

The Commonwealth of Massachusetts

Decision mailed: 10/30/09
Civil Service Commission 03

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

RICHARD HOLDEN,
Appellant

v.

**DEPARTMENT OF
CORRECTION,**
Respondent

Case No.: D-08-281

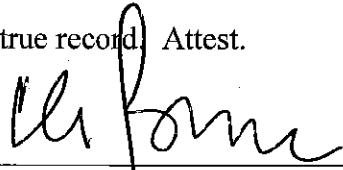
DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on October 29, 2009 to acknowledge receipt of the report of the Administrative Law Magistrate dated September 25, 2009. No comments were received by the Commission from either party. The Commission voted to adopt the findings of fact and the recommended decision of the Magistrate therein. A copy of the Magistrate's report is enclosed herewith.

The Appellant's appeal is hereby *allowed*. The Appellant shall be reinstated for the one day in which he was suspended without loss of compensation or other rights forthwith.

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on October 29, 2009.

A true record. Attest.



Christopher C. Bowman
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:

Robert A. Stewart, Esq. (for the Appellant)
Earl Wilson, Esq. (for the Appointing Authority)
Richard C. Heidlage, Esq. (DALA)

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

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September 25, 2009

Christopher Bowman, Chairman
Civil Service Commission
One Ashburton Place, RM 503
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Robert A. Stewart, Esquire
Louison, Costello, Condon & Phaff, LLP
67 Batterymarch Street
Boston, MA 02110

Earl Wilson, Esquire
Department of Correction
Division of Human Resources
P.O. Box 946 Industries Drive
Norfolk, MA 02056

Re: *Richard Holden v. Department of Correction*, D-08-281, CS-08-796

Dear Mr. Chairman, Mr. Stewart and Mr. Wilson:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c), they have 30 days to file written objections to the Recommended Decision with the Civil Service Commission, which may be accompanied by briefs.

Very truly yours,



Judithann Burke
Administrative Magistrate

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CIVIL SERVICE COMMISSION

THE COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Richard Holden,
Appellant

v.

Docket Nos. D-08-281
CS-08-796

Department of Correction,
Appointing Authority

Appearance for Appellant:

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67 Batterymarch Street
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Appearance for Appointing Authority:

Earl Wilson, Esquire
Department of Correction
Division of Human Resources
P.O. Box 946 Industries Drive
Norfolk, MA 02056

Administrative Magistrate:

Judithann Burke

CASE SUMMARY

The Appointing Authority, Department of Correction did not have just cause to impose a one-day suspension upon Appellant for a violation of Rules 6a, 6d and 18 of the Department of Correction Rules and Regulations Governing All Employees. The Appellant turned in his Illness Certification Form on his first available day back to work after the seven day deadline.

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CIVIL SERVICE COMMISSION

RECOMMENDED DECISION

Pursuant to G.L. c. 31 s. 41-45, the Appellant, Richard Holden, is appealing from the October 23, 2008 decision of the of the Appointing Authority, Department of Correction, suspending him for a period of one (1) day without pay from his position as Correction Officer Lieutenant (CO III) at the Massachusetts Treatment Center (MTC). (Exhibit 2). The appeal was timely filed. (Exhibit 1). A Section 43 hearing was held on March 4, 2009 and continued to June 15, 2009 when it was heard to completion at the offices of the Division of Administrative Law Appeals (DALA), 98 North Washington Street, Boston, MA.

At the hearing, thirty-seven (37) exhibits were marked. The Appointing Authority presented the testimony of: Deputy Superintendent Bernard Brady of MTC; and, Richard Santoro, the Hearing Officer at the Appointing Authority level hearing. The Appellant presented the testimony of: Lorenzo Taylor, CO I at MTC; and, Manuel Baptiste, CO I at MTC. The Appellant also testified in his own behalf. (One audiocassette was made on March 4, 2009 and one audiocassette was made on June 15, 2009. The record was left open for the filing by the parties of post hearing memoranda of law. The last of these was received at DALA on July 21, 2009, thereby closing the record.

FINDINGS OF FACT

Based upon the testimonial and documentary evidence submitted during the hearing in the above-entitled matter, I hereby render the following findings of fact:

1. The Appellant, Richard Holden, CO III at MTC, has been employed by the Department of Correction (DOC) since 1982. He has worked at the MTC since 1996. (Testimony).

2. In 2008, the DOC approved the Appellant for intermittent medical leave under the Family and Medical Leave Act (FMLA) for a chronic medical condition. The approval included the Appellant's being allowed to be out of work for an entire shift one to three days per month and/or being tardy one to five times per month. (Exhibits 17 and 18).

