State of New Hampshire

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88-D-100

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APPEAL OF DAVID DUTCHER

April 1, 1988

On Tuesday, February 9, 1988, the Personnel Appeals Board, Commissioners Cushman and Platt sitting, heard the appeal of David Dutcher, an employee of the New Hampshire State Prison, Department of Corrections. Corrections Officer Dutcher, who was represented by SEA Field Representative Stephen J. McCormack, was appealing a one-week suspension without pay ordered by Warden Michael J. Cunningham's letter of August 17, 1987. Warden Michael J. Cunningham represented the Prison. Testifying before the Board were Security Lieutenant Janet A. Lyden, Corrections Major George Ash and the appellant, Corrections Officer David Dutcher.

Warden Cunningham cited, as the basis for the suspension, "Violation of Rule C, Page 76 of the New Hampshire State Prison Employee Manual in that [Officer Dutcher was] derelict in [his] duty by failing to prevent unauthorized inmates from entering the second division of the prison annex and failing to submit a report of the violation of annex rules by the inmates involved." The letter further stated, "By your failure to take appropriate action you are in violation of Rule C (Dereliction of Duty) of the Employee Manual, New Hampshire State Prison and Personnel Rule 308.03(1)c and are hereby notified that a repetition of this violation will result in mandatory discharge."

The State argued that 1) all officers at the prison are aware of the policy to separate inmates living on one division from entering the other divisions, 2) Officer Dutcher knew of the policy and could have complied, and 3) the mixing of inmates from one division with inmates of another another is dangerous for the inmates and the staff. The Warden then stated that the seriousness of that offense, and Officer Dutcher's failure to report same warranted Officer Dutcher's suspension.

The appellant contended that a one-week suspension was an inappropriate discipline as Officer Dutcher had not violated any policy or rule, that he would not therefore have reported the incident, and finally that the policy which he allegedly violated failed to give specific instruction or direction as to the proper procedure for separating the inmates of one division from the others.

Before direct examination of his witnesses, Warden Cunningham explained that most attacks by inmates on other inmates occur in living areas. For that reason, the Prison had instituted a policy whereby inmates from any one division would be prohibited from entering any other division. The Warden submitted as evidence a copy of the April 30, 1987 memo from Lieutenant Lyden addressed to ALL ANNEX OFFICERS regarding "Securing Division Doors - All meals and Canteen Times" (State's Exhibit A). The warden also submitted a hand-drawn map of the first level of the Annex (State's Exhibit B).

In her testimony, Lieutenant Lyden indicated that she had issued a memorandum on April 30, 1987 to all the officers in the annex addressing the problem of movement between the "divisions". Further, Lieutenant Lyden testified that she had discussed the policy of separating the inmates by division. She indicated that the Division 1 inmate population is comprised of the most aggressive of the prison population. Inmates could work their way "up" through the divisions. She stated that the inmates housed on Division 2 were aggressive, but not as aggressive or dangerous as the inmates housed on Division 1.

When asked to explain the purpose of her memorandum (State's Exhibit A), and how she felt Officer Dutcher had violated the instructions outlined in that memorandum, Lieutenant Lyden indicated that there had been excessive movement of inmates between the divisions and she had issued the memo to the Annex officers in an effort to increase the security in the area and lessen the possibility of one inmate attacking another inmate or stealing another inmate's property. Lieutenant Lyden testified that her memo, in conjunction with the Post Orders, explained the process to be utilized by the officers when allowing the inmates back into their living areas on the various divisions. The officer on duty in that situation would first allow the inmates into the annex, where they could either congregate on the stairs or the "head" area until the officer opened the division doors. She said the proper procedure would be for the officer to first open one division door, allow the inmates living on that division into the divisional area, then lock the door once all the inmates living on that division had entered the divisional area. At that time, the officer would then unlock the other division door, allowing all the inmates on that division to enter their divisional area. She stated that by employing the proper procedure, an officer located at either of the division doors should be able to control the movement of those inmates through the doors and onto the separate divisions, insuring that only those inmates living on the division in question could enter the divisional area. She testified that the officer could use his own discretion in determining which division door to open first.

According to Lieutenant Lyden, when the inmates had returned from their evening meal on June 1, 1987, Officer Dutcher should have decided which division door to unlock first. He should then have let only those inmates living on that division (Division 1 or 2) onto their division. After securing and locking that division door, he should then have opened the next divisional door and again should have restricted entrance to that division to insure that only those inmates living on that division had entered. She stated that Officer Dutcher should not have begun unlocking individual cells until all the inmates were locked onto the appropriate divisions. Lieutenant Lyden stated that this procedure meant some running on the part of the officer, but that the procedure could be accomplished by a single officer.

Corrections Major George Ash testified that he supported the decision to suspend Officer Dutcher for one-week without pay, finding this an appropriate level of discipline given the incident of June 1, 1987. According to Major Ash, Officer Dutcher did not employ the proper procedure for allowing the inmates onto their divisions. Because of his failure to follow the prescribed procedure, several inmates from Division 1 were allowed into the Division 2 area, at which time they entered the cell of inmate Anthony May. Major Ash stated that Anthony May was then beaten by those inmates. Major Ash testified that Officer Dutcher should have made a "reasonable" judgment concerning the "mock beating" involving inmate Anthony May and should have followed the prescribed procedure for reporting the incident. He testified that Officer Dutcher not only was responsible for implementing the Annex policy prohibiting the movement of inmates between the Divisions, but was further obligated to report that violation of Annex rules. Upon completion of an investigation, it was then determined that Officer Dutcher had violated the prison rules and a one-week suspension without pay was deemed the proper discipline.

