

complaint on the basis that DOCS had legitimate non-discriminatory reasons for issuing the NOD against her.

Petitioner's appeal to the Board followed, and a hearing was conducted on December 7, 2012 in Rochester, New York, before Board Member and designated Hearing Officer, Jeffrey R. Cassidy.

BACKGROUND

Petitioner Stefanie Davis, an Alcohol and Substance Abuse Treatment (ASAT) Program Assistant at the Orleans Correctional Facility, was responsible for conducting counseling sessions with inmates who had a history of substance and/or alcohol abuse. On October 14, 2010, she filed her complaint with the New York State Department of Labor (DOL) alleging DOCS discriminated against her for raising workplace safety and health concerns when it issued to her an NOD seeking her dismissal from state service.

Shortly thereafter, DOL Acting Supervising Safety & Health Inspector Darren Mrak, requested that Davis complete a questionnaire and that she provide copies of evidence bearing on her complaint. Davis stated in the questionnaire that she had been subjected to harassment, a hostile work environment, retaliation, counseling memos, and the NOD. She alleged that these adverse actions were the result of her raising concerns about the operation of the ASAT program, and the effect of the program's deficiencies upon her safety and health at the correctional facility. Specifically, Davis asserted that her supervisor, Malika Hill, continually discredited her to inmates because she raised concerns about the ASAT program. According to Davis, her authority was marginalized and she was subjected to hostile inmate behavior as a result of Hill's conduct.

DOL's Division of Safety and Health Public Employee Safety and Health Bureau (PESH) interviewed Davis with follow-up questions on a second questionnaire. That questionnaire includes the following statement:

"Ms. Davis asserts that her employer have (sic) taken retaliatory actions against her because she reported that certain departmental policy and procedures have not been adhered to by supervision. Ms. Davis states that these policies and procedures were put in place to ensure a disciplined and respectful environment which would promote the goals of the program and a safe work environment.

"Her employer's failure to ensure that the policies and procedures were followed has resulted in a hostile work environment for the complainant. Her immediate supervisor has aligned with the inmates and not only allows, but encourages disrespectful behavior by inmates. Comments directed towards her to go unpunished."

PESH then informed DOCS Commissioner Brian Fischer of Davis's allegations, and asked that he provide a written response to Davis' claims. DOCS Acting Director, Office of Diversity Management, Deborah Nazon, responded by stating that DOCS' actions towards Davis were the result of legitimate non-discriminatory business reasons and not because of Davis' complaints about ASAT deficiencies. Nazon's letter lists 8 reasons for Davis' NOD, which were the same reasons stated in the NOD itself.

The DOL investigative file includes interview notes of three individuals, all identified as corrections officers and one individual identified as a "Program Asst at Orleans prior to S. Davis." However, the Commissioner presented no evidence explaining these notes. Also included in the investigative file, and also without any record explanation, is a "Final Investigative Report" under the name of Doug Shaw Sr., Industrial Hygienist, who was PESH's discrimination investigator in this matter. Shaw's report states that "Establishing that Ms. Davis participated in a Protected Activity is difficult at best," and, that "The employer was able to support their position that adverse actions taken against the complainant for reasons stated in the NOD. The documents support the employer's position of employing progressive disciplinary actions for misconduct not in retaliation for complaining about safety and health issues."

Petitioner Stefanie Davis argues that the Determination dismissing her discrimination complaint was invalid and unreasonable because it erroneously credited DOCS' allegations of misconduct; that such allegations were pretextual; and, that the Determination relied upon allegations of misconduct that DOCS itself did not rely upon for the issuance of the NOD.

Specifically, the Determination cited the following incidents of Davis' alleged misconduct for the basis of its finding that DOCS had legitimate non-discriminatory reasons for the NOD:

"1. On January 29, 2010, your supervisor met with you to discuss a number of issues concerning the operation of the ASAT program. Among the topics discussed was a direction that any inmate who facilitates a teaching activity or group discussion must be provided with a written guide for the activity. You were also instructed to use the disciplinary practices contained in the Cognitive Therapeutic Communities Model Manual. At a meeting with your supervisor on February 17, 2010 you were instructed not to write disciplinary 'tickets' for inmates without consulting with your supervisor. The written ticket system is used to document inappropriate inmate behavior and classify the behavior into one of three disciplinary categories. Again your supervisor emphasized that while it would be appropriate for you to issue disciplinary 'tickets' if you were interacting with the general prison population such 'tickets' are not part of the disciplinary process contained in Cognitive Therapeutic Communities Model Manual. When you responded that you wrote the ticket because an inmate was absent from the ASAT program for a forty-five minute period, you were informed that you are responsible for inmates during program hours. Rather than allow an inmate to be unaccounted for and write a ticket after forty-five minutes you should have located the inmate after no more than fifteen minutes.

