

## **ROBERT RHODES**

**v. Docket No. 95-CORR-465**

## **WEST VIRGINIA DIVISION OF CORRECTIONS**

### **DECISION**

The grievant, Robert Rhodes, is employed by the West Virginia Division of Corrections (CORR) as a Sergeant assigned to the Mount Olive Correctional Center (MOCC). He filed a grievance at Level I, September 22, 1995, protesting a five-day suspension without pay; the case reached Level IV December 7, 1995. A hearing was held January 17, 1996, and the parties submitted proposed findings of fact and conclusions of law by April 8, 1996. ([See footnote 1](#))

### **Background**

Much of what precipitated the suspension is not in dispute. On May 20, 1995, at approximately 11:30 p.m., a fire alarm in the "Quilliams II" section of MOCC necessitated that all prisoners in the area be placed in their cells. During the process, Captain Tim Hunter, the MOCC Operations Officer in charge of the 4:00 p.m. to 12:00 p.m. shift, ordered inmate Thomas Brock to return to his quarters. The prisoner initially refused and then complied with the directive.

Once the area was secured, Captain Hunter cited Brock with several violations of MOCC's rules for inmate conduct and directed that he be placed on a "72-hour lockdown." This punishment entailed the removal of all items except bedding from the prisoner's cell and restrictions on his release time. Brock resisted and became verbally abusive; he broke windows in his cell and threatened to use a small metal hasp from a footlocker ([See footnote 2](#)) to inflict injury on himself and/or any guard who attempted to enter the cell. Captain Hunter and the grievant, who served as Operations Officer for the next shift, were notified of the prisoner's behavior.

Captain Hunter and the grievant observed the prisoner for a period and concluded that it would be necessary to "extract" or physically remove him from his cell in order to disarm him and treat any injuries he may have sustained from broken glass. ([See footnote 3](#)) Captain Hunter remained past the end of his shift to either observe or assist in the extraction.

Shortly after assuming command of the 12:00 p.m. to 8:00 a.m. shift, the grievant assembled an extraction team consisting of himself and Correctional Officers John Nash, Tracy Matheny, Kevin Welch, Robert Koontz, and Robert Bennett. Officer Welch was armed with a riot baton and Officer Matheny was equipped with a canister of pepper gas. Officer Nash carried a shield; despite that there were helmets, gas masks and padded vests stored nearby, no officer was given any other protective gear. [\(See footnote 4\)](#) Except for the grievant and Officer Bennett, team members were relatively inexperienced in the use of physical force against inmates.

The extraction did not go well. As expected, Brock reacted violently and was removed from the cell only after an intense physical struggle with nearly all of the officers involved. He and most of the officers were sprayed with and suffered the effects of pepper gas. Officer Nash was struck with the riot baton and sustained a cut to his head; Officer Bennett injured his back. Both required treatment at a local hospital.

MOCC Warden George Trent subsequently directed Deputy Warden Howard Painter to conduct an inquiry into the incident. Mr. Painter conducted an extensive investigation which included tape recorded interviews with the inmate and all officers who were either directly involved or present in the area at the time of the extraction. He reviewed the officers' incident reports and the grievant's personnel file and training records.

Mr. Painter also directed MOCC Executive Assistant Michael Coleman to review the various reports and statements and evaluate the grievant's performance as Operations Officer during the incident. [\(See footnote 5\)](#) Mr. Coleman ultimately reported that his assessment revealed that the grievant had acted negligently with regard to several aspects of the extraction.

In a September 7, 1995 report to Warden Trent, Mr. Painter made the following conclusions:

At the time of the incident, Sgt. Rhodes had eight years of experience in corrections in the state of Texas, as well as approximately five months experience in West Virginia. Additionally, he had extensive training in Texas, although limited training in West Virginia.

At the time of the incident, Sgt. Rhodes was working as an operations officer, which is normally a captain's position.

The extraction team was not properly briefed as to their roles and responsibilities prior to entering Brock's cell.

The extraction team were not issued appropriate safety gear prior to the event.

The extraction team did not have all necessary mechanical restraints issued to them prior to the event.

The door to cell 710 was ordered opened by Sgt. Rhodes prematurely, while the team was still adjusting equipment.

The extraction was not videotaped.

Sgt. Robert Rhodes was assigned as operations officer on the midnight shift on 21 May 1995, and as such was responsible for total operations of the facility.

Sgt. Rhodes actions in planning, supervising and executing the forced cell extraction of inmate Thomas W. Brock from cell 710 resulted in the injury of officers John R. Nash, Jr. and Robert D. Bennett.

Sgt. Rhodes' actions with regard to this incident violated W.Va. Division of Corrections policy directive 400.00, offenses, B6 and C17.

The September 14, 1995 suspension letter essentially cited these findings as the basis for the disciplinary action.

