In the Matter of Christopher Allen, et al., Department of Corrections

(Civil Service Commission, decided May 18, 2011)

Christopher Allen, Keith Barnes, Yvonne Beckner, Herb Bellamy, Janette Bennett, Amir Bethea, Jeffrey Bitting, Erika Bobien, Derrick Bodtmann, Michael Brander, Anthony Brannon, Dennis Brousseau, Germani Brown, Sylvester Brown, Marilyn Cardona, Gregory Clark, Michael Coleman, Kevin Cooper, Eugenio Criscione, Miguel Cuevas, Edward Davis, Monica Davis, Robert Davis, Tyler Davis, Christian Deitz, Javier DelValle, Shawn Deyo, Rickie Dooley, Jeffrey Dupree, Dennis Dziedzic, Keith Eskridge, Charles Freeman, James Fruscella, Edward Graham, Mildred Graves, Danette Greene, Vincent Grossi, Morton Hale, Robert Hall, Peter Hand, Scott Hartrum, Michael Hayes, Waclaw Hein, Juan Hernandez, Alan Hoffman, Juan Hooper, Eleanor Houston, Kelvin Hugh, Everton Hunter, Heriberto Jimenez, Raymond Johnson, Dwayne Jones, Kenneth Jones, Wilmer Jordan, Jerome Koonce, James Lambert, Deborah Langston, John Lepencia, Robert Lucciola, Robert Maretz, Beau Marois, Tomas Martinez, Mathew Mattappali, James McLean, William Merced, Stanley Michalowski, Frank Micolupo, Donald Nelsen, Benjamin Newton, Beverly Nottingham, Marcus Offer, Demetria Page, Donald Pearson, Ronnie Perry, Ray Phelps, John Pramov, John Praul, Deedra Richmond, Carlos Rodriguez, Vincent Rodriguez, David Rossetti, Ivan Santiago, Christina Slaughter, Ronald Smallwood, Thomas Smith, Arthur Stannard, James Sweitzer, Dumas Torney, Marc Tyson, Joe Valente, Peter VanStone, Christian Vega, Edwina Washington, Charlie Williams, Edward Williams, Darrell Willis, Robert Wimberly, Michael Wisher, Michael Wolbert, James Yakaboski, Dominick Yaniero, and David Zajack, Senior Correction Officers, with the Department of Corrections, represented by Colin M. Lynch, Esq., appeal the fines in the amount of $413.76 imposed by the Department of Corrections. Because these appeals address similar issues, they have been consolidated herein.

The record reflects that the appellants were served with Notices of Minor Disciplinary Action, charging them with violations of a rule, regulation, policy, procedure, order or administrative decision and other sufficient cause. Specifically, the appointing authority asserted the appellants called out sick on dates on which there was significant snowfall, and they failed to present the required medical documentation to justify their absences.[1] For each date, Senior Correction Officers were fined $413.76.[2] The hearing officer found that the appointing authority issued three memoranda

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[1] It is noted that the events in question occurred on February 10, 11, 25, or 26, 2010. The dates for which the appellants were charged are set forth in the attached document.

[2] The appointing authority indicates that these figures represent the amount of overtime costs incurred by the appellants' absences.

to employees in February 2010, notifying them that they would be required to produce medical documentation in the event that they called out sick during a snowstorm. The hearing officer found that none of the appellants produced acceptable medical documentation to justify their absences. Consequently, the charges and fines were upheld.

On appeal to the Civil Service Commission (Commission), the appellants contend that there is no provision in Civil Service law or rules which grants an appointing authority "the ability to demand a doctor's note from an employee exercising sick leave at its whim." While the appellants concede that the appointing authority has the right to require such medical documentation where there is reason to believe an employee is abusing sick leave, the appellants maintain that it had no such reason for suspicion in the instant matters. The appellants note that the requirement that employees produce medical documentation within seven days of the dates at issue was "hurriedly and haphazardly" issued in memoranda on the dates preceding the anticipated snowstorms, *i.e.*, February 9, 10, and 25, 2010. The appellants assert that this last-minute notice was ineffective, as many of them were not on duty on the dates the policy was distributed, while others were on vacation following their absences, precluding them from meeting the seven-day time period for producing a doctor's note. The appellants also claim that many employees supplied medical documentation to their superiors and were later charged because it was not forwarded to the appropriate office. In addition, the appellants challenge the imposition of fines in these matters, contending that *N.J.A.C.* 4A:2-2.4 provides that fines may only be imposed as a form of restitution, in lieu of suspension where the appointing authority establishes that a suspension would be detrimental to the public health, safety or welfare, or where an employee has agreed to the imposition of a fine.

