

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

IN THE MATTER OF
DONALD DODDATO,
Grievant,

v.

STATE OF DELAWARE
DEPARTMENT OF CORRECTION
Agency

**DOCKETS NO. 95-06-39 AND
96-10-63**

OPINION AND ORDER

BEFORE Woo, Chairperson, Bowers, and Green, Members of the Merit Employee Relations Board, constituting a lawful quorum of the Board pursuant to 29 Del Code, Section 5908(a).

And now this 14th day of December, 1995, the above-referenced matter being before the Board on November 22, 1995, the Board makes the following Finding of Fact and Conclusions of Law; to wit:

1. The State made a Motion to Dismiss based on Merit Rule No. 20.0410 which provides in pertinent part:

Any employee who takes his employment problems outside of the classified service without first attempting to resolve said problems in accordance with the procedures outlined above shall be subject to disciplinary action. However, nothing in this section shall be deemed to abrogate any legal means of redress to the courts, or appropriate State or Federal agencies, or prohibit consultation with a union representative.

2. The first grievance before the Board was filed in June 1995. The second grievance consolidated with this hearing was filed in October, 1995 upon Mr. Doddato's termination. Since the Equal Employment Opportunity Commission (EEOC) is a federal agency and therefore an agency which a merit employee is permitted to file a grievance with without losing any rights under the Board and the fact that this hearing had been pending for several months, the Motion to Dismiss was denied as the Merit Rules do not provide for dismissal of any grievance because a grievant has availed himself of any rights he may have under federal law.

SUMMARY OF EVIDENCE

3. Donald Doddato was sworn and testified as follows:

Officer Doddato testified that he has been a Corrections Officer since January 5, 1981 and on May 22, 1994 there was an incident at the Delaware Correctional Center near Smyrna, Delaware. Officer Doddato testified that on the compound there were approximately 200 inmates and 4 to 5 correction officers and that a fight started. Officer Doddato testified that he was beaten in and about his head and was struck on his head with what he believed was a baseball bat. Officer Doddato testified that it took approximately twenty (20) minutes to break up the disturbance and that he was treated at Kent General Hospital. Officer Doddato testified that since that time he has had trouble with his temper and testified quite honestly that he was originally scared of going back to work with inmates but has gone to treatment and has improved. Officer Doddato further testified that the doctors wanted him to spend six (6) months in light duty where he would gradually get to work around inmates again in different areas such as court and transportation or outside duty on the perimeter or in the tower before he went back in this facility to work in a housing unit full time.

4. Officer Doddato testified that he received worker's compensation until the date he was cleared to return to work on a light duty basis which was September 26, 1994, according to a letter written by Dr. David E. Raskin, MD, a psychologist under contract to the State of Delaware. Office Doddato testified that his doctor, Gregory Villabona, cleared him to return to work on November 1, 1994 with the following limitation that he should be placed on outer patrol, tower, court transportation, administrative/desk for a minimum of six (6) months. Office Doddato testified that, in layman's terms, what he was suffering from was a simple stress disorder and that he could gradually go back to his duties and, if the gradual return to his duties was not satisfactory, that his career as a corrections officer would be over.

5. Officer Doddato testified that he had had several run-ins during the past twelve (12) years with Major Barry Hawlk, the security superintendent at the Delaware Correctional Center beginning in 1985 with an inmate urinalysis controversy through a

termination in 1987 that was subsequently reinstated in 1988. Officer Doddato testified that Major Hawlk once stated to him, "I am going to get rid of your ass," for reporting him reference the inmate urinalysis.

6. Officer Doddato testified that he did a walk-through in or about September 1995 with Major Hawlk and Correction Officer McWiggon out of Internal Affairs and he went to a debriefing afterwards with the counselor, Tony Powell. Officer Doddato stated that the inmates did not react during the walk-through but that was not surprising because of the high level of supervisory personnel that was with him during the walk-through. Officer Doddato characterized the correction officer's position like street police and that the inmates go over the heads of the correction officers to supervisors to make reports about certain correction officers and react differently when supervisors are not around. Officer Doddato testified that the discrimination he was suffering from the Department of Corrections was due to mental disability and injury during work that they would not provide him with the proper environment to return to work and that the people who were not providing this environment were Warden Snyder and Major Hawlk.

7. On cross-examination Officer Doddato that he started work on 1/5/81 and that a hearing was pending in front of the Industrial Accident Board for review of compensation. Officer Doddato further testified that he did not recall meeting with Dr. McGuire Raskin but only Dr. David Raskin and had met with him approximately three (3) times. Officer Doddato defined a malingerer, in his view, as one who stays around for a while, hangs on and testified that at the sessions with the psychologist and counselors that they would talk about different things. Officer Doddato testified that on a perimeter patrol or tower duty that a correction officer would have to carry a firearm and that main control would become the heart of the institution in case of emergency.