While the letter referenced "MOCC Operating Procedures" on extractions, CORR had no formal written policy on the subject until after the incident in issue. CORR has conducted training on extractions for several years, but the grievant had not attended any session during his five to six months of employment with the agency. [\(See footnote 6\)](#) He had participated in and/or supervised numerous extractions during his corrections-related employment in Texas. [\(See footnote 7\)](#)

The grievant had advised his superiors of his need for training in specific areas of MOCC operations. In response, MOCC Associate Warden of Security Tony LeMasters, in an April 11, 1995 memorandum to Lt. Steven Berryman, directed that the grievant receive training in, among other things, "emergency procedure." No action had been taken on this directive at the time of inmate Brock's extraction.

## **Argument**

The grievant denies that he acted negligently during any portion of the extraction. He asserts that to the extent the inmate's removal did not conform to CORR's expectations, it was due to the agency's failure to provide him specific instruction on extractions. [\(See footnote 8\)](#) CORR maintains

that the evidence establishes that the injuries suffered by the officers involved were the direct result of the grievant's unnecessary haste and failure to use protective gear. The agency avers that by virtue of his prior experience in the corrections field, the grievant was or should have been sufficiently aware of proper procedures for inmate extractions.

### **Findings and Conclusions**

In disciplinary matters involving a tenured state employee, the burden is upon the agency to show, by a preponderance of the evidence, that the employee engaged in the conduct complained of and that the conduct was of a substantial nature directly affecting the public's interests. Oakes v. W.Va. Dept. Of Fin. And Admin., 264 S.E.2d 216 (W.Va. 1989); Abbott v. W.Va. Div. Of Corrections, Docket No. 95-CORR-184 (Sept. 21, 1995). The employee bears the burden on any defenses raised to the action. Smith v. W.Va. Div. Of Corrections, Docket No. 95-CORR-547 (June 28, 1996).

The rather extensive evidence of record is conflicting in varying degrees on several issues, including whether the grievant properly instructed team members on their roles in the extraction, whether he prematurely ordered the door to the inmate's cell opened, whether he should have videotaped the extraction and whether he had access to protective gear. It is clear, however, that the grievant was disciplined primarily for his failure to use protective equipment. The undersigned finds that resolution of the evidentiary disagreements on that issue is essentially dispositive of the case. Since a preponderance of the evidence establishes that the grievant should have equipped the extraction team with the gear, and that a five-day suspension without pay was the proper penalty for his failure to do so, it is not necessary to address the remaining issues in any detail.

The evidence, including the grievant's own testimony, reflects that while inmate Brock's behavior required an urgent response, there was sufficient time to equip all officers with padded vests, helmets, face guards and even gas masks. Simply stated, the record establishes that the extraction team could have been armed with defensive gear as quickly as they were equipped with weapons. The reason offered by the grievant for his failure to do so was that MOCC Associate Warden of Security Tony LeMasters had prohibited him from even entering the room where the protective equipment was stored without his approval; Mr. LeMasters denied the allegation at Level III. The grievant was unpersuasive in this contention, and the evidence otherwise establishes that it is a contrived excuse.

It is telling that during his June 8, 1995 recorded interview with Deputy Warden Painter, the

grievant responded spontaneously and clearly to all questions concerning the extraction except those regarding the need for and availability of protective gear for the officers involved. On that subject, his answers were evasive and confusing. While he at first cited the restrictions purportedly imposed by Mr. LeMasters, he subsequently equivocated and indicated that it was the urgency of the situation which prompted him to forego the gear.

In his Level IV testimony, the grievant was quite clear that Mr. LeMasters' directive was the only reason he did not use protective equipment. He did not explain when he received the order or the circumstances under which it was given. Significantly, the grievant also did not explain why he made no effort to obtain approval to use the gear from Mr. LeMasters, Captain Hunter or other available MOCC officials.

The undersigned doubts generally that a superior gave the grievant an order which precluded him from using the protective gear. Moreover, even if the assertion was accepted, it does not excuse or even account for the failure to seek authorization to use the gear. The evidence establishes that between the time the decision to remove the prisoner from his cell was made and the point at the extraction began, there was sufficient opportunity for the grievant to contact his superiors and obtain permission to use the equipment.

To the extent that the grievant relies on CORR's failure to provide him training on the specifics of cell extractions as justification for his failure to use the gear, the argument is not compelling. A lay person could have discerned the need for helmets, padding and gas masks in an encounter which, by all assessments, would entail a violent physical struggle and the use of pepper spray and a riot baton.

While the evidence is inconclusive on Officer Bennett's injury, given the nature of Officer Nash's head wound, it is reasonable to conclude that he would not have been hurt had he been wearing a helmet. The record similarly supports that no officer would have suffered the effects of pepper gas if they had worn gas masks. CORR has demonstrated that the grievant's failure to issue helmets and gas masks was the proximate cause of these injuries.