Officer Dutcher testified that on June 1, 1987, he was one of four officers assigned to the Annex, and that none of the officers'held a rank above Corrections Officer. He also stated that he normally is assigned to the day shift, but was filling in on second shift over-time. He indicated that the procedure he followed in returning the inmates to their cells after the evening meal on the evening of June 1, 1987, was the same procedure he had used during his two years of employment with the Prison. Officer Dutcher said that he believed the policy of separating the inmates in the various divisions was intended principally to allow for greater protection of the personal property of the inmates, and that separating the inmates by division once they had returned to the annex had taken greater priority when the Prison had learned of a planned assault on one of the inmates some time earlier in the year.

Officer Dutcher stated that his usual procedure included opening one of the division doors, and then moving to the "head" area to open the cells for the individual inmates living on that division. He indicated that he was unaccustomed to all the inmates from the annex being in the building at the same time, since in his usual position on the day shift, not all the inmates would be present in the building at the same time. Because of that factor, he was in the habit of looking down into the cell area to assure that he was, in fact, opening cells for the inmate assigned to each cell. On June 1, 1987, he had opened the Division 2 door, then moved to the "head" area to unlock the

cells. It was at that time that Officer Dutcher noticed several inmates from Division 1 were in the Division 2 cell area. He ordered the inmates to move out of the area, and they immediately complied with his order. When questioned about his failure to comply with the policy of locking all of the Division 1 or Division 2 inmates into their respective areas before unlocking the individual cells, he indicated he only became aware of that policy during the investigation which lead to his suspension without pay.

Officer Dutcher further testified that the "mock" beating allegedly received by inmate Anthony May on the evening of June 1, 1987 was not a serious incident and had not resulted in any injury to the inmate. In documents submitted by the State Employees' Association on the appellant's behalf, it was shown that the report of the alleged beating did not occur until some four days after the incident. Officer Dutcher had confiscated property from another inmate, suspecting him of hiding marijuana in that property. At the time Officer Dutcher confiscated the property, the inmate allegedly threatened to "get him" and filed, the following day, a report that inmate Anthony May had been beaten.

Upon review of the testimony and evidence presented, the Board made the following findings of fact and rulings of law. Officers in the Annex should be aware of the policy requiring separation of the inmates between the various divisions. However, the Board was not persuaded that Officer Dutcher or any of the other Annex officers were informed of specific practices and procedures associated with this policy as described by Warden Cunningham, Major Ash and Lieutenant Lyden. The Board reviewed Post Order 7 and Lieutenant Lyden's memo of April 30, 1987. Neither the post order nor the memo provided direction regarding the locking and unlocking of the Division doors. Further, neither the Post Order nor the memo prohibited the opening of individual cells prior to locking the division doors. Therefore, the Board did not find any evidence to indicate that Officer Dutcher understood the desired procedure or that he knowingly violated that procedure, failing to comply with Lieutenant Lyden's instructions. The Board was not persuaded that Officer Dutcher "willfully or negligently" failed to follow Annex procedures, nor did he perform his duties "in a culpably inefficient manner." Therefore, the Board ruled that Officer Dutcher was not in violation of Rule C, page 76 of the Employee Manual.

Further, the Board found Officer Dutcher's testimony to be credible regarding his long-term utilization of the same procedures for allowing inmates onto the Divisions in the Annex. Without clear direction in the form of an amended Post Order or directive, or evidence that Officer Dutcher was aware of the specific described lock-up procedures, the Board found it unreasonable to accept that Officer Dutcher would write up the inmates for being on the wrong division. Further, Officer Dutcher acted reasonably in determining that a report of the incident was unnecessary given his belief that the "horseplay" involving inmate Anthony May had not resulted in any injury to May. Signed statements from several inmates, provided as part of the Appellant's Exhibits, supported the appellant's contention that the "mock beating" was not a dangerous incident and did not warrant reporting as a violation of Annex rules.

The Board understands and appreciates the importance of establishing and maintaining standardized procedures in dealing with an inmate population. The Board also understands the need to discipline employees who fail to adhere to those policies and procedures. However, in this instance, the Board found based on the evidence presented that the Department of Corrections did not provide clear direction to the staff at the Annex regarding the procedure for separating the inmates by division. Management could not, therefore, reasonably expect the Annex staff to comply with that procedure.

The Board therefore voted to order that Officer Dutcher's one-week suspension without pay be rescinded, and that any salary or benefits lost as a result of that suspension be reinstated. Further, the Board voted unanimously to order that any record of disciplinary action associated with this appeal be removed from Officer Dutcher's personnel records.

FOR THE PERSONNEL APPEALS BOARD

Mary Ann Steele

MARY ANN STEELE
Executive Secretary

cc: Stephen J. McCormack
SEA Field Representative

Warden Michael J. Cunningham
Director of Adult Services
New Hampshire State Prison

Commissioner Ronald Powell
Department of Corrections

Virginia A. Vogel
Director of Personnel