8. Officer Doddato testified that a the Department offered no assistance in searching for a job except for a written letter saying what they could provide and that he looked at bulletin boards. He didn't talk to anyone about any available positions and did apply for one position but someone with more seniority beat him out for that

position. Officer Doddato testified that he did take a tour of the institution after the two doctors, himself and the institution agreed and that it was fifteen (15) months after the incident when he started to receive counseling. Upon examination from the Board Officer Doddato testified that, after the injury, his problems included anger and depression and he was taking medication, including Zoloft, but he had been off medications for approximately four (4) months at this point. The doctor had told him that he was suffering a stress disorder and that the Department of Corrections told him this was a mental disorder. Officer Doddato testified in regard to the Employee Performance Planning and Appraisal (EPPA) that he had seven (7) different EPPA's in one year as that the lieutenant he reported to said his work was satisfactory but that they were always rejected and rewritten. Officer Doddato testified that one was torn up in front of him while he was working in the control room one day in 1986. Officer Doddato testified that he was fired in 1988 and he was reinstated in 1989 due to unfair termination practice.

9. Officer Doddato further testified, upon examination from the Board, that on May 22, 1994 he was roving inner patrol and was doing area checks and helping to open gates when the incident took place and that the captain was off that day; the lieutenant had a broken leg, the sergeant in the control room was on light duty and the other officers in the control room were not trained for an incident and it took approximately twenty (20) minutes for back-ups to arrive with dogs to put down the incident. Officer Doddato further testified that after he was cleared to return to work he was never offered any other jobs and that he could do any job outside the fence area.

10. Officer Doddato testified that a pre-termination hearing was conducted on December 28, 1994. Nothing was heard further until another pre-termination hearing was set for October 18, 1995 and that light duty work included light duty posts such as maximum security pods, the tower, etc., and that he recalled other officers who were given appropriate duties including one correction officer with a hemorrhoid problem who was placed on light duty basement assignment and that he felt that light duty only pertained to the people they want to allow it for. Officer Doddato further testified that he filed for unemployment in June 1995 but found out he wasn't officially terminated

until October of 1995 and that he is now collecting welfare and that he goes to the unemployment office weekly and checks the job computer. Officer Doddato further testified that some of the problems are due directly to Major Hawlk and include improprieties and, at one point, he was handcuffed, strip-searched and embarrassed in front of his fellow officers and this was due to directions by Major Hawlk and that his lieutenant is the person who writes his EPPA's. The lieutenants have changed over the years.

11. On redirect, Officer Doddato testified that he never recalled meeting Dr. McGuire Raskin, just Dr. David Raskin and that he's currently suffering financial problems as his wife is not working and that he may lose his house over the situation and that he feels he's being discriminated against because other people have gone back with mental and physical light duty assignments including Michael Woomer on maximum pod, Michael Dolan on maximum pod and Edward Crane in the gatehouse.

12. J. R. Morris was sworn and testified that he is the grievance representative for the Delaware Corrections Officers Association and is a corrections officer sergeant with the Department of Corrections and that Mr. Doddato had not been offered any positions of light duty that he could work and that a vacant supply room position in central was filled with a temporary seasonal, Thomas Lighthall, instead of Mr. Doddato. Officer Morris testified further that the union had met with Mr. Machtinger and Corrections Officer Doddato to try and facilitate his return to work and they had suggested assignments in construction, laundry, central supply as these are positions that have less frequent inmate contact and that no weapons are assigned to corrections officers in fulfilling these job positions. Officer Morris further testified that the union agreed to a two-month phasing in schedule where Officer Doddato would spend four (4) days in a position such as Mail Room where there is no inmate contact or the above-mentioned positions and one day in housing and gradually return to the point where he would be five (5) days in housing and no days on light duty assignment.

13. Sgt. Morris further testified that the Department makes the determination of no weapon contact and that was not contained in the medical recommendations and that

there were several people who had gone back to work with medical problems including stress disorders and that, previously, correctional officers with stress disorders were moved to other jobs in the facilities that, under the Merit Rules, everyone should be treated the same and that Officer Doddato was not being treated as like individuals. Sgt. Morris cited the following cases:

(a) Ed Crane in 1992 was on canine outside duty and for a period of time he was not allowed to carry a weapon and he worked inside during this time period until he was able to get his medical clearance in order to return carrying a weapon and return to his outside post.

