

Office of Administrative Law
State of New Jersey

STEPHEN S. BALKARAN, APPELLANT,
V.
NORTHERN STATE PRISON, DEPARTMENT OF CORRECTION, RESPONDENT.

Civil Service

OAL Docket No. CSV 2522-92

Initial Decision: March 9, 1994
Final Agency Decision: May 10, 1994

Initial Decision: AND

FINAL AGENCY DECISION

Lucas E. Phillips, Jr., Esq., for appellant

Paul Zatz, appearing pursuant to N.J.A.C. 1:1-5.4(a)(2), for respondent

SUKOVICH, ALJ:

PROCEDURAL HISTORY

Northern State Prison (Prison or respondent), State Department of Corrections (DOC), issued a Preliminary Notice of Disciplinary Action (Preliminary Notice) to Stephen S. Balkaran (Balkaran or appellant) on December 24, 1991. Respondent issued a Final Notice of Disciplinary Action (Final Notice) on January 23, 1992. A request for a hearing was made on appellant's behalf by letter dated February 10, 1992. The State Department of Personnel transmitted the matter to the Office of Administrative Law (OAL) on April 8, 1992 for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to - 13.

A settlement conference was conducted at the OAL on May 28, 1992, and the matter was thereafter reassigned to this judge. A hearing was initially scheduled for February 8, 1993, which hearing was adjourned at respondent's request. An in-person conference was held on April 26, 1993, and a hearing was scheduled for August 6, 1993. The latter date was adjourned at appellant's request. A hearing was held on January 7, 1994. Respondent filed a post-hearing brief on January 20, 1994; and appellant, on January 27, 1994, on which date the record was closed.

NATURE OF THE CASE

The December 24, 1991 Preliminary Notice charged appellant with insubordination (intentional disobedience or refusal to accept an order), assault or resisting authority, and disrespect or use of insulting or abusive language to a supervisor, constituting conduct unbecoming an employee. The specifications of the charges were that on December 23, 1991, at approximately 10:40 a.m., appellant was given a direct order from his supervisor to perform a plumbing detail, which he refused, and that appellant insulted the supervisor by using vulgar language regarding the latter's weight and challenging the supervisor to a fight. The specifications further alleged that appellant followed the supervisor from an office area to outside a doorway and began to provoke the latter into a fight by spitting in his face.

Appellant was suspended effective December 23, 1991, with pay, pending a departmental hearing. A departmental hearing was held on January 2, 1992. All the

charges were upheld, and appellant was suspended for 30 days.

The issues to be decided in a case such as this are whether appellant is guilty of the charges alleged and what penalty, if any, should be imposed. *West New York v. Bock*, 38 N.J. 500 (1962) (Bock).

STIPULATIONS

The parties stipulated that appellant was hired June 27, 1988 in the position of Senior Operator--Refrigerator Services.

FINDINGS OF FACT

Respondent alleges that appellant was insubordinate to and attempted to provoke his direct supervisor, Joseph Viteritto (Viteritto). In addition to Balkaran and Viteritto, Carolyn Abbua-Offei (Offei), the Assistant Superintendent of the Prison, testified.

I am persuaded from the evidence that appellant initially refused to perform certain tasks directed by Viteritto on December 23, 1991. Appellant testified that he communicated concerns regarding safety and adherence to Prison procedures to Viteritto.

Balkaran adamantly denied cursing and spitting at Viteritto. Viteritto's testimony that appellant did do so was corroborated by a report of Viteritto, which he wrote on the day of the alleged incidents, as well as Offei's testimony regarding communications from Viteritto to her on December 23, 1991. Notwithstanding, I am persuaded by Balkaran's testimony that he did not spit nor curse at Viteritto. Appellant generally impressed me as a sincere witness. His testimony that, because of prior incidents with Viteritto and Balkaran's knowledge of the grievance procedure, he would not have sought to provoke Viteritto had the ring of truth. Similarly, his testimony that Viteritto invited appellant to visit at Viteritto's vacation home subsequent to December 23, 1991 was credible. It is reasonable to infer that Viteritto would not have done so if appellant had behaved as alleged.

