PIERRE J. BROWN,
Appellant,
v.
TRENTON STATE PRISON,
Respondent.

Initial Decision: July 22, 1988
Final Agency Decision: September 7, 1988
Approved for Publication: June 12, 1990

Sam Love, President, PBA Local 105, for appellant, appearing pursuant to N.J.A.C. 1:1-5.4(a)6
Felice Weiner, Deputy Attorney General, for respondent (W. Cary Edwards, Attorney General of New Jersey, attorney)

SYNOPSIS

Appellant was terminated from his position as a senior corrections officer at Trenton State Prison for unsatisfactory attendance. He requested a hearing and the matter was transmitted to the Office of Administrative Law.

The administrative law judge assigned to the case found that appellant had called in sick less than one hour before his shift was to begin. This was a violation of prison reporting procedures. Appellant had been disciplined on six other occasions for calling in late or taking unauthorized absences. According to the prison's personnel policy, the penalty for unsatisfactory attendance is a reprimand for the first infraction and fines for the second through sixth infractions. For the seventh infraction, the employee is terminated. The administrative law judge concluded that this policy was reasonable and agreed that appellant should be removed from his position.

Upon review, this initial decision was adopted by the Merit System Board. The Board said appellant's lengthy record of infractions justified removal in this case, but did not adopt the policy of imposing removal after seven infractions.

MASIN, ALJ:

Pierre J. Brown appeals from his termination from a position as Senior Corrections Officer at Trenton State Prison. The reason for
the termination was a finding that he was guilty of unsatisfactory attendance, *N.J.A.C. 4:1-16.9.* Mr. Brown appealed his termination to the Merit System Board, which transferred the matter to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A. 52:14F-1 et seq.* A hearing was held before Administrative Law Judge Jeff S. Masin at the Office of Administrative Law in Mercerville on June 7, 1988.

The Preliminary Notice of Disciplinary Action, issued December 15, 1987, specified that Mr. Brown was being disciplined because he had failed to call in sick prior to one hour before his scheduled duty at 2:20 p.m. The call was received at 1:40 p.m. on December 5, 1987, 40 minutes before he was to have begun his tour. The requirement for reporting is set forth at A.P.M. 6.112.

Richard A. Keil, Operational Supervisor at the Institution, testified that he had received a report that Officer Brown had called off less than one hour prior to his reporting time. The report from Officer Mangus indicated that the call had come in at 1:40 rather than before 1:20 p.m., which would have been the required deadline. Officer Keil examined the duty roster and the logbook and determined that Brown had been marked off sick and had made the contact with the Institution at 1:40. He filed a report with Captain Hagler advising him of this. He also determined that the books showed that Brown had called in at 5:05 p.m. to report that he would be able to work the following day.

In determining the penalty to be imposed, the Institution followed guidelines set forth in Human Services Bulletin 87-17, as amended, which indicated that for a seventh infraction concerning unsatisfactory attendance removal was the appropriate penalty. Under the guidelines the first and second instances of unsatisfactory attendance draw an official reprimand, the third, a one day’s fine, the fourth, a two day’s fine, the fifth and sixth, three and four day fines respectively.

According to records of disciplinary actions taken against Mr. Brown during 1987, he was given a minor disciplinary action in the form of a first official reprimand on March 20, 1987 resulting from an emergency administrative leave day request which was denied on March 6, 1987. The absence was considered without permission. On July 23, 1987, he was given a second official reprimand resulting from a call at 2:05 p.m. on July 3, 1987 reporting that he was to be absent

*Revised at *N.J.A.C. 4A:2-2.3.*
that day for a shift which began at 2:20 p.m. The call was less than one hour prior to the start of the scheduled shift and therefore unacceptable.

On August 3, 1987, Brown was fined one day's pay resulting from his absence from duty four days without pay as of July 21, 1987. He had already exhausted his 15-days sick time for the year and his absences were considered as chronic and excessive absenteeism. He was then fined two day's pay on September 9, 1987 for his August 20, 1987 request for an emergency leave day which had not been submitted within 72 hours as required, therefore considered an absence without permission. On October 21, 1987, Brown was fined three day's pay. This resulted from a report of sick on September 26, 1987. As of June 24, 1987, Brown had been directed by his captain to submit a doctor's certificate for any further illnesses. As of August 5, 1987, he had not submitted one for the September 26, 1987 absence. On December 11, 1987, Brown was charged in a Preliminary Notice of Disciplinary Action with chronic and excessive absenteeism resulting from ten day's absence without pay as of December 21, 1987. He was fined four day's pay in a Final Notice of Disciplinary Action of January 27, 1988.