(b) Michael Dolan who was restricted from the tower due to a stress disorder and it was recommended that he be around other correction officers so he was given other work inside the facility.

(c) Michael Woomer who had a similar restriction as Officer Dolan and similarly given other work.

Sgt. Morris testified on cross examination that he gained his knowledge about the officers reference above due to working inside the prison facility and that he has no familiarity with stress disorders.

14. Upon examination by the Board Sgt. Morris stated that at the pre-termination meeting the union recommended positions to the Department of Corrections to which Officer Doddato could be placed and that for a posted vacant driver's position he got on the Certification List but was not selected for that position. Sgt. Morris testified that his understanding of restricted work was that it was the same as light duty work. Sgt. Morris further testified about the facts of the Crane reinstatement to work and provided copies of that which were introduced as the grievant's Exhibit No. 3.

15. Barry Hawlk was sworn and testified as follows: That he has been with the Department of Corrections since July 1, 1972 and has been stationed at the Delaware Correctional Center since 1977. Currently, he is a major and is the security superintendent and is responsible for security operations at the DCC twenty-four hours a day and there are 1700 inmates and 350 corrections officers that report under him. Major Hawlk testified further that on September 8, 1994 an inmate with AIDS had a

shank, or homemade knife, and stabbed him twice, once in the chest and once in the leg. The inmate was subdued and Major Hawlk was treated at the hospital for ten (10) stitches total for the chest and leg wounds and returned the next day to work so inmates wouldn't think that they got him down. Major Hawlk further testified that there was physical light duty at the Delaware Correctional Center, including station assignments in the pods, gates and control rooms where there are not a lot of movements but that there was no psychological light duty that he was aware of. Major Hawlk further testified that psychological light duty wasn't appropriate at the perimeter because correction officers there had weapons and dogs to control and that they had to perform quick reactions and that psychological light duty was not possible at the towers, again, because of the weapons and the quick decisions that had to be made in times of escape. Major Hawlk further testified that the control room positions were not suitable for psychological light duties because they contain a number of decision-making areas as well. In the case of an incident, the control room becomes the nerve center. Major Hawlk further testified that the control room is normally a quite stressful position in ordinary times with radios, telephones and people requesting gates to be opened and closed and that, during an incident, becomes extremely stressful and that, during a riot or incident, no one is allowed to leave the control room area. Major Hawlk further testified that on any given day there are redeployments throughout the institution due to circumstances that arise during a shift, an officer from one unit may be moved into another area.

16. Major Hawlk testified that there was a redeployment on May 22, 1994, the day of the incident and the perimeter dogs responded to put down the incident. Major Hawlk further testified regarding Michael Woomer; that he had been at DCC for several years; that Woomer was never on light duty to his knowledge and has worked many different assignments. With regard to Michael Dolan, Major Hawlk testified that Officer Dolan participated in counseling with a psychologist and then returned to full duty. He was deployed inside and not alone in a tower assignment. With regard to corrections officer Gary Crane, Major Hawlk testified that he was temporarily taken off his canine assignment but was returned to full duty when his doctor cleared him to use a weapon and that he had been terminated for reasons unrelated to that medical incident.

Major Hawlk further testified that he wrote a memo in October of 1994 recommending the termination of Officer Doddato due to the fact that he was unavailable for duty and he never made the comment that he was "out to get his ass" about Officer Doddato and it was highly unlikely that seven EPPA's were performed in one (1) year on Officer Doddato. With reference to the strip search of Officer Doddato, Major Hawlk testified that the warden authorized it and it was done based on inmate intelligence and that there had been disagreements previously that he'd had with Officer Doddato, including some minor conversations, but he did not recall the substance of them at this time.

17. On cross-examination, Major Hawlk said that he'd never discussed with Dr. Raskin the appropriate nature of light duty and had not even considered it but that the institution had considered psychological light duty and had made the decision not to go with the psychological recommendation. Major Hawlk testified that that decision was made by the Warden, the Deputy Warden and the Security Superintendent.

18. Major Hawlk further testified that statistically there are places with less chance of violence, however, the potential exists in all correctional officer positions at the Delaware Correctional Center to have inmate contact and to be placed with life or death situations, for example, an escape attempt or as what happened a few weeks previously, a woman had driven through the gate and had to be taken out of the vehicle at gunpoint.

19. Major Hawlk further testified that the institution, in rejecting what the psychiatrist and psychologist had recommended, because they did not believe that those individuals had a good understanding of the job description of a communications officer. Major Hawlk testified had he'd had one or two communications with Dr. Villabona but they were about other cases and that all of the communications in this matter had gone directly from Dr. Villabona to Alan Machtinger.

