the appointing authority has the burden to present sufficient evidence to demonstrate the suspension was issued for good cause. *White v. Commonwealth, Department of Corrections*, 110 Pa. Commw. 496, 532 A.2d 950 (1987); 71 P.S. §2603(c). Good cause must relate to an employee's competence and ability to perform his job duties, *Department of Corrections v. Ehnnot*, 110 Pa. Commw. 608, 532 A.2d 1262 (1987), or must result from conduct which hampers or frustrates the execution of the employee's duties. *McCain v. Department of Education*, 71 Pa. Commw. 165, 454 A.2d 667 (1983).

The appointing authority presented the testimony of Corrections Deputy Superintendent 2 Paul Ennis, Lieutenant Tricia Bashor, and Regional Field Human Resource Officer Theresa Croll. Appellant testified on her own behalf.

Deputy Superintendent Ennis provided testimony about the initial security breach and directive he issued to appellant. On May 13, 2019, at 6:30 a.m., Ennis arrived for work and saw an incident report alleging the library computer had

been breached; the breach included derogatory terms referring to appellant directly on the computer screen. N.T. pp. 26, 35. Upon discussion with security and the Superintendent, the decision was made to immediately suspend the four inmates hired to assist other inmates with using the library computers. N.T. p. 27. Ennis notified Inmate Employment the inmates were suspended from work. N.T. pp. 30-31.

On either May 13 or 14, 2019, Ennis went to the library to make sure appellant understood four inmates were suspended from work. N.T. pp. 32, 34-35; AA Ex. 1. Appellant told Ennis she had allowed one of the suspended inmates to come into work earlier in the day. N.T. pp. 33, 35. Ennis explained the inmate should not have been at work and should not be in the library from this point forward. N.T. pp. 33, 35. Ennis also explained the appointing authority was not certain which inmates were involved in the computer breach, therefore no inmates could be near the computers. N.T. p. 34. Appellant told Ennis she needed the four inmates to help her run the library. N.T. p. 36. Ennis reiterated the inmates could not be in the library for security reasons. N.T. pp. 36-37. After their conversation, Ennis was confident appellant understood his directive. N.T. pp. 36-37.

Ennis provided further testimony regarding appellant's decision to seek clarification of his directive. Specifically, on May 14, 2019, appellant emailed her direct supervisor, School Principal Clark about the conversation she had with Ennis regarding the four suspended inmates. N.T. pp. 40, 51; AA Ex. 1. In the email to Clark, appellant also stated she verified the suspension with Inmate Employment, had sent one inmate back to the population, but had allowed the other three inmates to work because she needed assistance. N.T. pp. 40, 51; AA Ex. 1. Clark forwarded the email to Ennis, asking if appellant's staffing request was acceptable; Ennis

replied, “No. She needs to follow the direction given until we have more information.” N.T. p. 42; AA Ex. 1. The entire email chain, including Ennis’ response, was forwarded to appellant. AA Ex. 1.

Further testimony was provided by Ennis to explain how he became aware the suspended inmates were continuing to work in the library and how he initiated the investigative process. On May 30, 2019, Corrections Teacher Booker informed Ennis the four suspended inmates were continuing to work in the library. N.T. pp. 44-45, 52-53. Booker provided a witness statement. N.T. pp. 45, 47-48; AA Ex. 2. In addition, Ennis spoke with security and the Superintendent; security and the Superintendent launched an investigation to determine whether appellant was insubordinate by allowing suspended inmates to work. N.T. p. 46. Ennis sent an email to Lieutenant Bashor and two clerical employees advising Bashor to schedule a fact-finding conference for appellant to determine, in relevant portion, if she violated Ennis’ directive by permitting inmates to come to work while they were suspended. N.T. pp. N.T. pp. 48, 69; AA Ex. 2.

Lieutenant Bashor explained her investigation and conclusion. She was initially investigating, in relevant portion, whether appellant was aware the inmates were suspended and whether she allowed the suspended inmates to report to work. N.T. p. 72; AA Ex. 3. During appellant’s fact-finding interview, she initially denied knowledge of the inmates’ suspensions, but later stated she believed Inmate Employment had informed her the inmates were suspended; she stated she had allowed the inmates to come into the library on days off to volunteer and had permitted inmates to enter staff offices, and allowed an inmate to help with the call out process. N.T. pp. 77- 81, 94-95, 99, 111-112; AA Ex. 3. When Bashor interviewed inmates, they verified working in the library during their suspensions.

N.T. pp. 81-82, 104; AA Ex. 3. Bashor concluded, in relevant portion, appellant initially denied knowing the inmates were suspended, but the email exchange between Clark, Ennis, and appellant showed otherwise. She further concluded appellant knowingly and willingly allowed the suspended inmates to come into the library and appellant had permitted an inmate to assist her with the call out process; appellant allowed inmates into the library staff office. N.T. pp. 105-106, AA Ex. 3.

