



STATE OF NEW JERSEY

In the Matter of Melvin Robinson :
Albert C. Wagner Youth Correctional :
Facility, Department of Corrections :
CSC DKT. NO. 2018-86 :
OAL DKT. NO. CSV 11292-17 :

DECISION OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 17, 2019 BW

The appeal of Melvin Robinson, Senior Correctional Police Officer, Albert C. Wagner Youth Correctional Facility, Department of Corrections, 120 working day suspension, on charges, was heard by Administrative Law Judge Mary Ann Bogan, who rendered her initial decision on March 8, 2019 reversing the 120 working day suspension. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge’s initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on April 17, 2019, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge’s initial decision.

Since the penalty has been reversed, the appellant is entitled to 120 days of back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10. Further, since the appellant has prevailed, he is entitled to counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division’s decision, *Dolores Phillips v. Albert C. Wagner Youth Correctional Facility, Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission’s decision will not

become final until any outstanding issues concerning back pay or counsel fees are finally resolved.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Melvin Robinson. The Commission further orders that appellant be granted 120 days back pay, benefits, and seniority. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C. 4A:2-2.12*. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2-2.10* and *N.J.A.C. 4A:2.12*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay or counsel fees.

The parties must inform the Commission, in writing, if there is any dispute as to back pay or counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R. 2:2-3(a)(2)*. After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 17TH DAY OF APRIL, 2019



Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 11292-17

AGENCY DKT. NO. 2018-86

**IN THE MATTER OF MELVIN ROBINSON,
ALBERT C. WAGNER YOUTH
CORRECTIONAL FACILITY,
DEPARTMENT OF CORRECTIONS.**

Timothy J. P. Quinlan, Esq., for appellant (Quinlan & Nigro, LLC, attorneys)

Tamara L. Rudow-Steinberg, Legal Specialist, appearing for respondent Albert C. Wagner Youth Corrections Facility, Department of Corrections, pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: January 22, 2019

Decided: March 8, 2019

BEFORE **MARY ANN BOGAN, ALJ:**

STATEMENT OF THE CASE

Appellant, Melvin Robinson, a senior correction officer at respondent, Albert C. Wagner Youth Correctional Facility, Department of Corrections, (Wagner) appeals disciplinary action seeking a 120-day suspension for conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6); insubordination, in violation of N.J.A.C. 4A:2-2.3(a)(2); and other sufficient cause, in violation of N.J.A.C. 4A:2-2.3(a)(12),

specifically, violation of H.R.B. 84-17 as amended, C11, conduct unbecoming a public employee; E1, violation of a rule, regulation, policy, procedure, order or administrative decision; and C9, insubordination: intentional disobedience or refusal to accept an order, assaulting or resisting authority, disrespect or use of insulting or abusive language to a supervisor, by improperly using the call-off procedures in order to delay being served with a charge for removal. Appellant denies the allegations and contends that he properly requested a sick number, when he was called to report to work while at home on paid status, and he reported to work the next morning to receive the removal charge.

PROCEDURAL HISTORY

On June 21, 2017, the DOC issued a Preliminary Notice of Disciplinary Action charging the appellant. No hearing was requested. A Final Notice of Disciplinary Action was entered on July 17, 2017, sustaining the charges in the Preliminary Notice, and the appellant was suspended from employment for 120 working days. (J-10.) Appellant appealed, and on August 8, 2017, the matter was filed at the Office of Administrative Law for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 14F-1 to -13.¹ The case was originally assigned to the Honorable Joseph Ascione, and was then assigned to me in October 2018. The matter was heard on January 22, 2019, and the record closed.

FACTUAL DISCUSSION AND FINDINGS

Testimony

Administrative Lieutenant Brian Boyle (Boyle) testified that he writes policy, reviews and prepares all paperwork related to significant events at Wagner, and initiates discipline when appropriate. He prepared the Special Custody Report for this incident.

¹ A recommendation to consolidate this case with two other civil service cases and a CSR case was made upon transmittal to the OAL. Prior to this hearing, OAL Dkt. Nos. CSV 17673-16 and CSV 09461-15 were withdrawn; and OAL Dkt. No. CSR 11236-17 was heard, and an initial decision was filed by the Honorable Joseph Ascione in February 2018.