There were certain differences among the testimony of the witnesses regarding the nature of the communications occurring on the date in question. I am persuaded that the detail and specificity of Balkaran's testimony in this respect corroborates and supports a conclusion that he was generally credible. He testified that he was called to Offei's office and met with her and a union representative. Offei testified that appellant came to her office; she did not reference the presence of a union representative.

Both Viteritto and Balkaran testified that another employee of the Prison, Romeo Trezense (Trezense) was present when Balkaran allegedly cursed and spat at Viteritto. In addition, Viteritto testified that appellant did so in the presence of an inmate. I place some weight upon the lack of testimony of the only eyewitnesses. See, *Michaels v. Brookchester, Inc.*, 26 N.J. 379 (1958). I am persuaded that appellant did not spit nor curse at Viteritto.

Based upon a review of the entire record, I FIND the following to be FACTS.

Appellant was employed by the DOC as a senior Operator--Refrigeration Services and assigned to the Prison as of December 23, 1991. As of that date, Viteritto was also employed by the DOC and assigned to the Prison as an assistant engineer in charge of maintenance. He was responsible for insuring that needed repairs at the Prison site were effectuated. On the day in question, the supervisor of the maintenance department was not present, and Viteritto was in charge of maintenance.

Appellant was generally assigned to perform refrigeration repair and servicing tasks, but consistent with general procedures at the Prison, was periodically assigned to other maintenance details, including plumbing. All civilian employees assigned to the maintenance department are required to perform various details, as needed.

Maintenance tasks are directly performed by inmates. A civilian employee is required to be present with inmates performing maintenance tasks. It is the civilian employee's responsibility to obtain the tools necessary, give them to the inmates, and lock them up when jobs are completed. It is part of appellant's job duties to function in this respect, vis-a-vis inmates, as necessary.

Viteritto commenced distributing work assignments to appellant on December 23, 1991 at approximately 8:00 a.m. There was only one refrigeration work order to be completed that day, but numerous plumbing repairs to be effectuated. Because of a lack of manpower, Viteritto told Balkaran that appellant would have to take plumbing details. Appellant initially responded to the effect that he would do so and physically took the plumbing details work papers from Viteritto. Appellant would have had to obtain the necessary tools and provide them to a group of inmates assigned to him and remain with the inmates while they completed the repairs. Viteritto then told Balkaran that appellant would also have to complete a refrigeration detail. More specifically, Balkaran was assigned to effectuate a repair to an ice maker in a small room in an inmate residency building. The plumbing work orders would have had to have been executed in the same room. Viteritto told Balkaran that appellant should attend to the refrigeration work order while the inmates worked on the plumbing tasks. Although physically taking the plumbing and refrigeration work orders, Balkaran told Viteritto that he could not perform both plumbing and refrigeration tasks because it was against Prison rules, more specifically, that he was not supposed to leave inmates unsupervised in possession of tools. Viteritto told appellant that he (Viteritto) was giving Balkaran a direct order, and appellant reiterated his position. Appellant left and commenced refrigeration repairs with a group of inmates assigned to him.

Viteritto thereafter called Offei, telling her that Balkaran had refused to comply with an order. The Prison superintendent was not present that day and as part of her duties, Offei was in charge. Without discussing in much detail the nature of the tasks in question, nor the communications between Balkaran and Viteritto, Offei told Viteritto that Viteritto was the supervisor and should give a direct order to Balkaran. Viteritto subsequently contacted Balkaran on an intercom system and told appellant to speak with Offei, which appellant did. Offei directed appellant to complete the plumbing detail. Another employee was sent to relieve Balkaran of supervision of the inmate group, and Balkaran worked on the plumbing orders.