3. Article 8(K) of the Collective Bargaining Agreement (CBA) between the DOC and the Correction Officers' Union, MCOFU, provides, in pertinent part:

An employee with forty-eight (48) hours of sick leave during a calendar year shall provide satisfactory medical evidence (as contained in the Department's Illness Certification Form) for each absence thereafter for the remainder of the calendar year...

Failure to provide such medical evidence within seven (7) days of its request or upon the employee's return to work may result, at the discretion of the Appointing Authority, in denial of the sick leave for the day(s) involved, and/or disciplinary action.

(Exhibits 26).

4. The DOC publication entitled "Sick Leave Number 103 DOC 209", as published in both January 2008 and May 2008, contains the following description of the conditions under which sick leave is granted:

209.03 CONDITIONS UNDER WHICH SICK LEAVE IS GRANTED

1. Sick leave is granted at the discretion of the appointing authority to an employee only under the following conditions:

- a. When an employee cannot perform his/her duties because he/she is incapacitated by personal illness or injury.
- b. A bargaining unit 1, 2, 3, 4, 4A, 6, 8, 9 or a confidential or managerial employee may use up to a maximum of thirty (30) days of sick leave per calendar year for the purpose of:
 - i. Caring for the spouse, child, foster child, step child, parent, step parent, brother, sister, grandparent, parent or child of spouse, person for whom the employee is legal guardian, or relative living in the household who is seriously ill.
 - ii. Parental leave due to the birth or adoption of a child, to be concluded within twelve (12) months of the date of the birth or adoption.
- c. A bargaining unit 7 or 9 employee may use up to a maximum of thirty (30) days of sick leave per calendar year for the purpose of:
 - i. Caring for the spouse, child or parent of either the employee or his/her spouse or a relative living in the immediate household who is seriously ill.
 - ii. Parental leave due to the birth or adoption of a child, or placement of a child in foster care to be concluded within twelve (12) months of the date of birth or adoption.

NOTE: Where an eligible employee and his/her spouse are both employees in bargaining unit 4 or 7, they may be jointly granted a total of not more than thirty (30) days of accrued sick leave for care of a seriously ill parent or for parental leave due to birth.

- d. An employee may use up to a maximum of ten (10) days of sick leave per calendar year in order to attend to necessary preparations and legal requirements related to the employee's adoption of a child...
- e. An employee may use up to ten (10) days of sick leave per year for necessary preparations and/or legal proceedings related to foster care of DSS children...
- f. When through exposure to contagious disease, the presence of the employee at the employee's work location would jeopardize the health of others.

- g. When a bargaining unit 1, 2, 3, 4A, or 6 employee is absent due to excessive use of alcohol or narcotics and becomes and continues to be an active participant in an approved counseling service program.
- h. When an employee cannot reasonably schedule appointments with licensed medical or dental professionals outside of normal work hours for purposes of medical treatment or diagnosis of an existing medical or dental condition.

(Exhibits 27 and 28).

5. In a memorandum addressed to the Appellant on March 4, 2008, MTC Superintendent Robert Murphy notified him that, since the MTC records indicated the Appellant had used 48 hours of sick leave, he would be required to provide satisfactory medical evidence for any absence, full or partial, including the absences that exceeded the provisions of his intermittent FMLA approval, for the remainder of the calendar year. (Exhibit 16).

6. The Appellant was out sick from May 6 to May 8, 2008. He was hospitalized with a condition outside of his FMLA status. (Testimony and Exhibits 19 and 20).

7. The Appellant returned to work on May 12, 2008. At that time, he understood that he was required to turn a DOC Illness Certification from his doctor by May 19, 2008, seven days after his return to work. (Testimony and Exhibits 8 and 26).

8. On May 14, 2008, Dr. Hector Mateo, the Appellant's physician, completed the DOC Illness Certification Form indicating thereon that the Appellant had been unable to perform his duties from May 6, 2008 through May 11, 2008 due to pleurisy and that the Appellant was able to return to work on May 12, 2008. (Exhibit 20).

9. The Appellant worked a partial shift on his next working day, May 12, 2008. He was out sick again on May 16, 2008. The next two days, May 17 and 18, 2008, were his regular days off. He was out sick again on May 19 and May 20, 2008. (Testimony and Exhibit 23).

10. On May 20, 2008, Psychologist Donald Street completed a DOC Illness Certification Form indicating thereon that the Appellant had been incapacitated by personal illness or injury on May 16, 19 and 20 due to a "confidential matter." (Exhibit 21).

11. The Appellant returned to work on May 21, 2008. At that time, he submitted the DOC Illness Certification Forms for his absences from May 6-8 (Exhibit 20) and May 16-20, 2008 (Exhibit 21). (Exhibit 23).

12. On May 21, 2008, on the document entitled "Attachment A DOC Sick Leave Slip," Captain Brault noted that the Illness Certification Form pertaining to the May 6-11, 2008 absences was "received 5-21-08 after time limit." (Exhibit 19).