Individually, several appellants claim that they submitted the requisite medical documentation. For example, Scott Hartrum claims he provided a medical note, but it was rejected because it was not time stamped when received. In support, he submits an insurance form indicating that he was seen by his physician on February 15, 2010 for congestion in his chest/head. It is noted that he was fined for his absence from work on February 11, 2010. In addition, Juan Hernandez claims that he was absent from his shift from 2:00 p.m. to 10:00 p.m. on February 10, 2010, a period of time he alleges was "not covered" by the appointing authority's requirement that employees supply medical documentation. He also asserts that he presented the required medical documentation, and he submits a February 15, 2010 note from his physician, indicating that their office was closed on February 10, 2010. Moreover, Raymond Johnson submits a doctor's note dated February 12, 2010, indicating that he was unable to work due to illness on February 5 and February 10, 2010. However, he was fined for missing work on February 25, 2010. Finally, Marc Tyson argues that he fell ill on

February 7, 2010. While he planned on returning to work on February 9, 2010, he was unable to do so, and he remained out of work through February 13, 2010. He maintains that his February 7, 2010 medical documentation also served to excuse him from work on the dates for which he was fined, February 10 and 11, 2010. In support, the appellant submits a receipt indicating that he saw his physician on February 7, 2010.

In response, the appointing authority argues that the appellants have not met the standard for review of minor disciplinary actions. It asserts that it appropriately required medical verification for sick leave utilized during periods of inclement weather, and it contends that the timing of the sick leave provided it with a reasonable belief that employees were abusing sick leave. Moreover, the appointing authority maintains that it appropriately imposed fines, "given the large number of employees at issue, the fact that they are essential, the fact that suspension time results in overtime costs, and the fact that the Department did not wish to incur overtime costs in addition to that already generated by their call-outs during the snow storm." The appointing authority also notes that the Merit System Board (Board) previously upheld the imposition of fines in similar circumstances in *In the Matter of Edward Aguilar* (MSB, decided March 9, 1999). Further, it underscores that it had 1,552 employees call out sick during the February 2010 snowstorms, and it resulted in the payment of several hundred thousand dollars in overtime. Of those 1,552 employees, approximately 650 failed to provide medical documentation. The appointing authority asserts that, if it were now required to suspend these 650 employees, it would incur another several hundred thousand dollars in overtime costs and face an "extreme operational challenge."

Additionally, the appointing authority submits a certification from Kenneth C. Green, the Director of its Office of Employee Relations. Green avers that he issued memoranda to all Directors of Custody Operations and to the presidents of all affected collective negotiations units on February 9, 10, and 25, 2010, notifying them that employees would be required to present medical verification if they utilized sick time from 10:00 p.m. on February 9, 2010 through 2:00 p.m. on February 11, 2010 and from 10:00 p.m. on February 24, 2010 through 10:00 p.m. on February 26, 2010. Employees were given seven days to produce their medical documentation. Green also emphasized that employees were notified that they could convert their sick time to administrative, vacation or compensatory time if they wished.

CONCLUSION

N.J.A.C. 4A:2-3.7(a) provides that minor discipline may be appealed to the Board. The rule further provides:

1. The Commissioner [of Personnel] shall review the appeal upon a written record or such other proceeding as the Commissioner directs and determine if the appeal presents issues of general applicability in the interpretation of law, rule or policy. If such issues or evidence are not fully presented, the appeal may be dismissed and the Commissioner's decision will be a final administrative decision.

2. Where such issues or evidence under (a)1 above are presented, the [Merit System] Board will render a final administrative decision upon a written record or such other proceeding as the Board directs.

This standard is in keeping with the established grievance and minor disciplinary procedure policy that such actions should terminate at the departmental level.

It is noted that, effective June 30, 2008, *N.J.S.A.* 11A:2-16 was amended, providing for the review of minor discipline in State service by the Civil Service Commission. Hence, the instant matter is being reviewed by the Commission in lieu of the Commissioner of Personnel.

Moreover, in considering minor discipline actions, the Commission generally defers to the judgment of the appointing authority as the responsibility for the development and implementation of performance standards, policies and procedures is entrusted by statute to the Department of Corrections. The Commission will also not disturb hearing officer credibility judgments in minor discipline proceedings unless there is substantial credible evidence that such judgments and conclusions were motivated by invidious discrimination considerations such as age, race or gender bias or were in violation of Civil Service rules. *See e.g., In the Matter of Oveston Cox* (CSC, decided February 24, 2010). In the instant matter, the appellants challenge their fines on two primary bases: that the appointing authority improperly required the submission of medical documentation for their absences during snow storms in February 2010 and that the appointing authority improperly imposed fines for their infractions. As these two bases constitute issues of general applicability in the interpretation of Civil Service law and rules, these matters will be reviewed by the Commission.