20. Major Hawlk further testified that he had not reviewed the medical reports received although he may have seen a copy but many decisions were made prior to the report dates.

21. With regard to the disability policies, Major Hawlk testified that the physical disability policy is in a memorandum form from the Warden and is at the discretion of the Security Superintendent. There is no mental disability policy. The Deputy Warden reviews all the requests for physical disabilities and that the DCC Warden has the final say.

22. Major Hawlk further testified that the control center becomes the hub of the institution. The control room personnel answer the phone, make log entries, monitor radios, issue equipment and, due to the fact that the control center becomes the operations center during an emergency situation, it cannot be used for a psychological light duty job placement. Inmates may not be able to get into the control room or into the tower, there is no suitable psychological light duty positions in the Delaware Correctional Center, in his opinion. Major Hawlk had no medical opinion in writing to back up that criteria. Major Hawlk further testified he did not know if Corrections Officer Michael Woomeer could not be issued a weapon.

23. Major Hawlk testified that on October 28, 1994 he made his recommendation to terminate Corrections Officer Doddato and that he did not use the September 26, 1994 letter by Dr. Raskin in making that determination. Major Hawlk did testify that the policy of the Center was to move pregnant female corrections officers to light duty during the course of the pregnancy. Major Hawlk further testified that he did not know if he would make the same recommendation now but that he routinely recommends termination when a correction officer cannot return to the job assignment within six (6) months and that the termination date of Corrections Officer Doddato was 10/13/95. With regard to Corrections Officer Dolan, he was moved from the tower per consultation with the Deputy Warden.

24. Upon examination by the Board, Major Hawlk testified that he'd known Corrections Officer Doddato since 1984 and that Doddato had been a problem and had been terminated once previously but reinstated and that there were occasions that he had discipline and had been out on worker's compensation. Major Hawlk testified he was not present at the pre-termination meeting.

25. Major Hawlk further testified as to the role of a doctor/psychologist; that the doctors and psychologists make their judgment on medical (what they know) but the role of a prison official is based on the years of experience in a prison setting and that setting is usually stressful. Major Hawlk further testified that Officer Doddato periodically filed the Return to Work forms which are required monthly and that he had made the decisions based on what was written on the Return to Work forms.

26. Major Hawlk testified that there were approximately one thousand (1,000) corrections officers within the State Department of Corrections and approximately six hundred fifty (650) were outside at the Delaware Correctional Center; that he would imagine that some of the positions would have less contact with inmates but he explored no options in moving Officer Doddato to another facility to accommodate this psychological light duty request of the treating physician. Major Hawlk testified he's not involved in the process after recommendation to terminate is made and that in seventeen (17) months the position was unfilled but that things were occurring during that time period. Major Hawlk further testified that the institution has full responsibilities for security and other institutions work the same as the Delaware Correctional Center.

27. Janet Na was sworn and testified that she is a Personnel Officer for the Department of Corrections and that all personnel actions come through her office and that she has been in the position of Personnel Officer since May of 1994. Ms. Na testified that she is familiar with the Doddato case as the first report of injury came to her office and that her office was responsible for processing worker's compensation claims. Ms. Na further testified that she was present at the first pre-termination meeting in December 1994 as well as the second pre-termination meeting in October of 1995.

28. Miss Na testified further that the institution's responsibility during an injury to an employee is that, within three (3) days a copy of the First Report of Injury is to be filed with the Personnel Office and the Personnel Office forwards it to the insurance carrier within ten (10) days. On a monthly basis, the employee is to submit Return to Work forms to a supervisor and these are to be filed until the employee comes back to

work or is terminated. Ms. Na testified that at a pre-decision meeting, the Personnel Director conducts the meeting, in this case, Mr. Machtinger, and another staff member sits in, either herself or Martha Custer, Personnel Administrator, who is her supervisor. In the Doddato case, Ms. Na testified there were two (2) pre-decision meetings and that after the first meeting the Personnel Administrator, Mr. Machtinger, discussed the case and reviewed notes and reviews with the Bureau Chief and Commissioner on everything that was presented during the meeting. Ms. Na testified that, in this case, due to the conflicting doctors' statements, that a second pre-decision meeting was held to allow each side to present additional doctors' statements and, at the October 1995 pre-decision meeting, the Department was not provided a return date for full duty.

29. Ron Husterman was sworn and testified that he has been with the Department of Corrections for 23 years, serving in the last four (4) years as the Delaware Correctional Center's Treatment Administrator. In his role as a counselor/supervisor for the last twelve (12) years he's been responsible for safety and security. He also supervises a staff of counselors and has served as a member of the team that works to review operational procedures. Mr. Husterman testified that every staff member at the DCC has security responsibilities and that in his dealings with correctional officers that they have to call for backup on a regular basis and that officers lives depend on each other, and that in his role in the treatment program, he supervises correctional officers but that he had not worked with correction officers on security and has never held the title of corrections officer or was he an immediate supervisor of a corrections officer.

