

COMMONWEALTH OF PENNSYLVANIA

Brian Corbin	:	State Civil Service Commission
	:	
v.	:	
	:	
State Correctional Institution at Fayette, Department of Corrections	:	Appeal No. 30901
	:	
Brian Corbin <i>Pro Se</i>		Page Darney Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Brian Corbin challenging his five-day suspension from regular Corrections Officer 2 employment with the State Correctional Institution at Fayette, Department of Corrections. A hearing was held on July 26, 2022, via video, before Commissioner Gregory M. Lane.

The Commissioners have reviewed the Notes of Testimony and exhibits introduced at the hearing. The issue before the Commission is whether the appointing authority established good cause for appellant’s five-day suspension.

FINDINGS OF FACT

1. On January 27, 2022, appellant received notice of his five-day suspension from regular Corrections Officer 2 employment with the appointing authority, effective March 6, 2022. Comm. Ex. A; N.T. p. 35; AA Ex. 2.

2. The January 27, 2022, notice provided the following reasons in support of appellant's five-day suspension:

On January 25, 2022, a fact-finding was held to afford you an opportunity to respond to the charge(s) stated below. During the course of the meeting, information was presented which established that you committed the following violation(s):

Failure and/or refusal to undergo weekly COVID-19 testing due to not being fully vaccinated against COVID-19 or disclosing that you are as required by Governor Wolf's August 10 "Vaccine or Test" announcement.

You failed and/or refused to undergo weekly COVID-19 testing for the week starting January 16, 2022.

Comm. Ex. A; AA Ex. 2.

3. The appeal was properly raised before this Commission and was heard under Section 3003(7)(i).¹ Comm. Ex. C.
4. Appellant is employed by the appointing authority as a Corrections Officer 2. N.T. p. 55.

¹ Appellant's request for a hearing on the suspension under Section 3003(7)(ii) of Act 71 of 2018 was denied due to an insufficient allegation of discrimination.

5. Appellant is unvaccinated against the COVID-19 virus. N.T. p. 18.
6. On August 10, 2021, Corrections Officers, including appellant, received the Governor's Office announcement that a vaccine or test requirement for all Commonwealth employees in healthcare and high-risk congregate facilities would begin on September 7, 2021. N.T. p. 41; AA Ex. 5.
7. Under the vaccine or test requirement, Corrections Officers were required to either receive the COVID-19 vaccine or undergo weekly testing for the COVID-19 virus. AA Ex. 5.
8. The State Correctional Institution at Fayette is considered a high-risk congregate facility. N.T. p. 41.
9. On August 11, 2021, Corrections Officers, including appellant, received an email outlining the vaccine or test requirement along with the Governor's Office's incentive to receive a vaccination. N.T. p. 43; AA Ex. 6.

10. On August 26, 2021, and September 3, 2021, the appointing authority's Deputy Secretary for Administration sent Corrections Officers, including appellant, an email outlining the vaccine or test requirement. N.T. pp. 44-45; AA Exs. 7, 8.
11. In September 2021, the appointing authority elected to sign a Policy-Procedure Waiver Request (hereinafter "Waiver Request"). N.T. pp. 36-37; AA Ex. 4.
12. The Waiver Request granted the appointing authority permission to "quickly issue discipline, only for failure/refusal undergo weekly testing for COVID-19, up to a (5) day suspension with Final Warning or a Level 2 ADLS with Final Warning for employees that fail/refuse to undergo weekly testing for COVID-19, by not requiring PDCs or Central Office review prior to issuance of discipline." N.T. pp. 36-37; AA Ex. 4.
13. The Waiver Request waived the requirements set forth in the appointing authority's Human Resource Policy 4.1.1. N.T. p. 37.

14. The appointing authority's Human Resource Policy 4.1.1 outlines the steps of progressive discipline that can be issued to an employee. N.T. p. 39; AA Ex. 3.
15. The steps of progressive discipline are as follows: counseling, verbal reprimand, written reprimand, one-day suspension, three-day suspension, five-day suspension, and removal. N.T. p. 39; AA Ex. 3.
16. On October 14, 2021, the appointing authority, through its Deputy Secretary, sent a notice to all Corrections Officers if the employees failed and refused to undergo testing, then they would be subjected to progressive discipline starting on October 18, 2021. N.T. p. 46; AA Ex. 9.
17. On October 20, 2022, appellant received counseling because he failed and refused to undergo COVID-19 testing during the week of October 10, 2021, through October 16, 2022. N.T. p. 21; AA Ex. 1 (p. 2).
18. On October 27, 2021, appellant received a verbal reprimand for failing and refusing to undergo COVID-19 testing. N.T. p. 21; AA Ex. 1 (pp. 3, 7).