2. On February 26, 2010, your supervisor wrote you a memorandum addressing the requirement that inmates who are facilitating group activities be provided with a written guideline for discussion. You were also directed not to comment on your desire to transfer to another facility in the presence of inmates. The memorandum also addressed your increasingly aggressive and confrontational demeanor.

3. On April 22, 2010, your supervisor, after being informed that you had not informed security staff or signed into the log book upon arrival at the B-2 dorm, wrote you a memorandum which reviewed the instructions that you had been give concerning the requirement of informing security staff upon entering the dorm.
4. On April 30, 2010, your supervisor wrote you a memorandum indicating that she had observed that two inmates were not in their assigned program on April 29, 2010 and that she observed inmates going into the dorm area without permission. You were reminded of your responsibility concerning the location of inmates assigned to the ASAT program.
5. On May 6, 2010, your supervisor wrote you a memorandum concerning your failure to call her on the telephone concerning the movement of an inmate out of the ASAT program, as you had been directed. The memorandum also noted that you were unaware that an inmate had been moved from the program and reminded you of your obligation to be aware of the whereabouts of inmates. Your rude and unprofessional tone was also noted.
6. On May 13, 2010, you received a memorandum from your supervisor addressing your discussions with inmates concerning your job dissatisfaction and desire to transfer to another correctional facility. Your supervisor noted that you had previously been instructed not to have such conversations with inmates. Your supervisor also identified several occasions where you had refused to follow her explicit directives.
7. In a meeting on June 17, 2010 with your supervisor, her supervisor and the Deputy Superintendent for Programs, you were directed to follow the directions of your supervisor.
8. On June 30, 2010, your supervisor wrote you a memorandum directing you follow proper procedures in the use of the "Early Warning System Form" and to follow the chain of command by addressing issues or concerns with your immediate supervisor.
9. On July 1, 2010, your supervisor wrote you a memorandum addressing four past due assignments and failure to enforce or observe proper procedures including, once again, the failure to account for inmates assigned to your group.
10. On July 8, 2010, your supervisor wrote you a memorandum concerning your practice of not responding when spoken to by your supervisor, other staff and program participants.
11. On July 19, 2010, you were directed to report for a formal counseling session with your supervisor. You arrived late, with no excuses. The counseling session was summarized in a memorandum

dated July 20, 2010. In that memorandum your supervisor noted your continued failure to follow the NYSDOCS directive on dress code, specifically your failure to wear appropriate foot wear and wearing clothing that revealed your undergarments. It was also noted that you continued to allow inmates to facilitate group discussions without a written guide or outline, despite the repeated directives from your supervisor.

12. On September 20, 2010, a Notice of Discipline dated September 9, 2010, was delivered to you. The NOD listed eight specific incidents or misconduct, insubordination, failure to adequately perform your duties, failure to know the location of inmates, and failure to comport yourself in a professional, courteous, and professional manner.”

The Determination concluded that Davis engaged “in a pattern of uncooperative and insubordinate behavior towards [her] immediate supervisor;” that by a March 10, 2010 memorandum, she “deemed it appropriate to criticize [her] supervisor in writing;” and, that she continued to ignore directives that inmates not be permitted to facilitate group discussions in the ASAT program without written guidelines or an outline. It also concluded that Davis did not report her arrival in a dorm area to security personnel and that she failed to control the location of inmates in the ASAT program.

The NOD charged Davis with:

1. Insubordination for refusing to rewrite a summary of her concerns to include time frames and specific dates in a meeting with her supervisor and an inmate (February 9, 2010).
2. Failure to perform her job adequately by allowing an inmate to facilitate a group discussion without having the inmate attend the required training session prior to facilitating a group (February 23, 2010).
3. Insubordination for failing to inform security staff of her arrival at a dorm (April 22, 2010).
4. Failure to know the location of inmates assigned to the ASAT afternoon “module” (April 29, 2010).
5. Insubordination for wearing shoes without straps (June 28, 2010).
6. Insubordination for wearing shoes without straps (July 2, 2010).
7. Insubordination for wearing shoes without straps (July 5, 2010).
8. Failure to comport herself in a “courteous and cooperative manner,” by accusing her supervisor, in front of inmates and in a loud voice, of harassing her (July 9, 2010).

