

**FILED**

MAY 05 2014

EMPLOYEE APPEALS BOARD

**BEFORE THE MISSISSIPPI EMPLOYEE APPEALS BOARD**

**TOMMY MITCHELL**

**APPELLANT**

**VS.**

**DOCKET NO. 14-008**

**MISSISSIPPI DEPARTMENT OF CORRECTIONS**

**RESPONDENT**

**ORDER**

Before the Mississippi Employee Appeals Board is the appeal of Tommy Mitchell ("Mitchell" or "Appellant") for the imposition of written counseling by the Mississippi Department of Corrections ("MDOC"). A hearing was held on Mitchell's appeal on April 4, 2014. Mitchell represented himself. The MDOC was represented by David Scott.

Having considered the testimony of all witnesses who testified at the appeal hearing and having considered all exhibits introduced into evidence, this tribunal enters the following Order.

**FACTS**

Commander (Captain) Tommy Mitchell appealed to the Mississippi Employee Appeals Board a "written counseling" he received from Archie Longley, Deputy Commissioner of Institutions for the Mississippi Department of Corrections. Initially, Mitchell had received a written reprimand on December 23, 2013, from Deputy Warden Sonja Staniel for Mitchell's alleged Group II, subparagraph 1 offense which alleged that Mitchell did not properly inform his superior of a discrepancy with the inmate count.

At Mitchell's appeal hearing, he explained that when he learned of an incorrect count at Unit 26, he instructed a subordinate to advise Warden Faye Noel at the Mississippi State Penitentiary at Parchman of the count discrepancy and that he then went directly to Unit 26 to address the count discrepancy. Shortly after Mitchell arrived at Unit 26, Warden Noel arrived at Unit 26. It is clear

to this tribunal from Mitchell's testimony that he promptly went to Unit 26 upon being informed of the count discrepancy; that he promptly instructed a subordinate to notify Warden Noel and that Warden Noel learned of Unit 26's count discrepancy within a reasonable time after Mitchell was informed of the discrepancy.

Upon Mitchell's receipt of the written reprimand, he grieved receipt of the reprimand through administrative channels within the MDOC. Ultimately, on February 4, 2014, Archie Longley, Deputy Commissioner of Institutions, issued MDOC's final response to Mitchell's in-departmental grievance. Specifically, Commissioner Longley stated:

This correspondence will serve as the Step Three response to your grievance dated January 13, 2014, "Failure to Report a Discrepancy" in the 1400 hour count.

After reviewing the documentation submitted and meeting with you on January 30, 2014 at my Jackson location, I agree that it is your responsibility to notify the Deputy Warden and the Warden of any discrepancy with the count, and not to relay to someone else for them to do.

I am also in agreement with Superintendent Lee's decision to reduce the "Written Reprimand" to a "Written Counseling", and consider the matter closed.

The effect of Deputy Commissioner's ruling was to reduce the written reprimand to a written counseling. Based on Deputy Commissioner Longley's decision, Mitchell was issued a written counseling dated February 10, 2014. It is from the February 10, 2014, written counseling that Mitchell has appealed.

#### **CONCLUSIONS OF LAW**

As the Appellant and employee, Mitchell has the burden of proof/persuasion that the allegations upon which his imposition of written counseling was based are either (1) untrue or, (2) if true, the actions taken by the MDOC in imposing written counseling were not justified for the

conduct that he engaged in. See, *Mississippi State Personnel Board Policy and Procedures Manual* 10.7.21(C).

The Mississippi Supreme Court has made clear that the administrative rule which places the burden of proof/persuasion on the employee is not merely semantics. In *Richmond v. Mississippi Department of Human Services*, 745 So. 2d 254 (Miss. 1999) the court stated:

The statute and administrative regulations clearly place the burden of persuasion on the aggrieved employee to demonstrate that the reasons given are not true. Rule 17, Administrative Rules of the Mississippi Employee Appeals Board; Miss. Code Ann. § 25-9-127 (1972). ... This is not mere semantics. Under our scheme, in a nutshell, ties go to the appointing authority. That is, unless the employee carries the burden of persuasion that the alleged conduct did not occur, the employee has no right to have the employment decision overturned. *Mississippi Employment Security Commission v. Collins*, 629 So. 2d 576, 580 (Miss. 1993); Miss. Code Ann. § 25-9-127.

Having considered the testimony of all witnesses who testified at Mitchell's appeal hearing and having considered all exhibits introduced into evidence, this tribunal finds that Mitchell failed to meet his burden of proof/persuasion that the written counseling he received on February 10, 2014, should not have been issued.

This tribunal understands Commander Mitchell's argument that he promptly directed a subordinate to advise Warden Noel of the count discrepancy, that Mitchell immediately went to Unit 26 to address the discrepancy problem and that Warden Noel arrived at Unit 26 shortly after Mitchell. However, based on the evidence before it, this tribunal cannot say that Mitchell met his burden of proof that he followed the appropriate procedure in not personally notifying Warden Noel of the discrepancy in the count is irrelevant. While Mitchell may have believed the procedure he employed in delegating notice to Warden Noel was correct, the MDOC contends that it was not, and

that failure to follow the correct procedure warranted that Commander Mitchell receive written counseling on the issue.

Commander Mitchell's February 10, 2014, written counseling makes clear that "Counseling Sessions are not considered a form of disciplinary action. They are designed to enhance employer-employee relationships and to improve overall operations. Counseling Sessions are utilized to document supervisor-subordinate communication." Mitchell has not met his burden of proof that he should not have received the written counseling or that the written counseling he received was too severe for him failing to follow MDOC procedures.

Commander Mitchell also appealed additional issues to the Mississippi Employee Appeals Board. These issues are set forth in detail in Mitchell's appeal. Summarized, they allege/infer that Warden Noel and others in Mitchell's chain of command committed a number of MDOC infractions in their investigation and handling of the investigation which ultimately concluded in Mitchell's receipt of a written counseling from Deputy Warden Sonja Staniel. However, none of Noel or Staniel's alleged infractions constitute, even if true, a grievable offense under the Mississippi State Employee Handbook. Accordingly, those grievances are dismissed.

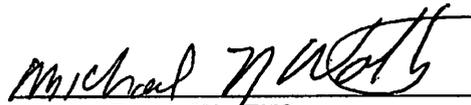
In summary, the gist of the written reprimand against Mitchell was that he personally did not inform Warden Noel of the discrepancy in the count at Unit 26. Mitchell's understanding of the operating procedure was that it was appropriate for him to direct a subordinate to inform Warden Noel or other superiors of Mitchell of the count discrepancy and that he was to later confirm that Warden Noel or other superiors had, in fact, received the appropriate notification. Mitchell, upon seeing Warden Noel at Unit 26 shortly after he arrived at Unit 26 and shortly after Mitchell told a subordinate to notify Warden Noel understood Warden Noel had been informed of the count discrepancy and did not specifically report it to her. The MDOC disagreed with Mitchell's

interpretation of the procedure to be followed when a count discrepancy exists. The MDOC's written counseling of Mitchell was an appropriate response to the situation. Accordingly, the MDOC's action in providing written counseling to Mitchell is AFFIRMED. Mitchell's appeal is DISMISSED, with prejudice.

SO ORDERED, THIS THE 5 DAY OF MAY, 2014.

MISSISSIPPI EMPLOYEE APPEALS BOARD

By:



MICHAEL N. WATTS  
Presiding Hearing Officer