19. On December 1, 2021, appellant received a written reprimand for failing and refusing to undergo weekly COVID-19 testing. N.T. pp. 21-22; AA Ex. 1 (p. 4).
20. On December 14, 2021, appellant received a one-day suspension for failing and refusing to undergo weekly COVID-19 testing. N.T. p. 22; AA Ex. 1 (pp. 5-6).
21. On January 6, 2022, appellant received a three-day suspension for failing and refusing to undergo weekly COVID-19 testing. N.T. p. 23; AA Ex. 1 (p. 7).
22. During the week starting on January 16, 2022, Corrections Officers, including appellant, were required to undergo COVID-19 testing. N.T. p. 18.
23. Appellant voluntarily failed and refused to undergo COVID-19 testing for the week starting on January 16, 2022. N.T. pp. 19-20; AA Ex. 1.
24. Appellant received a fact-finding meeting on January 25, 2022. N.T. p. 23; AA Ex. 1 (p. 9).

DISCUSSION

The issue in the present appeal is whether the appointing authority established good cause to issue appellant's five-day suspension. The appointing authority charged appellant with failing and/or refusing to undergo weekly COVID-19 testing as required by the Governor's August 10, 2021 "Vaccine or Test" requirement. Comm. Ex. A; AA Ex. 2.

In an appeal challenging the suspension of a regular status employee, the appointing authority bears the burden of establishing good cause for the personnel action. *White v. Commonwealth, Department of Corrections*, 110 Pa. Commw. 496, 532 A.2d 950 (1986); 71 Pa. C.S.A. § 2603(c). Good cause must be based upon meritorious criteria and be related to one's competency and ability to execute job duties properly. *White*, 110 Pa. Commw. at 498, 532 A.2d at 951.

In support of its charges, the appointing authority presented the testimony of Corrections Officer 3 Michael Starchok² and Employee Relations Manager Kristen Carney.³ In response, appellant testified on his own behalf. The following evidence presented is undisputed.

² Lieutenant Starchok's civil service job title is Corrections Officer 3 and he has held this position for over two years. N.T. pp. 16-17. As a Lieutenant, Starchok has been assigned as the scheduling Lieutenant for the State Correctional Institute at Fayette's unit two for eight months. N.T. p. 17.

³ Carney is employed by the Office of Administration as an Employee Relations Manager. N.T. pp. 30, 33. Carney's responsibilities include reviewing disciplinary matters, grievances, workplace violence reports, and Equal Employment Opportunity (hereinafter "EEO") complaints. N.T. p. 33.

Appellant is employed by the appointing authority as a Corrections Officer 2. N.T. p. 55. Appellant is unvaccinated against the COVID-19 virus. N.T. p. 18. On August 10, 2021, the Governor's Office announced to all Commonwealth employees, including appellant, that a vaccine or test requirement for all Commonwealth employees in healthcare and high-risk congregate facilities would begin on September 7, 2021. N.T. pp. 40-41; AA Ex. 5. Under the vaccine or test requirement, Corrections Officers were required to either receive the COVID-19 vaccine or undergo weekly testing for the COVID-19 virus. AA Ex. 5; *See* Finding of Fact 7.

After receiving the August 10, 2021, announcement, appellant continually received correspondence reminding him of the vaccine or test requirement, including notice informing him if he failed to undergo weekly testing, then he would be subjected to progressive discipline starting on October 18, 2021.⁴ N.T. pp. 43-46; AA Exs. 6, 7, 8, 9; *See* Findings of Fact 9, 10, 16. Despite receiving numerous notices, appellant continually failed and refused to undergo COVID-19 testing since the August 10, 2021 announcement. As a result, appellant received counseling, a verbal reprimand, a written reprimand, a one-day suspension, and a three-day suspension. N.T. pp. 21-23; AA Ex. 1; *See* Findings of Fact 17, 18, 19, 20, 21.

⁴ Carney explained the vaccine or test requirement was readily available for all Corrections Officers on the appointing authority's intranet known as DOCNet. N.T. p. 45; AA Ex. 8. The appointing authority further provided Corrections Officers a Proof of Vaccination or Test Weekly FAQ (hereinafter "FAQ") for their reference. N.T. pp. 47-48; AA Ex. 10. The FAQ provides that "if a staff member refuses or fails to get tested, HR will begin the progressive discipline process. HR will provide guidance to the FHROs on the progressive discipline for consistency. Staff will not be sent home for refusing to test." N.T. p. 48; AA Ex. 10.

During the week of January 16, 2022, Corrections Officer 3 Starchok was assisting Corrections Officers, including appellant, receive weekly COVID-19 testing. N.T. p. 18. Corrections Officers who were unvaccinated against the COVID-19 virus were required to undergo testing. N.T. p. 18. Starchok confirmed appellant failed and refused to undergo COVID-19 testing for the week starting on January 16, 2022. N.T. pp. 19-20; AA Ex. 1; *See* Finding of Fact 23.