In addition to the NOD, Davis received counseling memos on February 26, April 22, April 30, May 6, May 13, June 17, June 30, July 1, July 8, July 9, and a "Formal Counseling" memo on July 20, 2010. The Determination relies upon on all these counseling memos, though its allegations in paragraphs 1, 5, 6, 7, 8, 9, 10, and 11 are either not referenced in the NOD, or referenced only in part.

SUMMARY OF EVIDENCE

Malika Hill is a DOCS Offender Rehabilitation Coordinator at the Orleans Correctional Facility in Albion, New York. She was an ASAT counselor in 2010, and was responsible for managing the substance abuse treatment program for inmates. She was also Davis' supervisor.

Hill testified regarding the events that led to all Davis' counseling memos. She said that the memos were written to correct behavior and to document prior discussions and that a formal counseling memo was the next step in the disciplinary process. She explained that if behavior is not corrected, discipline can proceed further. She also testified that the reasons given in the NOD were the only reasons for DOCS seeking Davis' discharge.

Charles Riley is an industrial hygienist and discrimination investigator for DOL. Riley testified that he was in training at the time of the investigation of Davis' complaint and that Doug Shaw was the lead investigator. Riley maintained that he was present during Davis' investigatory interview, but that he could not remember any other witnesses that were interviewed other than Deputy Superintendent of Programs Tracz and a corrections officer. He had no direct knowledge of the accuracy of the investigative file, but testified that he did not know anything in the files to be incorrect.

DOL's investigative file includes interview notes of Correction Officers Keith Arnold, Charles Prentice, and Heidi Miller, and Program Assistant Lynn Jordan. A "Final Investigative Report" contained in the file states that there were interview notes of Tracz, though none were contained in the file offered into evidence. The report also states that Hill provided a more detailed explanation of the incidences cited in the NOD, although Hill's interview notes were also not in the investigative file that was submitted into evidence.

Charge Specification 1

Davis explained that she did not refuse to rewrite a summary of the time frames and specific dates that an inmate violated ASAT's rules. She stated that she rewrote what she could, but needed additional information that was located about a half mile away and that Hill would not allow her to leave. She added that she asked Hill for an extension to the end of that work day to gather the material needed to comply with Hill's directive, but that Hill denied her request and "snatched" what she had written from her. Davis maintained that she did rewrite the summary once she got the material that she needed and that Hill's immediate supervisor, Lewis Urban, granted her request for the extension.

Hill did not testify about specification 1.

Charge Specification 2

Davis denied the charge that she allowed an untrained inmate to facilitate a group discussion. She admitted that she allowed the inmate to co-facilitate a topic for a short period

while she was momentarily busy doing something else, but added that she had done the same thing in other DOCS facilities and was never disciplined for it. She also stated that the ASAT program operational manual does not prohibit untrained inmates to ask just a few questions.

Hill's testimony was limited to identification of a February 26th memo she wrote to Davis that criticized her for permitting untrained inmates "without staff guidance or lead material" to facilitate groups after a discussion with her in a staff meeting.

Charge Specification 3

Specification 3 accuses Davis of being insubordinate on April 22, 2010, for failing to inform security staff of her arrival at "B2 dorm," a charge Davis denied. She explained that in the past she always let the security staff know where she was, though she admitted she might not have informed them immediately upon her arrival, but did so after she did preliminary work in setting up the room for group counseling sessions. After an incident when an ASAT staff member was injured by a mental health client, HUB Superintendent Kirkpatrick informed more than 100 staff members that they needed to make security personnel aware of when they arrived and when they left the facility. Davis admitted that there may have been times when she had to leave and did not give notice, but she added that on those occasions security was not present. However, she maintained that those occasions were not brought to her attention.

Hill identified the April 22, 2010 memo, and testified that security was responsible for safety and needed to know when staff arrived and left. She stated that she issued the memo in writing because Davis had not followed verbal direction.