Regional Field Human Resource Officer Croll explained what happened at appellant's Pre-Disciplinary Conference and how the discipline was determined. On September 10, 2019, appellant was scheduled for a Pre-Disciplinary Conference, but did not attend or have evidence presented on her behalf. N.T. pp. 129, 128, 131, 153. Based upon the investigative evidence they had before them, the Pre-Disciplinary Conference panel concluded the charges were substantiated and provided the information for the supervisor to recommend an appropriate level of discipline. N.T. pp. 128, 131. Although the Superintendent recommended a ten to fifteen day suspension with final warning, the union interceded and appellant was issued a Level-One Alternative Discipline in Lieu of Suspension. N.T. pp. 139-140.

With regard to the implications of appellant's conduct, Ennis explained the appointing authority operates on a "follow the last order given" system. N.T. p. 58. Appellant's most recent directive stated the inmates were suspended. N.T. p. 58. Therefore, any suspended inmate arriving for work should not have been allowed to work and appellant should have told them to return to the population. N.T. pp. 59-60. He explained the call out passes or any handwritten pass provided by a Corrections Officer will not override a suspension order. N.T. pp. 57, 59. Ennis clarified, "There's no exception to call outs or handwritten passes when administrative staff give direction that inmates aren't to be at work." N.T. p. 63.

Bashor provided additional information explaining why appellant's behavior was egregious and violated policies. Specifically, regardless of whether appellant was informed by Ennis or by Inmate Employment, she was aware the inmates were suspended. N.T. pp. 99-100. Moreover, appellant violated the appointing authority's Code of Ethics by providing an inaccurate statement during the investigation regarding how she learned of the inmates' suspensions. N.T. pp. 80, 93. Once appellant had the directive the inmates were suspended, any suspended inmate arriving with a call out or handwritten pass should have been returned to the population and appellant should have questioned the issuance of their call out. N.T. pp. 103-104. In addition, allowing inmates into the staff office creates security concerns and violates long standing policy. N.T. pp. 107-108.

In response to the charges, appellant explained that during her fact-finding interview, she was "foggy" from medications and could not precisely recall the email chain between herself, Ennis, and Clark. N.T. p. 155. Appellant alleged she did not allow the suspended inmates to work after her May 13 or 14, 2019 conversation with Ennis. N.T. p. 156. However, she later testified, "So yes, I knew they were suspended. Did I let them work? Only three times; when I had permission, another one I thought I had permission – well two other times I thought I had permission. So it was just a misunderstanding." N.T. pp. 159-160. Appellant also admitted she allowed inmates into the staff office and alleged she was previously unaware they were not allowed to be there. N.T. p. 150. Finally, appellant explained the inmate did not do the computer work for the call outs, he simply read numbers to her as she typed them in. N.T. p. 160.

Upon review of the record, the Commission finds the appointing authority has presented sufficient evidence to establish appellant violated the appointing authority's security policies and Code of Ethics when she allowed inmates to work in the library despite knowledge they were suspended, provided inaccurate information during the investigation, allowed inmates to enter the library staff offices, and allowed an inmate to work on call outs. We find Deputy Superintendent Ennis credible⁵ he informed appellant the inmates were suspended and issued her a directive they were not allowed to work. Lieutenant Bashor credibly testified her investigation uncovered the facts that appellant continued to allow the inmates to work in the library, allowed them to enter the staff offices, and allowed an inmate to work on call outs. Bashor also credibly explained that during the investigation, appellant provided inaccurate information regarding when she initially learned the inmates were suspended. Appellant acknowledges allowing inmates to work in the library after she knew they were suspended, allowing the inmates into the staff offices, and allowing the inmate to assist with call outs. Appellant's provision of inaccurate information during the investigation, repeated defiance of the inmates' suspension order by allowing them to work, permitting inmates into the staff office, and allowing an inmate to work on call outs all clearly reflect negatively upon her competency and ability to perform her job duties. *Ehnot, supra*. Accordingly, we enter the following:

⁵ The Commission has the inherent power to determine the credibility of witnesses and the value of their testimony. *McAndrew v. State Civil Service Commission (Department of Community and Economic Development)*, 736 A.2d 26 (Pa. Commw. Ct. 1999).

CONCLUSION OF LAW

The appointing authority has presented evidence establishing good cause for suspension under Section 2603 of Act 71 of 2018.

ORDER

AND NOW, the State Civil Service Commission, by agreement of its members, dismisses the appeal of Robin L. Nyberg challenging her Level-One Alternative Discipline in Lieu of Suspension from regular Corrections Librarian employment with the Correctional Institution at Albion, Department of Corrections and sustains the action of the Correctional Institution at Albion, Department of Corrections in the Level-One Alternative Discipline in Lieu of Suspension of Robin L. Nyberg from regular Corrections Librarian employment.

State Civil Service Commission

Gregory M. Lane
Commissioner

Bryan R. Lentz
Commissioner

Mailed: October 26, 2020