(J-1.) Appellant was home on paid disciplinary leave for about a day or two when Boyle contacted him by phone and ordered him to return to work to receive a charge. (J-5.) Paid disciplinary leave means the employee is being paid, but he remains at home, while the department determines the type of disciplinary action to issue. Appellant was expected to be available by phone, and to report to work if necessary. When Boyle ordered appellant to return to work to receive a charge, Boyle reminded appellant that he was in paid disciplinary status.² Appellant refused the order issued by Boyle and asked to be forwarded to the operations unit to obtain a sick number. An employee is not automatically approved for sick leave because he or she obtained a sick number. (J-3.) Boyle informed the administration that appellant purposefully refused the order to return to work. Boyle concluded that appellant's insubordinate conduct was evident by the "tone of the conversation." "In my opinion, I just felt he was trying to intentionally delay [being served with] the charge." Boyle acknowledged that had appellant been sick, his actions would not have been actionable. Boyle offered that he "really couldn't prove" and he "had no idea" if appellant was sick or not. Appellant's action did not extend his paid status because respondent served the union representative that same day. Boyle had no knowledge that appellant returned to work the next morning to receive the charge.

Respondent's Custody Leaves Procedure for unscheduled sick leave require all employees "to maintain sufficient sick leave to cover absences" and to "notify the institution of any absence due to illness at least one (1) hour prior to the employee's scheduled starting time." (J-6, section D.1.) Any violation of the policy could result in discipline. When an employee is on another approved leave and becomes ill, and desires to be carried on sick leave, the individual must call off requesting to use sick leave. (J-6, section D.6.) If an employee requests unscheduled sick leave mid-shift, the employee must contact their immediate supervisor to be released from duty, then report to the shift commander and fill out a partially completed shift release form. (J-6, section F.1.) After the shift commander has released the employee, the employee "will report to the Operations Unit and request a sick number." (J-6, section F.2.)

² It is also possible that Boyle called appellant back shortly after the first call to remind him of his paid status.

The policy does not require employees to state a reason for their sick leave or present a medical note. Boyle concluded that appellant properly followed the policy when he informed Boyle that he would obtain a sick number, but he violated the policy when he failed to notify his shift commander.

Boyle is familiar with the Family and Medical Leave Act (FMLA). In his current and previous position, he received notification of employees approved for FMLA leave. He generally recalled the employees who frequently used leave under the FMLA, but he had no knowledge of appellant being approved for FMLA leave.

Administrative Major Ryan Giannascoli (Giannascoli) ensures compliance with departmental policies and issues employee discipline. Giannascoli asserts that appellant had knowledge of the departmental rules and procedures, which required that he obtain permission from the shift commander before requesting a sick number.

In addition to leave policies, all law-enforcement titles are provided with a copy of the Law Enforcement Personnel Rules and Regulations. The policy at Article I, General Provisions, Section 2, prohibits officers from acting in any way that "might reasonably be expected to create an impression of suspicion among the public that an officer may be engaged in conduct violative of the public trust as an officer." Article I, Section 3, holds all officers responsible for the proper performance of duty and for strict adherence to these rules of conduct. (J-8.)

Article II, Performance of Duties, lists specific actions:

Section 1

- No officer shall be absent from duty without proper authority.
- An officer who will be absent from duty shall give proper notice.
- No officer shall abuse, or excessively use, sick leave.

- An officer shall be punctual in reporting to duty, and in reporting to assignments where time is specified.

Article II, Section 2, prohibits an officer from maligning or feigning an illness.

Article I, Section 5(a), requires officers to “[p]romptly obey any lawful order,” which is defined as “a written/verbal directive issued by Competent Authority which does not violate the statutes or ordinances of the State of New Jersey or of the United States.” Article I, Section 5(b), states that an officer shall “[n]ot willfully disobey any lawful verbal or written order of any individual placed by Competent Authority in a position of supervision over such officer.”

Wagner is a paramilitary organization, just like the branches of the military, and all employees are expected to follow the chain of command and to follow all orders. The order to report to duty is just as important.

Giannascoli had no knowledge of appellant’s chronic illness or FMLA leave. He determined that a 120-day suspension is appropriate since appellant has a substantial disciplinary history which contains similar conduct. (J-11.)

Melvin Robinson (appellant) was sent home on paid leave on June 15, 2018. The next day, Boyle contacted him and told him to report to work to sign for charges. He told Boyle that he could not make it in that day, but could come in on the next day, “first thing in the morning,” to which Boyle replied, “I’ll let them know.” That was the end of the conversation. Ten minutes later, Boyle called again to say, “they want you to know you are on paid status.” In response, appellant asked to get a sick number. Boyle said, “ok that works,” and voluntarily transferred the call to the Operations Unit. Appellant was experiencing shortness of breath, wheezing, fatigue, and anxiety from asthma when Boyle contacted him. He has a history of asthma, and had been approved for intermittent leave under the FMLA, although he was not approved for that day.

Had appellant been at work, he would have informed his shift manager, so his post could be properly managed. Appellant reported to work the following morning and was served with the charges. He thought he saw Boyle there too. There was no indication that his request was inappropriate, as he had available sick time.