Charge Specification 4

Davis responded to the charge that on April 29, 2010, she failed to know the location of inmates assigned to the ASAT "module." She testified that she did not recall what happened on that specific day, and would have to know what inmate Hill was referring to in this charge. She added that the inmates may have been in a bathroom, had gone to their dorm, or could have had a program call out.

Hill identified the April 30, 2010 memo, and testified it was the responsibility of the "program person" to know where inmates were at all times. She added it was important to know where the inmates were and that her written communications to Davis was to ensure an accurate record of what was conveyed to her.

Charge Specifications 5, 6, 7

The NOD, in specifications 5, 6 and 7, accused Davis of not wearing shoes with straps on three different occasions, charges that were included in Davis' July 20th "Formal Counseling" memo. Davis explained that she had shoes where the strap had broken during the workday. She was unable to change shoes at that time so she taped the back of the shoes. Subsequently she stapled and glued the strap until she could get new shoes.

The shoes policy requires that they be securely fitted and could not be "flip flops or sandals without a heel strap." Davis testified that she was in compliance with the shoe code as her shoes were securely fitted.

Hill testified that strapless sandals were prohibited in the workplace because staff had to be able to run and running in sandals without straps limited their ability to do so. She was asked whether Davis' footwear was taped, she responded "No, sandals have to have a strap."

Charge Specification 8

Davis was charged with acting unprofessional, discourteously and in an uncooperative manner on July 9, 2010, by saying in a loud voice to Hill words to the effect "You're harassing me" in the presence of inmates. Davis asserted that Hill approached her and wanted to know why she sent an inmate into her office. Davis maintained that Hill screamed at her, with her finger in her face, and humiliated and embarrassed her. Inmates were in the area and Davis admitted that she told Hill that she was harassing and embarrassing her.

Hill identified the July 9, 2010 memo she sent to Deputy Superintendent of Programs Tracz in which she alleged that Davis yelled at her, stating that she was harassing her in front of inmates. She testified that when she asked Davis to let an inmate know which ASAT "mod" he was in, she responded by yelling at her in front of inmates. There is no evidence that the July 9, 2010 memo was also given to Davis.

Hill testified about various allegations against Davis that are not in the NOD. She asserted that Davis acted in a rude, unprofessional and loud manner when asked about the location of a particular inmate and that such conduct jeopardized the security of staff. She testified that Davis discussed with inmates her job dissatisfaction and intent to leave, discussions that Hill said created an unsafe environment. She testified that Davis allowed more than two inmates together in a bathroom creating a work performance and security issue. She alleged that she attempted to correct Davis' behavior around the misuse of an early warning system that is used to inform security of gang activity. She identified a July 8th memo that criticized Davis' communications with staff and program participants and accused Davis of acting unprofessionally, in a rude, aggressive tone. Hill also referred to a memo that she wrote to Tracz in which she accused Davis of an inappropriate, unprofessional and obnoxious attitude by conversation and demeanor towards her in front of inmates.

DISCUSSION

The Board's role in this matter is to review whether the Commissioner's determination that Davis was not discriminated against in violation of the Public Employee Safety and Health Act (PESHA) was reasonable and valid (Labor Law §§ 27-a (6) (c) and 101; *Matter of Nadolecki*, Docket No. PES 07-008 [May 20, 2009]).

Labor Law § 27-a (10) (a) provides that no person shall discharge, discipline or in any manner discriminate against an employee who has filed a public safety and health complaint. Labor Law § 27-a (10) (b) sets forth the only statutory process available to a public employee who believes that he or she has been discriminated against in retaliation for filing such a complaint:

"Any employee who believes that he has been discharged, disciplined, or otherwise discriminated against by any person in violation of this subdivision may, within thirty days after such violation occurs, file a complaint with the commissioner alleging such discrimination. Upon receipt of such complaint, the

commissioner shall cause such investigation to be made as he deems appropriate . . . If upon such investigation, the commissioner determines that the provisions of this subdivision have been violated, he shall request the attorney general to bring an action in the supreme court against the person or persons alleged to have violated the provisions of this subdivisions . . .”