Officer Kiel was unable to testify whether there had been a specific problem arising from the absence of Mr. Brown on December 5. However, he explained generally that because of such absences occurring where the report of the absence is received less than one hour before the reporting time, it is often necessary for the Institution to obtain substitutes for the absent officer from a list known as the "stuck" list, the name being indicative of the fact that those on the list are required to perform overtime on a short notice basis. Where volunteers are unable to be secured, such resort to the mandatory list occurs. This has an adverse effect upon the morale of officers.

On cross-examination, the witness admitted that there are certain exceptions to the one hour call-in rule. An officer can take an emergency administrative leave day, which must be approved at the discretion of the chief. The witness has no authority to approve or disapprove late sick calls and no one to whom the calls are directed has the authority to approve or to disapprove them.

The witness was directed to N.J.A.C. 4A:6-1.4, which portion of the Administrative Code provides that:

An employee whose work unit requires 24-hour or shift coverage shall, at least one hour before the scheduled starting time, notify the designated contact person of any absence due to illness. In case
of sudden illness or emergency, exceptions may be granted by the designated contact person.

Kiel explained that the persons who received calls concerning absences are not those who may grant the exceptions and that these are only allowable by the Chief Deputy Keeper.

Pierre J. Brown testified that he has been employed as a Corrections Officer for five years and holds the title of Senior Correction Officer. He is familiar with the call in procedure and knew that he had to call in one hour before if he was going to be out sick. He called in at 1:40 p.m. because he was feeling sick. He explained this to Officer Mangus who took the call. Brown knew that he was calling in late, but there was no way he could come to work. Mangus took his name and hung up. He was never asked by anyone why he had called in late.

The witness explained that the reason why he did not call in in time was that he was having severe stomach pains and was in the bathroom “a lot” with diarrhea. He did bring in a note from a doctor, which is difficult to read but does say something about “excuse 5 December 87 illness.” This note is on a prescription pad from Ewing Medical Associates of Trenton. It bears a signature which is impossible to read. In addition Brown testified that when he went to the doctor he was given a prescription for some medicine to control his diarrhea. A “document,” which he produced in court and which he insisted was the document which he was given by the doctor and presented to the pharmacy to receive the drugs, is a sheet of paper which on one side had an advertisement for Bumex, a medicine, and on the other side on blank white paper was written some reference to a drug and the words “240 mg” with something else written below. The paper appears to come from a medical journal of some sort. It is clearly not a prescription pad and it is inconceivable to this judge, who has experience handling pharmacy board cases, that a physician could have drawn this as a prescription and expected it to be honored by a pharmacy as a lawful prescription. The prescription on such a document would be inappropriate and in violation of pharmacy board regulations and it is frankly inconceivable to the judge that this document was in fact given to the witness in order for him to obtain prescription drugs. Nevertheless, the witness insists that is what did occur and it is perhaps possible that the reference on the page is to a nonprescription drug and was just written down by the doctor and then presented to the pharmacist, who gave the medicine to Mr. Brown since no prescription was necessary for it. On the other hand,
of course, it is also possible that Mr. Brown is not telling the truth.

Mr. Brown explained that he turned in the doctor's note to operations when he returned to work on Tuesday. He was off duty on Sunday and Monday. He could not recall to whom in operations he gave the note.

In addition to the above testimony, evidence was presented concerning Mr. Brown's prior disciplinary record. That will be referred to below.

**DISCUSSION**

The evidence in this case uncontrovertably establishes that Mr. Brown did call in sick at 1:40 P.M. on December 5, 1987 for a shift which was to begin at 2:20 P.M. This call-in occurred 40 minutes prior to the start of the shift, and it was late according to the requirements of *N.J.A.C. 4A:6-1.4(c)*. In addition, although that regulation provides the possibility for discretionary excuses to be given for such late calls, there is no evidence that Mr. Brown on his own requested that anyone excuse the late call. Clearly the burden of presenting the reason for the absence to the appropriate persons who are authorized by regulation and institutional practice to grant such excuses is on the employee, and not on the institution. The institution has no way of knowing the reason for the absence, and the legitimacy of any late call and requests for these excuses and evidence in support of the requests must come from the employee.