Appellant derived no benefit by coming in the next day to be charged.

The record reflects that the facts are essentially not in dispute. Based on the testimonial and documentary evidence presented, I make the following **FINDINGS of FACT**:

1. Appellant was at home on paid disciplinary leave on June 16, 2018, when he was ordered to return to work to be charged.
2. Employees on paid leave are required to follow any lawful order.
3. Appellant notified Boyle that he could not come in that day, but would return to work the next morning. He requested and received a sick number.
4. Appellant returned to work the following morning to receive the charge.
5. Boyle issued discipline based upon the "tone of the conversation" and concluded that appellant improperly used the call-off procedures in order to delay being served with a charge for removal. Boyle had "no idea" whether appellant was sick or not.
6. On June 16, 2018, respondent served appellant's union representative with the charges.
7. Appellant has a history of discipline that includes one disciplinary action for failure to follow proper call-off procedures, and a multitude of disciplinary actions relating to reporting late to work or not reporting to work. (J-11.)

Based on the facts as found above, I **FIND** it was not unreasonable for the appellant to conclude that there was no need to call in sick in advance of the day he was at home serving a discipline on paid leave, and that there was no need to contact a shift manager.

LEGAL ANALYSIS AND CONCLUSIONS

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant, and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). The preponderance may also be described as the greater weight of credible evidence in a case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Testimony, to be believed, must not only proceed from the mouth of a credible witness, but it must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 554–55 (1954). Both guilt and penalty are redetermined on appeal from a determination by the appointing authority. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). An appeal to the Civil Service Commission requires the Office of Administrative Law to conduct a de novo hearing and to determine the appellant's guilt or innocence, as well as the appropriate penalty. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987); Cliff v. Morris Cnty. Bd. of Soc. Servs., 197 N.J. Super. 307 (App. Div. 1984).

As a correction officer, appellant is held to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576–77 (1990). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966).

Here, the respondent has charged the appellant with conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6); insubordination, in violation of N.J.A.C. 4A:2-2.3(a)(2); and other sufficient cause, in violation of N.J.A.C. 4A:2-2.3(a)(12), specifically, violation of H.R.B. 84-17 as amended, C11, conduct unbecoming a public employee; E1, violation of a rule, regulation, policy, procedure, order or administrative decision; and C9, insubordination: intentional disobedience or refusal to accept an order, assaulting or resisting authority, disrespect or use of insulting or abusive language to a supervisor, by improperly using the call-off procedures in order to delay being served with a charge for removal.

Conduct unbecoming a public employee has been broadly interpreted as conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect for governmental employees and confidence in public entities. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). A finding or conclusion that a public employee engaged in unbecoming conduct need not be based upon the violation of a particular rule or regulation, and may be based upon the violation of the implicit standard of good behavior governing public employees consistent with public policy. Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting City of Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Respondent charged appellant with conduct unbecoming in violation of N.J.A.C. 4A:2-2.3(a)(6) because respondent concluded that appellant improperly used the call-off procedures in order to delay being served with a charge for removal. The respondent's evidence that appellant purposefully did not return to work when ordered to in an effort to delay being served is conclusionary. Furthermore, under the facts of this case, there is no evidence that appellant conducted himself in a manner that affects the morale or efficiency or that destroyed public respect for the employee, as the charge suggests. Appellant properly pursued a permissible course of action by allowing for sick leave. He kept his word, and arrived to work the next morning to receive the charge. Therefore, I **CONCLUDE** that respondent has not met its burden of proof on this charge.

Appellant was also charged with insubordination, in violation of N.J.A.C. 4A:2-2.3(a)(2). Insubordination can be defined as intentional disobedience or refusal to accept reasonable orders, assaulting or resisting authority, disrespect or use of insulting or abusive language to a supervisor. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971). Respondent desires to demonstrate that appellant refused an order, based upon the "tone of the conversation," nonetheless, Administrative Lieutenant Boyle acknowledges that he had "no idea" whether or not appellant was feigning illness to purposefully delay being served with the charge for removal. The simple tone of a conversation does not provide an ascertainable basis for discipline that can withstand a finding of arbitrary and capricious or unreasonable application of a standard for discipline, where there is no particular testimony asserting hostile language or behavior, defiance, screaming, or statements such as "I'll see if I can make it." Respondent did not demonstrate by a preponderance of the credible evidence that appellant's conduct was such that he improperly used the call-off procedures to refuse to obey an order, and the record lacks any evidence to demonstrate that appellant was disrespectful, defiant, or hostile. Therefore, I **CONCLUDE** that respondent has not met its burden of proof on this charge.