The civil prosecution of this case would require evidence that (1) Davis engaged in a protected activity; (2) DOCS was aware of the protected activity; and (3) Davis suffered an adverse employment action (*See, e.g. Matter of Janice Razzano*, Docket No. PES 11-009 [Dec. 14, 2012]; *Matter of Adam Crown*, Docket No. PES 10-009 [Oct. 11, 2011]; *Matter of Paul Danko*, Docket No. PES 09-002 [Mar. 24, 2010] [applying standards of *McDonnell Douglas Corp. v Green*, 411 US 792 [1972]; *Dept of Correctional Services v Div. of Human Rights*, 238 AD2d 704 [3d Dept 1997] (applying federal standards to New York discrimination cases)). In the present case, the Determination states that a prima facie case of retaliation was established and the only issue is whether DOCS established that it had non-discriminatory, non-pretextual reasons for its action (*McDonnell Douglass*, 411 US at 803).

The petitioner, Stefanie Davis, bears the burden of proof in this proceeding (Labor Law § 101; Board Rules 65.30; State Administrative Procedure Act § 306 [1]). Davis contends that DOL failed to conduct a reasonable investigation because it erroneously credited DOCS’ false accusations against her, accusations she believes were pretextual, and because the Determination was based on a number of charges against her that DOCS did not consider in seeking her termination. We find that Davis met her burden to show that it was not reasonable or valid for DOL to conclude based on the investigation it conducted that DOCS had legitimate reasons for its adverse action. We reach this conclusion, in part, because the Determination relied upon a number of allegations of misconduct that were not relied upon by DOCS.

These allegations included charges that Davis:

1. Left an inmate unaccounted for because of improperly issuing disciplinary tickets rather than determining the inmate’s whereabouts.
2. Failed to call her supervisor about an inmate that had moved out of her program and was rude and unprofessional.
3. Discussed with inmates her job dissatisfaction and desire to transfer.
4. Was warned on June 17th to follow the direction of her supervisors.
5. Was warned about not following the chain of command by not discussing with her supervisor an “Early Warning System Form.”
6. Failed to timely submit past due assignments.
7. Wore clothing that revealed her undergarments.

- 8. Arrived late to a meeting with no excuse.
- 9. Had a practice of not responding when spoken to by her supervisor, other staff and program participants.

The Determination relied upon unproven allegations, most of which were contained in counseling memos and not disciplinary notices, that went beyond the reasons given in the NOD. It is unreasonable and invalid for DOL to rely upon allegations of misconduct that were not allegations that DOCS used in its decision to seek Davis' termination. Moreover, the allegations that DOL relied upon that were not referenced in the NOD were serious allegations.

For example, DOL's allegation that Davis wore clothing that revealed her undergarments demonstrates the inappropriateness of its reliance on charges not relied upon by DOCS. The Determination states that by a memo dated July 20, 2010, Davis' supervisor noted her "failure to wear appropriate foot wear and wearing clothing that revealed her undergarments." The July 20th memo, which is labeled a "Formal Counseling" memo, alleges both breaches of the dress code, however, the NOD does not – it only takes issue with Davis' footwear.

Moreover, Davis credibly explained the circumstances of the undergarment issue. She stated that it was cleared up and subsequently Hanson gave her a letter stating that she was dressed appropriately on that day.

It appears that in constructing the Determination, DOL reviewed every counseling memo issued to Davis, and relied on each of them, whether or not they were used by DOCS in drafting the NOD. It also is evident that DOL considered each counseling memo as accurate and disciplinary in nature, even though Hill testified that counseling memos were used to correct behavior, and that discipline only followed after the behavior did not improve.

Further, the Determination relied upon a memo that Davis allegedly sent on March 10, 2010, to the Deputy Superintendent for Programs at the Orleans Correctional Facility in which Davis criticized Hill. The Determination stated "you apparently deemed it appropriate to criticize your supervisor in writing (see your memorandum of March 10, 2010 . . .)." Here, the Determination not only relies upon a document that is neither a disciplinary nor counseling memo, but is a memo from Davis, the contents of which, are not found in the NOD.

For the above reasons, therefore we find that Davis has met her burden of proof and that DOL's Determination was not valid and reasonable, and we revoke it and remand the case back to DOL for further investigation.

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NOW, THEREFORE IT IS HEREBY RESOLVED THAT

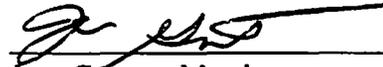
1. The Determination under review herein is revoked; and
2. The Petition is granted.



Anne P. Stevason, Chairperson



J. Christopher Meagher, Member



Jean Grumet, Member

~~RECUSED~~

LaMarr J. Jackson, Member



Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
June 12, 2013.