Starchok conducted an investigation into whether Corrections Officers, including appellant, did not receive the COVID-19 vaccine and refused to undergo weekly COVID-19 testing. Afterwards, he reviewed a spreadsheet to track the Corrections Officers to see why they refused testing. N.T. p. 19. At the conclusion of his investigation, Starchok prepared and created appellant's fact-finding packet on January 25, 2022. N.T. pp. 19-20; AA Ex. 1. The focus of appellant's fact-finding packet is appellant's failure and refusal to undergo weekly COVID-19 testing for the week of January 16, 2022 to January 22, 2022. Specifically, "despite being notified on August 10, 2021 that this requirement would start on September 7, 2021 you failed and/or refused to undergo a weekly COVID-19 test." N.T. p. 20; AA Ex. 1 (p. 1).

On January 25, 2022, appellant received his fact-finding meeting. AA Ex. 1 (p. 9). During his fact-finding meeting, appellant was asked prepared questions regarding his failure and refusal to undergo COVID-19 testing. N.T. p. 24. At the conclusion of his fact-finding meeting and, despite receiving an opportunity to sign, appellant refused to sign for his responses to the prepared questions. N.T. p. 24.

Employee Relations Manager Carney explained how the appointing authority issued discipline pursuant to the Governor's Office vaccine or test requirement. In September 2021, the appointing authority elected to sign a Policy-Procedure Waiver Request (hereinafter "Waiver Request"). The Waiver Request granted the appointing authority permission to "quickly issue discipline, only for failure/refusal undergo weekly testing for COVID-19, up to a (5) day suspension with Final Warning or a Level 2 Alternative Discipline in Lieu of Suspension with Final Warning for employees that fail/refuse to undergo weekly testing for COVID-19, by not requiring pre-disciplinary conferences or Central Office review prior to issuance of discipline." N.T. pp. 36-37; AA Ex. 4. The Waiver Request waived the requirements set forth in appointing authority's Human Resource Policy 4.1.1. that permitted removal as a form of discipline. N.T. p. 37; AA Exs. 3, 4; *See Findings of Fact 12, 13, 14, 15.* As a result of the investigation and pursuant to the appointing authority's Waiver Request provisions, appellant received a five-day suspension from regular Corrections Officer 2 employment on January 27, 2022. Comm. Ex. A; N.T. p. 35; AA Ex. 2.

In response to the appointing authority's presentation, appellant provided the following:

Okay. As far as the testimony goes, both Lieutenant Starchok and Kris Carney did not present anything that I had issue with. Everything that was addressed was laid out in that fashion. So from their standpoint, I have no issues with anything they delivered. So if we can just go to direct my argument, my closing argument, because I have nothing else to present other than my closing argument.

N.T. pp. 56-57. In his closing statement, appellant argued he was being punished for refusing to take the COVID-19 test when he was not sick with the virus. Appellant also asserted his religious exemption was refused by the appointing authority. Appellant emphasized he is a model employee who has not missed a day during the COVID-19 pandemic and has not adversely affected the agency or the State Correctional Institution at Fayette. N.T. pp. 71-73. Nevertheless, the Commission notes appellant failed to present any evidence or testimony during his case in chief to support these arguments.

Having carefully reviewed the record, the Commission finds the appointing authority has established good cause to suspend appellant for five-days. We find the testimony of Starchok and Carney credible⁵ and persuasive in how appellant failed and refused to undergo COVID-19 testing during the week of January 16, 2022. As a Corrections Officer 2 abiding by the appointing authority's compliance with the Governor's Office's August 10, 2021, announcement, appellant was responsible for either receiving vaccination against the COVID-19 virus or undergo testing. Appellant voluntarily refused and failed to undergo testing. Appellant does not dispute this refusal. As such, appellant's refusal and failure to undergo COVID-19 testing negatively reflects upon his competency and ability as a Corrections Officer 2. *White, supra*. Accordingly, we enter the following:

⁵ It is within the purview of the Commission to determine the credibility of the witnesses. *State Correctional Institution at Graterford, Department of Corrections v. Jordan*, 505 A.2d 339, 341 (Pa. Commw. Ct. 1986).

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 two of its members,⁶ dismisses the appeal of Brian Corbin challenging his five-day suspension from regular Corrections Officer 2 employment with the State Correctional Institution at Fayette, Department of Corrections and sustains the action of the State Correctional Institution at Fayette, Department of Corrections in the five-day suspension of Brian Corbin from regular Corrections Officer 2 employment, effective March 6, 2022.

State Civil Service Commission

Maria P. Donatucci
Chairwoman

Gregory M. Lane
Commissioner

Mailed: 1/25/23

⁶ Commissioner Pamela M. Iovino, who took office on December 22, 2022, did not participate in the discussion of or decision for this appeal.