Finally, appellant was charged with "other sufficient cause," in violation of N.J.A.C. 4A:2-2.3(a)(12). Specifically, appellant is charged with violation of Human Resources Bulletin 84-17 as amended, C11, conduct unbecoming; E1, violation of a rule, regulation, policy, procedure, order or administrative decision; and C9, insubordination: intentional disobedience or refusal to accept an order, assaulting or resisting authority, disrespect or use of insulting or abusive language to a supervisor. The Law Enforcement Personnel Rules and Regulations prohibit officers from being absent from duty without proper authority or to abuse or excessively use sick leave. All officers who are absent from duty must give proper notice. This section of the policy also requires that an officer be punctual in reporting to duty, and in reporting to assignments where time is specified. Officers are also prohibited from maligning or feigning an illness. Article I, Section 5(a), requires officers to "[p]romptly obey any lawful order," which is defined as "a written/verbal directive issued by Competent

Authority which does not violate the statutes or ordinance of the State of New Jersey or of the United States.” Article I, Section 5(b), states that an officer shall “not willfully disobey any lawful verbal or written order of any individual placed by Competent Authority in a position of supervision over such officer.” Respondent concluded that appellant properly contacted the institution or his supervisor to report his intention to use sick time, but that he failed to contact a shift manager. It was not unreasonable for the appellant to conclude that there was no need to contact a shift manager when he was not at work. His conduct does not rise to the level of a violation of the policy, under the facts of this case, and the record does not include testimony or evidence to demonstrate any conduct that comes close to assaulting or resisting authority, disrespect, or use of insulting or abusive language to a supervisor. I **CONCLUDE** that the respondent had not met its burden of proof on this charge.

Appellant does have a disciplinary history that correlates to similar conduct; however, this history is not admissible to prove the charges. W. New York v. Bock, 38 N.J. 500, 512 (1962) (wherein the Supreme Court addressed this issue and made clear that an employee’s prior disciplinary record is appropriately considered only after a finding of guilt when determining a penalty).

ORDER

I **ORDER** that the action of the respondent appointing authority suspending the appellant for 120 working days from his position as a senior correction officer is hereby **REVERSED**, and the charges of violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(2), insubordination; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, specifically, violation of H.R.B. 84-17 as amended, C11, conduct unbecoming a public employee; E1, violation of a rule, regulation, policy, procedure, order or administrative decision; and C9, insubordination: intentional disobedience or refusal to accept an order, assaulting or resisting authority, disrespect or use of insulting or abusive language to a supervisor, are **DISMISSED**.

It is further ordered that appellant is entitled to back pay, pension credit, service credit, and all other emoluments. The amount of back pay awarded is to be reduced

and mitigated to the extent of any income that was earned or that could have been earned by appellant during this period. Proof of income shall be submitted by or on behalf of appellant to the appointing authority within thirty days of issuance of this decision. Pursuant to N.J.A.C. 4A:2-2.10, the parties shall make a good-faith effort to resolve any dispute as to the amount of back pay.

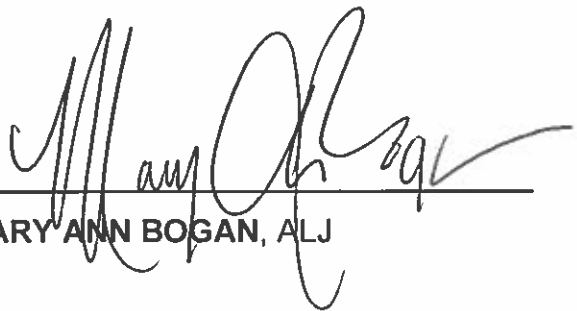
I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 8, 2019

DATE



MARY ANN BOGAN, ALJ

Date Received at Agency:

March 8, 2019

Date Mailed to Parties:

March 8, 2019

MAB/cb

APPENDIX

WITNESSES

For appellant:

Melvin Robinson

For respondent:

Brian Boyle, Administrative Lieutenant

Ryan Giannascoli, Administrative Major

EXHIBITS

Joint exhibits:

- J-1 Special Custody Report with Attachments by Lt. Brian Boyle, dated June 16, 2017 Control No. 17-0856
- J-2 Sick Call Log Book dated June 15 – June 17, 2017
- J-3 Job Bid
- J-4 Decision of Informal Pretermination Hearing, ACW 17-042
- J-5 Time and Leave Reporting System, June 2017, and Absence Code Types and Time Point schedule 6/10/17 – 6/30/17
- J-6 Internal Management Procedures, #216, Custody Leave Procedures
- J-7 Policy Receipts, dated September 5, 2000
- J-8 Law Enforcement Rules and Regulations
- J-9 HRB 84-17, as amended
- J-10 Final Notice of Disciplinary Action, dated 7/17/17
- J-11 Work History