At approximately 10:30 a.m., "a comp time" for inmates, Balkaran locked away his tools and proceeded to a room referred to as the powerhouse, where the boilers are located. The room, which functions as an office, is a 12'x12' cubicle. Trezense, an engineering employee in charge of the boilerroom, was seated at a desk in the rear of the powerhouse. The door to the cubicle was open. Appellant completed a grievance form regarding the work assignments from Viteritto, in the presence of Trezense, and conversed with the latter regarding the situation. Viteritto arrived at the powerhouse and spoke with appellant. Appellant did not threaten Viteritto nor spit at him. Appellant soon left and went to lunch, in building No. 5, the building where the plumbing detail was located. After lunch, he again worked on the plumbing detail with a group of inmates. He was thereafter paged and told to go to Offei's office by Viteritto, which he did. Rodney Calendar (Calendar), president of Union Local 2, to which appellant then belonged, was present at Offei's office. Calendar told Balkaran that he (Calendar) had been called to represent appellant because appellant was being charged with some impropriety. Offei and Calendar then spoke in Offei's office. Calendar left the office and told appellant, who was in the waiting room, that Balkaran had been accused of spitting at Viteritto. Appellant told Calendar that he had not done so. Offei then called both men into her office and informed them of the accusation. Appellant was suspended with pay and was told that a hearing would be scheduled. Appellant advised Offei that he was scheduled to go on vacation and was told by her to cancel it. He told her that he would. An officer then escorted appellant out of Offei's office.

Appellant's disciplinary record is as follows. Appellant was suspended in 1990 for 15 days for insubordination/intentional disobedience evidenced by the use of profane language to a supervisor. He was also suspended for three days in 1990 for non-

response to a supervisor, and he was suspended one day in 1989 for bringing food to inmates, in violation of Prison policies and procedures. In 1991, Balkaran was officially reprimanded for unreasonable failure to report a delay in reporting to work.

DISCUSSION

Major discipline of permanent employees in the career service includes suspension. N.J.A.C. 4A:2-2.1 & 2.2. An employee may be subject to discipline for certain specified reasons, including insubordination, conduct unbecoming a public employee, or other sufficient cause. Id. at § 2.3. Administrative appeals require a de novo hearing, that is, not merely a new hearing on the record. *Weaver v. N.J. Dept. of Civil Service*, 6 N.J. 553 (1951). The burden of proof in appeals concerning major disciplinary action is upon the appointing authority. N.J.A.C. 4A:2-1.4. Seniority credit, as well as back pay benefits and counsel fees, may be awarded in disciplinary appeals. Id. at § 1.5. Interest may be awarded in certain circumstances when back pay is awarded. Id. at § 2.11

An employee's past disciplinary record cannot be used to prove a charge which is not one of habitual misconduct. However, such record may be used for guidance in determining the appropriate penalty for a current specific offense. An individual's service record may include any available ratings by superiors, as well as formally adjudicated disciplinary actions and instances of misconduct informally adjudicated by having been previously called to the attention of and admitted by the employee. *Bock*, supra, N.J. at 523-24.

CONCLUSIONS

Appellant's failure to effectuate an order constituted insubordination, notwithstanding the fact that appellant had concerns regarding the order. Viteritto was in charge of the maintenance department on the day in question and had authority to assign work orders to Balkaran. Balkaran's duties required him to periodically supervise inmates. The performance of a plumbing detail by appellant, while inmates worked with tools on a refrigeration task in proximity to Balkaran, would not, based on the record in this case, present such a danger to appellant that he would arguably be justified in ignoring an order from a supervisor. Nor does the record establish that such a situation would violate Prison policies and procedures. Appellant was well aware of grievance procedures, and his recourse was to subsequently file a grievance which, in fact, he did.

I CONCLUDE that appellant's refusal to initially comply with Viteritto's order on December 23, 1991 that Balkaran complete assigned plumbing details constituted insubordination. I also CONCLUDE that respondent has not met the burden of proving by a preponderance of the credible evidence that appellant engaged in conduct unbecoming an employee on that day by cursing and spitting at Viteritto.

Although not a long-term employee of the DOC, appellant has been previously disciplined several times, including two instances categorized as insubordination. As found, he received a 15-day suspension in 1990. In light of appellant's prior disciplinary record, I am persuaded that a suspension in excess of 15 days would be appropriate. However, the record in the current matter does not reflect an allocation of the 30-day suspension initially imposed between the charges of insubordination and unbecoming conduct. Therefore, an application of the suspension equally between the charges is reasonable in my judgment. It is also therefore reasonable, in my judgment, to impose a suspension in the current matter of 15 days.

I CONCLUDE that a suspension of 15 days is reasonable. Back pay and counsel fees should be awarded to appellant applicable to 15 days of suspension; however, appellant should not receive back pay and other benefits for the time period between August 6, 1993, the hearing date adjourned at appellant's request, and January 7, 1994, the date on which the hearing was conducted. Finally, I CONCLUDE that the record does not support an award of interest.

