

BEFORE THE MISSISSIPPI EMPLOYEE APPEALS BOARD

SHERRY HEARN

VS.

MISSISSIPPI DEPARTMENT OF
CORRECTIONS

FILED

MAY 07 2014

EMPLOYEE APPEALS BOARD

APPELLANTS

NO. 13-072

APPELLEE

ORDER

Sherry Hearn filed an appeal of her termination from the Mississippi Department of Corrections ("MDOC") on March 15, 2013. This cause came on for hearing on, February 19, 2013, in Jackson, Mississippi. The Appellant was represented by John McNeal and David Scott represented the MDOC.

SUMMARY

Sherry Hearn was employed as a Commander at the Forrest County Community Work Center ("Forrest County CWC") a MDOC facility. On October 20, 2012, two inmates escaped from the Forrest County CWC. Following the escape the two guards who were working at the Forrest County CWC, John McDaniel and Barbara Thompson, were terminated. Hearn was their supervisor. McDaniel and Thompson appealed their termination to the Mississippi Employee Appeals Board (*John Paul McDaniel and Barbara Thompson v. MDOC, Docket No. 13-021, 13-022*). At the McDaniel/Thompson hearing, Hearn testified on behalf of McDaniel

and Thompson. On August 30, 2013, The MEAB reversed McDaniel and Thompson's termination. The MDOC appealed the Hearing Officer's Order in *McDaniel and Thompson v. MDOC* to the MEAB Full Board. On February 4, 2014, the Full Board affirmed the Hearing Officer's decision to reverse the termination.

On December 4, 2013, Hearn was terminated from MDOC for a Group Three, No. 18 offense of "breach of agency security or confidentiality."

Specifically during the Employee Appeals Board Hearings for former Correctional Officers Barbara Thompson and John McDaniel on June 4, 2013 and July 2, 2013 you were a witness. At those hearings, you verbally acknowledged that you allowed the officers to violate MDOC SOP 16.06.01 entitled 'Offender Count and Movement'. They failed to ensure that all necessary offender head counts were properly conducted at the Forrest County CWC on October 20, 2012. The violation of the aforementioned SOP resulting in offenders escaping the Forrest County CWC was a breach of security.

On December 19, 2013, Hearn filed a notice of appeal of her termination with the MEAB. On February 19, 2013, this matter was heard.

At the hearing Hearn argued that the MEAB was collaterally estopped from affirming Hearn's termination by the finding of the Mississippi Department of Employment Security ("MDES"), with regard to Hearn's claim for unemployment benefits, that she was not guilty of misconduct. This tribunal rejects the argument that it is estopped by the MDES's finding. This Tribunal further finds that Hearn did not commit a

Group III, #18 offense of "[a] breach of agency security or confidentiality," but did commit a Group II No. 1 offense of insubordination. Therefore, Hearn is reinstated to her position with MDOC, but shall receive a written reprimand and a five day suspension for the insubordination offense.

FINDINGS

For purposes of this appeal the following findings and conclusions from the *McDaniel/ Thompson* order are pertinent:

MDOC SOP Number 16-06-01 specifies the policy for Offender Count and Movement at Community Correction Centers. The policy states as follows:

Formal Counts are official counts conducted by staff within the center at least every hour. . . The facility has a system of physically counting offenders. There are at least three offender counts daily. . . All offenders in the center will be counted simultaneously, each at a specific location... A minimum of two (2) staff members is required to make a correct count. One staff member will count, using the recount roster, while the other observes and ensures that there is no movement. The counting officers will remain in the area counted until the count is verified and correct.

Both *McDaniel* and *Thompson* verified that, as a matter of practice, a formal count was conducted by making the inmates get on their beds and counting them – the inmates are not actually matched to the inmate roster, they are merely counted. Both *McDaniel* and *Thompson* testified that they had been allowed to conduct formal counts in this manner, that their supervisor was aware that they conducted formal counts in this manner, and that they had never been counseled or told to conduct formal counts in any other manner. Their supervisor, Commander Sherry Hearn, verified that she was aware that formal counts were not conducted every hour as prescribed by MDOC SOP Number 16-06-01. Hearn also testified that as a matter of practice it was customary to simply reconcile the count sheets to substitute for the formal counts. Hearn stated that the count sheets were only used when the certified counts were conducted, three times daily. Hearn was aware that physical

counts as prescribed by MDOC SOP Number 16-06-01 were only conducted three times a day. Hearn stated that daily activities at The FCCWC were not disrupted for formal counts, but that the correctional officers were expected to keep up with all offender movement.