Based upon the evidence presented, there is no question but, and I FIND, that Mr. Brown's call on December 5 was in violation of the established regulation. It therefore subjected him to discipline. The records of his prior disciplinary history in 1987 indicate that he was disciplined in connection with absence problems, unsatisfactory attendance, *et al.*, on numerous prior occasions. In fact, the institution had given him the required two official reprimands and the four fine penalties authorized for third through sixth infractions in connection with absences occurring during 1987. The last of these, the fine of four day's pay, occurred in connection with a Preliminary Notice of Disciplinary Action issued December 11, 1987, which was several days after the December 5 late call which is the subject of the removal proceeding. However, that Preliminary Notice referred to ten days absence without pay, constituting chronic or excessive absenteeism, which had accumulated up to November 21, 1987, a date preceding the December 5 late call. The four-day penalty was issued on January
27, 1988, which date preceded the issuance of the Final Notice of Disciplinary Action of February 16, 1988 which incorporated the removal penalty for the December 5, 1987 absence.

Based on the above, it is clear that the institution imposed upon Mr. Brown the appropriate suggested penalties contained in the guidelines of Human Resources Bulletin 87-17 as amended, and only on the seventh infraction did the institution seek to impose a removal penalty. Based upon the officer's record in 1987 alone, such a penalty is clearly warranted. An institution functions only through the actions of its employees. Where an employee regularly absents himself or fails to follow guidelines in connection with attendance such as to cause the institution difficulties in obtaining the necessary staffing, even where such staffing is obtained through volunteers and/or use of mandatory overtime lists, such actions tend to affect the morale of employees and cause administrative problems which an institution should not be required to bear. The guidelines of the Human Services Bulletin recognize the fact that a progressive discipline procedure is favored by the Merit System Board and provides for a range of penalties starting with official reprimands up through fines. The guidelines do not provide for a suspension of an officer for the simple reason that the very problem which his attendance difficulties causes the institution is the absence of the officer from duty and the need to replace him with others. A suspension of the officer from duty would only exacerbate the very problem caused by his absences. As such, the guidelines allow for limited financial penalties and then, after six infractions have occurred and the officer has been subjected to four different instances of escalating financial penalties, the guidelines provide for removal. Such a procedure is reasonable and necessary if an institution is to function in an efficient fashion.

Based upon the incident of December 5, 1987, I CONCLUDE that the appointing authority has established that Pierre Brown violated the regulation with respect to required reporting time for absence from scheduled duty and further that the institution has satisfactorily established the propriety of removal of Mr. Brown from his position as a Senior Corrections Officer. This finding is made separate and apart from any reference to his prior record of disciplinary actions, many of which resulted from problems similar to the ones which caused his 1987 difficulties. As far back as May 1984, the institution had advised Brown that he was late reporting for duty. On June 8, 1984, he failed to call in at least one hour prior to his scheduled shift.
On June 18, 1984, he failed to provide medical documentation for an absence of June 1, 1984, this same type of incident occurred with respect to a June 8, 1984 absence. He reported late for duty on three occasions in August 1984. In September 1984 he failed to report to work or to advise of his intended absence. The instances of failure to submit doctors' certificates, reporting off duty less than one hour before the scheduled shift, reporting late for duty, failing to report to work as scheduled without informing anyone, etc., continued on numerous occasions through 1984 and 1985 and were repeated again on several occasions in 1986.

Based on all of the above, I CONCLUDE that the institution has established that Mr. Brown must be removed from his position. As such, it is ORDERED that the appeal of his removal be DISMISSED and he be removed from his position.

This recommended decision may be adopted, modified or rejected by the MERIT SYSTEM BOARD, which by law is empowered to make a final decision in this matter.

FURTHER DECISION BY THE MERIT SYSTEM BOARD:

The appeal of Pierre J. Brown, Senior Corrections Officer, Trenton State Prison, State Department of Corrections, removal effective February 26, 1988, on charges, was heard by Administrative Law Judge Jeff S. Masin, who rendered his initial decision on July 22, 1988. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Merit System Board at its meeting on September 7, 1988, accepted and adopted the Findings and Conclusion as contained in the Administrative Law Judge's initial decision. However, the Board notes that this decision is limited to the merits of this particular case. The Board neither accepts nor adopts the internal discipline policy of the appointing authority in concluding the appellant should be removed from his position. Rather, the Board concludes that appellant's lengthy record of infractions involving absenteeism and tardiness justifies his removal.

ORDER

The Merit System Board finds that the action of the appointing authority in removing appellant was justified. The Board therefore affirms that action and dismisses the appeal of Pierre J. Brown.
This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

You must check the New Jersey Citation Tracker in the companion looseleaf volume to determine the history of this case in the New Jersey courts.