13. Captain Brault commenced an investigation into the matter of the May 21, 2008 filing of the Illness Certification Form that he believed had been due on May 19, 2008. On June 18, 2008, he interviewed the Appellant concerning why the sick leave note for May 6-11 was not turned in by May 19, 2008, and why it had been handed in late. The interview was also attended by the Appellant's union representative, CO Manuel Baptiste. At some points during the interview, the conversation became heated. (Testimony).

14. On September 18, 2008, Superintendent Murphy imposed a one day suspension on the Appellant, to be served on September 26, 2008. Superintendent Murphy found that the Appellant had violated the following rules from the *Rules and Regulations Governing All Employees of the Massachusetts Department of Correction*:

6. INTERPERSONAL RELATIONSHIPS AMONG ALL EMPLOYEES

(a) Correctional goals and objectives can best be achieved through the united and loyal efforts of all employees. In your working relationships with co-workers, you should treat each other with mutual respect, kindness and civility, as become correctional professionals. You should control your temper, exercise the utmost patience and discretion and avoid all collusions, jealousy and controversies in your relationships with co-workers...

(d)... You should readily perform such duty as assigned, and must exhibit at all times the kind of respect toward your superior which is expected and required in correctional service...

18. ATTENDANCE AND ABSENCES

(b) Employees who abuse sick leave, fail to produce satisfactory medical evidence of illness (physician's slip) when requested, or use sick leave for personal matters not related to illness, will be denied said sick leave, and may be subject to disciplinary action up to and including discharge, in compliance with all collective bargaining agreements.

(Exhibits 6 and 36).

15. The Appellant appealed Superintendent Murphy's decision to the DOC Commissioner. On October 23, 2008, after receiving a hearing officer's report from the October 16, 2008 hearing, DOC Commissioner Harold W. Clarke denied the Appellant's appeal. (Exhibits 2 and 3).

16. The Appellant filed a timely appeal to the Civil Service Commission.

(Exhibit 1).

CONCLUSION

After a careful review of all of the testimony and documents in this case, I have concluded that the one day suspension was imposed upon the Appellant in this case without just cause. The Appointing Authority failed to prove by a preponderance of the evidence that the Appellant violated Rules 6a, 6d and 18 of the *Rules and Regulations Governing All Employees of the Massachusetts Department of Correction*.

The first issue for discussion is the timing of the Appellant's providing the Illness Certification Form and the Sick Leave Note concerning his absences on May 6-8, 2008. He returned to work on May 12, 2008. According to the Collective Bargaining Agreement, he was required to provide medical proof of his absence seven days later, or by May 19, 2008. However, the Appellant was out sick again on May 16, 19 and 20, 2008. He was not on DOC property. This latest absences were a valid use of sick leave, per the Illness Certification Form turned in by the Appellant on May 21, 2008 to substantiate the May 16-20 absences. Therefore, the Appellant was unavailable to file his Illness Certification Form for the May 6-8, 2008 absences until his return to work on May 21, 2008.

Rule 18 appears to have been applied incorrectly in this case. The definitions of sick leave in the DOC Sick Leave publication, 103 DOC 209, consistently refer to sick leave as that time during which an employee is unavailable for work due to his or her incapacitating illness, his/her carrying a contagious illness, his/her involvement in a drug/alcohol rehabilitation program, or the incapacitating illness of a household member

or close relative. The definitions also contemplate the employee being unavailable for purposes newborn child care, the adoption of a child or the tending to a foster child. None of the definitions implies that the employee is expected to appear on the DOC premises for any reason, including the filing of an Illness Certification Form, nor is there any suggestion in either Rule 18, the Collective Bargaining Agreement, or the sick leave definitions that said employee must utilize any means possible to deliver the form prior to his her physical return to work. In this case, the Appellant handed in the form on the first day he returned to work following the May 16-20 sick leave. This appears to be consistent with the entire body of rules and regulations governing sick leave in the DOC.

Next, there is no evidence that the Appellant violated Rules 6a or 6b during the June 18, 2008 interview with Captain Brault. The captain did not testify at the 2009 DALA hearing. His report was not weighed. The two other parties who were present in that interview, CO Baptiste and the Appellant, each testified that the conversation became heated. Without more specific evidence about the actual dialogue during the interview, this evidence alone does not reflect that the Appellant acted in a less than professional, civil or deferential manner toward Captain Brault. That a conversation between two or three men occasionally became heated is not necessarily indicative of a lack of respect, lack of discretion or loss of temper.

In conclusion, I recommend that the Civil Service Commission reverse the decision of the DOC and reinstate the Appellant for the one day he was suspended without loss of compensation or other rights.

Division of Administrative Law Appeals,
BY:


Judithann Burke
Administrative Magistrate

DATED: September 25, 2009