ORDER

It is hereby ORDERED that the Final Notice of Disciplinary Action issued by respondent on January 23, 1992, directed to appellant, be and is hereby AFFIRMED as it pertains to a charge of insubordination and that such notice be and is DISMISSED as it pertains to charges of assaulting or resisting authority and disrespect or use of insulting or abusive language to a supervisor. It is also ORDERED that appellant be awarded back pay, benefits, and seniority, in accordance with N.J.A.C. 4A:2-2.10, subject to the limitation set forth hereinabove, and counsel fees, pursuant to N.J.A.C. 4A:2-2.12. I also ORDER that interest not be awarded pursuant to N.J.A.C. 4A:2-2.11.

I hereby FILE my initial decision with the MERIT SYSTEM BOARD for consideration.

This recommended decision may be adopted, modified or rejected by the MERIT SYSTEM BOARD, which by law is authorized to make a final decision in this matter. If the Merit System Board does not adopt, modify or reject this decision within forty-five (45) 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 (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the DIRECTOR, APPELLATE PRACTICES AND LABOR RELATIONS, DEPARTMENT OF PERSONNEL, Three Station Plaza, 44 South Clinton Avenue, CN 312, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

FINAL AGENCY DECISION

ANSELMINI, Commissioner:

The appeal of Stephen S. Balkaran, Senior Correction Officer, Refrigeration Services, Northern State Prison, State Department of Corrections, suspension for thirty (30) days, on charges, was heard by Administrative Law Judge Diana C. Sukovich (ALJ), who rendered her initial decision on March 9, 1994. Exceptions were filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Merit System Board at its meeting on May 10, 1994, accepted and adopted the Findings of Fact as contained in the attached ALJ's initial decision. However, the Board did not adopt the conclusion and recommendation that the penalty be reduced to a fifteen (15) day suspension. Rather, the Board concludes that the appointing authority's action in suspending appellant for thirty (30) days should be affirmed. The Board further notes that, because the insubordination charge was upheld, appellant did not prevail on substantially all of the primary issues. Accordingly, appellant is not entitled to counsel fees, pursuant to N.J.A.C. 4A:2-2.12.

DISCUSSION

Appellant was charged with conduct unbecoming a public employee and insubordination. Specifically, the appointing authority asserted that appellant refused an order from his supervisor to perform a plumbing detail and further insulted his supervisor and attempted to provoke him into a fight. The ALJ dismissed the charge of conduct unbecoming a public employee because the appointing authority failed to prove the charge by a preponderance of the evidence, but sustained the charge of insubordination. The Merit System Board agrees with this determination.

However, the Board disagrees that the circumstances present in this matter warrant reduction of the penalty. As the ALJ determined, appellant disputed a directive from his supervisor to oversee a plumbing detail, continued to do so even after being advised that it was a direct order and failed to comply with the order. Insubordination is a serious offense. Individual employees cannot be afforded the luxury of deciding for themselves whether to obey a particular order. Such behavior would result in chaos and interfere with effective public administration. Despite

his opinion that he should not be responsible to oversee a plumbing detail while performing a refrigeration task, appellant had a duty to carry out the order and could have pursued his concerns as to whether the procedure employed was proper at a later time.

In addition to consideration of the seriousness of the underlying incident in determining the proper penalty, the Board also utilizes, where appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). The record indicates that appellant received two prior suspensions for insubordination, including a 15-day suspension in 1990, as well as several minor disciplinary actions during only 3 1/2 years of service. Although the charge of conduct unbecoming a public employee was dismissed, no reduction in penalty is warranted under the circumstances in this matter. Based on the totality of the record, including the seriousness of the incident and appellant's prior record, the Board concludes that the penalty of a thirty (30) day suspension is neither unduly harsh nor disproportionate to the offense.

ORDER

The Merit System Board finds that the action of the appointing authority in its thirty (30) day suspension of appellant was justified. The Board therefore affirms that action and dismisses the appeal of Stephen S. Balkaran.

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

1994 WL 463466 (N.J. Adm.), 94 N.J.A.R.2d (CSV) 534

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