

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael McAlkich, :
Petitioner :
 :
v. : No. 549 C.D. 2010
 : Submitted: August 20, 2010
 :
Pennsylvania State Civil Service :
Commission(State Correctional :
Institution at Huntingdon, Department :
of Corrections), :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: September 16, 2010

Michael McAlkich (Petitioner) appeals from the determination of the State Civil Service Commission (Commission) sustaining the decision of the Department of Corrections (Department) terminating Petitioner's employment as a corrections officer for sleeping on the job while guarding an inmate at a hospital. For the reasons that follow, we affirm.

On March 12, 2009, Petitioner was terminated from his position as a corrections officer at SCI-Huntingdon, a civil service position, for sleeping on the job while supervising an inmate being treated at the Altoona Regional Health

System (Hospital).¹ Petitioner appealed to the Commission. Before the Hearing Officer, the following testimony was elicited: Joyce Offman, R.N. (Nurse Offman), who treated the inmate Petitioner was assigned to at the Hospital,

¹ According to his termination letter, this conduct violated the following Department rules:

- Department of Corrections, Code of Ethics, Section B-10, which states, “Employees are expected to treat their peers, supervisors and the general public with respect and conduct themselves properly and professionally at all times; unacceptable conduct or insolence will not be tolerated.”
- Department of Corrections, Code of Ethics, Section B-19, which states, “Employees shall not read books, magazines, newspapers, or other non-job related printed material while on official duty. Employees are required to remain alert while on duty; inattentiveness, sleeping, or the appearance thereof is prohibited.”
- Department of Corrections, Code of Ethics, Section B-31, which states, “Corrections Officers are to read, sign and fully comply with all post orders.”
- Department of Corrections, SCI-Huntingdon Post Order, Outside Hospital Security Officer Dated: February 10, 2008 #II Zone of Responsibility, A, 3, which states, “The officer will remain alert at all times and must be able to react quickly and decisively in emergency situations.”
- Department of Corrections, SCI-Huntingdon Post Order, Outside Hospital Security Officer Dated: February 10, 2008 V, Emergency Response, C, 1, Perimeter Mobile Security Patrol, Section V, General Orders, A, Procedures, 1, which states, “Always be alert, paying particular attention to escape attempts, fights, unauthorized activities, etc. Notify the command room immediately if these activities are observed, and alert the other officers in the area by radio, voice, or whistle.”

(Original Record, Tab 1, following transcript.)

testified that she entered the inmate's room three times on the morning in question, and each of those times Petitioner, who was one of two corrections officers assigned to the inmate, was leaning back in his chair with his eyes closed. Although Nurse Offman was in the room for several minutes each time, only once did Petitioner even open his eyes. A couple of the times she went in, Petitioner had his chair moved most of the way into the bathroom doorway and still appeared to be sleeping. Greta Hurley, R.N. (Nurse Hurley), treated the inmate while Nurse Offman was at lunch. Nurse Hurley testified that she went into the inmate's room once, and Petitioner had his chair pushed part way into the bathroom, was leaning back with his legs stretched out, and his head was tilted off to the side. He remained this way for approximately 30 seconds until Nurse Hurley made a noise by setting the inmate's lunch tray down, at which time Petitioner appeared to wake up.

Two officials from SCI-Huntingdon also testified. According to their testimony, corrections officers were supposed to be extremely vigilant when accompanying inmates outside the prison because there is an escape risk. In fact, just a few years earlier, an inmate at the Hospital did escape for a few hours. Additionally, this was not Petitioner's first offense. He had been disciplined twice before for sleeping on the job. The first time Petitioner was sleeping on his block and had to be shaken awake by his unit manager, resulting in a written warning, and the second time he fell asleep in the outside perimeter vehicle, was caught on camera, and had to be woken up by a relief person. This offense resulted in a three-day suspension and a final warning that another offense would result in termination. Furthermore, besides falling asleep again in the Hospital, Petitioner

also did not sign his post orders for the day, as is required of all corrections officers.

Petitioner then testified on his own behalf. He admitted to the first two offenses but categorically denied falling asleep in the Hospital and asserted that he had significant interaction with the nurses that day. He also testified that it was true that he did not sign the post orders, but that corrections officers very rarely sign them, even though technically they are supposed to.

Finding the nurses and Department witnesses to be credible but Petitioner not credible, the Commission determined that Petitioner was sleeping or appeared to be sleeping on the job and that this was just cause for his removal under the Civil Service Act.² Petitioner then appealed to this Court.³

² Section 807 of the Civil Service Act, Act of August 5, 1941, P.L. 752, *as amended*, 71 P.S. §741.807, provides, “No regular employe in the classified service shall be removed except for just cause.”

³ Our standard of review of decisions and orders of the Commission is limited to determining whether constitutional rights have been violated, whether an error of law has been committed, whether the provisions of 2 Pa. C.S. §§501-508 (related to practice and procedure of Commonwealth agencies) have been violated, or whether the factual findings are supported by substantial evidence. 2 Pa. C.S. §704; *Allen v. State Civil Service Commission*, 992 A.2d 924 (Pa. Cmwlth. 2010).

On appeal, Petitioner contends that there was no just cause⁴ to terminate his employment because there was no substantial evidence that he was actually sleeping on the job. The only testimony was that he “appeared” to be sleeping on the job, which was insufficient to show that he actually was sleeping. In determining whether substantial evidence exists to support the Board's findings, this Court must examine the testimony in the light most favorable to the party prevailing below, giving the prevailing party the benefit of any inferences which can be logically and reasonably drawn from the evidence. *Szostek v. Unemployment Comp. Bd. of Review*, 541 A.2d 48, 50 (Pa. Cmwlth. 1988).

Here, the Commission found credible the testimony of Nurse Offman that she found Petitioner three times in a position that caused her to believe he was sleeping, and Nurse Hurley, who found the same thing the only time she entered the room where Petitioner was working. The Commission found Petitioner’s testimony that he was not sleeping not credible. It is irrelevant whether Petitioner actually was sleeping or merely appeared to be sleeping as the rules Petitioner was accused of violating prohibit “sleeping, or the appearance thereof” and require corrections officers to be “alert” at all times. In addition, Petitioner himself admits that he did not sign the post orders as required and had two previous violations for

⁴ A civil service employee may only be removed for just cause. *Webb v. State Civil Service Commission*, 934 A.2d 178 (Pa. Cmwlth. 2007). Just cause must be merit-related, which includes whether the employee failed to properly execute his duties or acted in a way that hampered or frustrated the execution of his duties. *Id.* What constitutes just cause for removal of a civil service employee is largely a matter of discretion on the part of the head of the department. *Woods v. State Civil Service Commission*, 590 Pa. 337, 912 A.2d 803 (2006). The appointing authority bears the burden of proving just cause for removal. *Thompson v. State Civil Service Commission*, 863 A.2d 180 (Pa. Cmwlth. 2004).

sleeping on the job, the second of which resulted in a final warning that he would be terminated if it happened again. Because it is beyond settled that our scope of review does not permit us to make credibility determinations, re-evaluate the evidence or draw our own inferences, the Commission had substantial evidence to find that Petitioner was sleeping or appeared to be sleeping while guarding a prisoner.

Accordingly, the order of the Commission is affirmed.

DAN PELLEGRINI, JUDGE

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ORDER

AND NOW, this 16th day of September, 2010, the order of the State Civil Service Commission dated March 5, 2010, is affirmed.

DAN PELLEGRINI, JUDGE