N.J.A.C. 4A:6-1.4(d) provides:

> (d) An appointing authority may require proof of illness or injury when there is a reason to believe that an employee is abusing sick leave; an employee has been absent on sick leave for five or more consecutive work days; or an employee has been absent on sick leave for an aggregate of more than 15 days in a 12-month period.

Here, the appointing authority contends that it possessed a reasonable belief that employees who utilize sick leave during a period of significant snowfall are abusing sick leave. In other words, due to the increased amount of sick calls received during such weather events, the appointing authority asserts that it was reasonable for it to believe that these employees were not utilizing sick leave for its intended purpose, *i.e.,* because of their own illness or to care for an ill member of their immediate family. The appellants have not presented any persuasive arguments to convince the Commission that the appointing authority's suspicion of widespread sick leave abuse was not reasonable in this instance. Moreover, in *In the Matter of Edward Aguilar, supra,* the Board upheld a similar requirement. In *Aguilar,* the Department of Corrections suspected sick leave abuse due to an inordinate amount of sick calls on May 5, 1997. As a result of its suspicion of a concerted "sick out," the Department of Corrections required all employees on sick leave on that date to produce medical verification of their illness, and the Board upheld the imposition of minor disciplinary fines for all employees who were unable to produce such verification. Similarly, in this case, the appointing authority reasonably suspected abuse, due to the inordinate amount of employees who called out sick on the dates in question, as well as the fact that there was inclement weather on the dates in question. Even more compelling is the fact that the appellants here were notified *in advance* of the requirement that they must produce a doctor's note to verify their medical inability to work on the dates of the snowstorms. It is noted that *N.J.A.C.* 4A:6-1.4(d) does not require that an employee be notified of the medical verification requirement prior to the absence; therefore, those appellants who claim they were not properly notified do not present compelling arguments. Accordingly, the Commission finds that the appointing authority's policy complied with *N.J.A.C.* 4A:6-1.4(d).

Additionally, concerning the propriety of the imposition of fines in this matter, *N.J.A.C.* 4A:2-2.4(c) provides:

> An appointing authority may only impose a fine as follows:
> 1. As a form of restitution;
> 2. In lieu of a suspension, when the appointing authority establishes that a suspension of the employee would be detrimental to the public health, safety or welfare; or

> 3. Where an employee has agreed to a fine as a disciplinary option.

See also, N.J.S.A. 11A:2-20. The Commission emphasizes that this matter is strikingly similar to the facts presented in *Aguilar, supra,* where the Board upheld the imposition of fines. In *Aguilar,* the Board found that the large numbers of employees who called out sick on the same date were "successful in imposing significant costs in overtime and the administration of overtime on the Department. Thus, the fines can be considered a form of restitution." Further, the Board noted:

> Moreover, suspending, rather than fining the officers for their participation in the "sick out" would produce the same calamitous situation that the appointing authority is trying to correct. It is true that in prior matters, the Board has never held that the suspension of an employee in a large institution would be detrimental to the public health, safety or welfare. This policy has been upheld by the courts. *See, e.g., In the Matter of Sandra Fraser,* Docket No. A-3886-88T1 (App. Div. April 5, 1990). However, these matters all involved single employees, not the instant situation where a large number of employees would be disciplined for the same infraction. Notwithstanding the ability of the institution to stagger suspensions, the use of suspensions under these circumstances would still have a significant adverse impact on the public health, safety and welfare. *Id.* at 5.

The situation presented in this matter is analogous to that presented in *Aguilar,* and the Commission concurs that the imposition of fines in this matter was appropriate for the reasons stated above. *See also, In the Matter of Joseph DiMemmo,* Docket No. A-2025-08T1 (App. Div. January 13, 2010).

Moreover, a thorough review of the record reveals that none of the appellants in this matter have presented the Commission with medical documentation demonstrating that they were medically unable to work on the dates for which they were disciplined. In this regard, the "notes" submitted by Hartrum, Hernandez, and Tyson do not indicate that they were medically unable to work at any time due to their alleged illnesses on the dates at issue. In addition, Johnson submits a doctor's note indicating his inability to work on February 5 and February 10, 2010; however, he was fined for his absence on February 25, 2010. Further, Hernandez's claim that his shift from 2:00 p.m. to 10:00 p.m. on February 10, 2010 was "not covered" by the appointing authority's policy is without merit. The documentation submitted by the appointing authority clearly indicates that all absences

from 10:00 p.m. on February 9, 2010 through 2:00 p.m. on February 11, 2010 required medical verification. Finally, the Commission notes that employees were notified that they could convert their sick time to administrative, vacation or compensatory time if they wished.

Accordingly, the Commission finds no merit to the appellants' claims, and their appeals are hereby dismissed.

ORDER

Therefore, it is ordered that these appeals be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.