Although CORR's evidence is less conclusive on whether the incident should have been videotaped and whether the grievant properly briefed the extraction team and gave them ample time to prepare before the cell door was opened, the record does establish that overall, the extraction was not well planned and that the inmate's condition did not justify the haste with which it was executed.

Since the record also establishes that CORR has not consistently applied or adequately publicized a requirement that all use of physical force against inmates be videotaped when practical, the grievant cannot be found at fault for failing to film the incident. This finding does not necessitate a reversal or modification of the suspension.

In summary, CORR has met the burden set forth in Oakes, supra; the agency has shown that the grievant was negligent with regard to several aspects of the extraction, particularly in his failure to issue protective equipment to the officers involved. The grievant has not shown that his omissions were the result of a lack of training and has otherwise failed to advance or substantiate any valid defense to the disciplinary action.

Accordingly, the grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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**JERRY A. WRIGHT**  
**ADMINISTRATIVE LAW JUDGE**

**Dated: November 29, 1996**

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[Footnote: 1](#)

*The grievant was originally suspended for thirty days without pay. At Level III, the hearing evaluator concluded that this was an excessive punishment and recommended that it be reduced to five days. It appears that CORR accepted this recommendation and was preparing to reimburse the grievant for any loss of wages he may have incurred beyond five days when it received notice that he had appealed the evaluator's decision to Level IV. After conferring with representatives of the West Virginia Division of Personnel, CORR concluded that it was not legally obligated to accept the Level III decision, and, for fiscal reasons, might be obligated to withhold a month's wages pending the outcome of the appeal to Level IV. The agency notified the grievant it was reinstating the thirty-day suspension period.*

*The grievant viewed CORR's actions as retaliatory; he subsequently filed a second grievance over his "re-*

suspension." This matter was pending at Level III when the January 4, 1996 Level IV hearing was held on the first appeal. At that hearing, counsel for CORR represented that MOCC officials had reconsidered the reinstatement of the initial suspension period and would take steps to see that the grievant was reimbursed for any loss of wages beyond five days. Counsel also represented that the case, for all purposes, should be treated as if the grievant was originally suspended for five days. The presentation of evidence proceeded in that manner.

Despite CORR's concessions on the length of the suspension, the grievant, in his Level IV proposals, devotes a great deal of legal argument to the "second" suspension. The undersigned finds that this matter is moot. The case has been treated as if the grievant received an initial five-day suspension; the findings and conclusions herein have been made accordingly.

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[Footnote: 2](#)

*It appears that another inmate secretly conveyed the hasp to Brock.*

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[Footnote: 3](#)

*A MOCC nurse previously attempted an examination from outside of the cell but the inmate refused to cooperate.*

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[Footnote: 4](#)

*It appears that although the shield provided some protection, its primary purpose was to allow the user to pin an inmate to a wall or floor.*

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[Footnote: 5](#)

*Mr. Coleman has an extensive background in the corrections field and has instructed new and tenured MOCC staff on a variety of corrections-related issues. His Level IV testimony establishes that he is particularly knowledgeable on the subject of use of physical force against inmates.*

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[Footnote: 6](#)

*Notice is taken that per regulations of the West Virginia Division of Personnel, employees in the classified service, like the grievant, generally must serve a six-month probationary period before acquiring tenured status. It would appear that the grievant had not obtained that status at the time of the suspension. CORR, however, made no assertion that the grievant was a probationary employee and did not assert that the propriety of the suspension should be reviewed under a different and/or lesser standard than that for tenured employees. Because the parties do not raise the issue and the record is not well developed on the point, the conclusions herein assume that the grievant was a permanent tenured employee at the time the disciplinary action was taken.*

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[Footnote: 7](#)

*It appears that the grievant obtained his advanced rank by virtue of this previous corrections experience.*

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[Footnote: 8](#)

*The grievant's proposals suggest but do not assert outright that Captain Hunter should be held accountable for at least some of the deficiencies cited in the suspension letter. The grievant made similar suggestions during his Level IV*

*testimony. To the extent that the argument is properly made, it is specious. As previously noted, there is no dispute that the grievant assumed command of the 12:00 p.m. to 8:00 a.m. shift. It is also clear that the grievant fully realized that he and not Captain Hunter was in charge of the extraction.*

*It is also noted that the evidence reflects that Captain Hunter, apparently without the grievant's knowledge, made a substitution on the extraction team shortly before the onset of the prisoner's removal from the cell. The record supports that Captain Hunter played no further role in the extraction except to the extent that he was available for assistance and consultation. The grievant cites the substitution as a factor which at least contributed to some of the perceived inadequacies in the extraction. The record as a whole does reflect that it was poor judgment to make the replacement without notifying the grievant; the undersigned has weighed the evidence on this aspect of the extraction in reaching the conclusions herein.*