The FCCWC has two zones, A zone and B zone which are separated by a corridor. Based on testimony from McDaniel, Thompson, and their immediate supervisor, Commander Hearn, a 24 year employee of MDOC, it is extremely difficult if not impossible to ensure that all inmates are counted simultaneously, with no movement, by only two officers. In order to properly count all of the inmates "simultaneously" in the manner described by MDOC policy at least three officers would be required.

In her testimony at the *McDaniel/Thompson* hearing, Hearn acknowledged that if she wrongly interpreted MDOC policy that she should be held responsible. However, Hearn also correctly noted that she was not responsible for the inmate escape because the failure to count according to policy was not the cause of the inmate escape. In *McDaniel/ Thompson* this tribunal found that McDaniel and Thompson were terminated because "their mistake (in counting the offenders) prevented MDOC from conducting a proper search for the inmates." i.e., the failure to count according to policy did not cause the escape.

OPINION

With regard to the matter of collateral estoppel, this tribunal has reviewed the Full Board Order in the matter of *Bertucci v. MDOC, Docket No.88-035 (June 12, 1989)*. In that Order the Full Board determined that

under the circumstances, the MEAB was estopped from a finding that was different from the finding of MDES. However, the issue in *Bertucci* was reduced to a simple question of fact: whether Bertucci had falsified documents? MDES determined that Bertucci had not falsified documents. The Full Board determined that the MEAB was therefore estopped from making an alternative finding of fact, i.e., that Bertucci had falsified documents. Since the fact that Bertucci had falsified documents was the reason for Bertucci's termination, the termination could not be upheld by the Full Board.

In the instant matter, MDES made a determination that Hearn was not guilty of misconduct as defined by Mississippi Unemployment Compensation Law.

The meaning of the term "misconduct," as used in the unemployment compensation statute, [is] conduct evincing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect from his employee. Also, carelessness and negligence of such degree, or recurrence thereof, as to manifest culpability, wrongful intent or evil design, and showing an intentional or substantial disregard of the employers interest or of the employee's duties and obligations to his employer, [come] within the term. Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, or inadvertences and ordinary negligence in isolated incidents, and good faith errors in judgment or discretion [are] not consider "misconduct" within the meaning of the statute.

Pendleton v. Miss. Dep't Emp't Sec., 86 So. 3d 284, 285 (¶6) (Miss. Ct. App. 2012) (citing *Wheeler*, 408 So. 2d at 1383).

The MDES finding that Hearn did not commit misconduct is not equivalent to a finding that she did not commit a breach of agency security or confidentiality, which is the charge for which she was terminated. Therefore, this tribunal finds that the assertion of collateral estoppel is without merit in this matter.

MEAB Rule XX provides that "[a]n appealing party shall have the burden of proving that the reasons stated in the notice of the agency's final decision are not true or are not sufficient grounds for the action taken." MDOC charged Hearn with "[a] breach of agency security and confidentiality," in that she allowed Thompson and McDaniel to violate MDOC SOP 16.06.01 which lead to McDaniel and Thompson failing to ensure that all necessary offender head counts were properly conducted on October 20, 2012, resulting in the offenders escaping the Forrest County CWC.

At the *McDaniel/Thompson* hearing this tribunal found that Hearn knew that McDaniel and Thompson were not conducting offender counts as prescribed by MDOC SOP 16.06.01. This tribunal also found that "it is extremely difficult if not impossible to ensure that all inmates are counted simultaneously, with no movement, by only two officers. In order to properly count all of the inmates 'simultaneously' in the manner described by MDOC policy at least three officers would be required." Additionally

this tribunal found that there "was no evidence that McDaniel/Thompson did or failed to do anything that contributed to the actual inmate escape."

This tribunal finds that Hearn failed to enforce MDOC SOP 16.06.01 as written, but that the policy was difficult to enforce at the Forrest County CWC. This tribunal also finds that the failure to enforce that policy did not result in the offender escape. Under these circumstances, this tribunal concludes that the failure to enforce MDOC SOP 16.06.01 did not lead to a breach of security.

This tribunal finds that the reasons state in the notice of the agency's final decision are not true or are not sufficient grounds for the action taken. Accordingly pursuant to MEAB Rule XXIV B. Hearn is actually guilty of a Group Two No. 1 act of insubordination, in that she failed to comply with applicable established written policy. Accordingly Hearn's discipline is reduced to a written reprimand and a suspension without pay for five working days. Hearn is reinstated to her position with MDOC with back pay and all attendant rights and benefits.

SO ORDERED THIS THE 7th DAY OF May, 2013.

MISSISSIPPI EMPLOYEE APPEALS
BOARD

BY:



INGRID DAVE WILLIAMS
Hearing Officer