THE LAW

29 Del. C. § 5931. Grievances.

"The rules shall provide for the establishment of a plan for resolving employee grievances and complaints. The final two (2) steps of any such plan shall provide for hearings before the Director or the Director's designee and before the Board, respectively, unless a particular grievance is specifically excluded or limited by the Merit Rules. The director and the Board, at their respective steps in the grievance procedure, shall have the authority to grant back pay, restore any position, benefits or rights denied, place employees in a position they were wrongfully denied, or otherwise make employees whole, under a misapplication of any provision of this chapter or the Merit Rules. The rules shall require that the Board take final action on a grievance within ninety (90) calendar days of submission to the Board. Upon approval of all parties, the ninety (90) days may be extended

an additional thirty (30) calendar days. (29 Del. C. 1953, § 5931; 55 Del Laws, c. 443, §6, 69 Del. Laws, c. 436, §7.)" Effect of amendments -- 69 Del. Laws, c. 436, effective July 14, 1994, rewrote this section.

CHAPTER 19.0000 NON-DISCRIMINATION POLICY

Merit Rule No. 19.0100

Discrimination against any person in recruitment, examination, appointment, training, promotion, retention, discipline or any other aspect of personnel administration because of political or religious opinions or affiliations or because of race, national origin, age, sex, physical or mental disability, or other non-merit factors will be prohibited.

CHAPTER 21.0000 APPEALS

Merit Rule No. 21.0110 Direct Appeals

Appeals may be made directly to the State Personnel Commission for the following reason:

Merit Rule No. 21.0112 Appeal from Discrimination

Any applicant or employee who has reason to believe that he/she has been discriminated against because of an interpretation or application of the Merit Rules by the Director of any procedures or regulations established by the Director for the purpose of implementing the Merit Rules may appeal directly to the State Personnel Commission within ten (10) working days of the date of the action being appealed. Such appeal must be based on discrimination due to religious or political opinions or affiliations, national origin, race, or other non-merit factors. Any employee who has reason to believe he/she has been discriminated against by action within an agency should initiate a grievance in accordance with the grievance procedure. (See also 20.0300.)

FINDING OF FACT

1. Corrections Officer Donald Doddato was injured as a result of an incident at the Delaware Correctional Center on May 24, 1994.
2. Officer Doddato was cleared to return to work by both his doctor and the State's doctor as of October 1, 1994.
3. The Return to Work documents had a notation that Officer Doddato was to have light duty work in positions that were either away from or reduced inmate contact.
4. Major Barry Hawlk at the Delaware Correctional Center certified on Return to Work notices that no such light duty work was available at the institution.

5. The Department of Correction had no Department policy regarding psychological light duty.
6. The Department of Correction's position is that there is no psychological light duty at the Delaware Correctional Center.
7. The Department failed to determine if there was a comparable corrections officer position within the State's Department of Correction system that had the reduced inmate contact recommended by both Dr. Raskin, the State's doctor and Dr. Villabona, the grievant's doctor.
8. Other correction officers were accommodated for their physical or psychological-related disabilities with comparable positions.

CONCLUSIONS OF LAW

The grievance is upheld due to a finding that the Department did violate Merit Rule 19.0100 with regard to the retention of correction officers and the failure to determine if there was a comparable corrections officer position within the State's Department of Corrections system to accommodate Corrections Officer Doddato during the period of his restriction from full duty. The Department of Corrections may be exercising legitimate business discretion in not providing psychological light duty at the Delaware Correctional Center, however, erred by first, not establishing a policy in this area and second, did not determine whether other corrections officers positions within the Department of Corrections could have been utilized for psychological light duty. A violation of Merit Rule 19.0100 discrimination due to retention based on physical or mental disability.

ORDER

For the foregoing reasons the Board grants the grievance of Donald Doddato. Pursuant to 29 Del. C. § 5949, Donald Doddato shall be granted back pay to the date that he became eligible to return to work, that date being October 1, 1994 with all benefits and rights denied and to be made whole for that time period less any agency assistance granted to him by any agency including but not limited to public assistance, unemployment compensation, or industrial accident board awards for the time period up to and including the date of this opinion.

IT IS SO ORDERED

Katy Woo

Katy K. Woo, Chairperson

Walter O Bowers

Walter Bowers

Dallas Green

Dallas Green