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ATTORNEY FOR APPELLANT:

ADAM G. FORREST
Boston Bever Klinge Cross
& Chidester
Richmond, Indiana

ATTORNEY FOR APPELLEE:

DAVID P. MURPHY
David P. Murphy & Associates, P.C.
Greenfield, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

CITY OF RICHMOND, INDIANA,)
)
 Appellant-Plaintiff,)
)
 vs.) No. 89A01-0704-CV-188
)
 CHRISTOPHER TODD STICCO,)
)
 Appellee-Defendant.)

APPEAL FROM THE WAYNE CIRCUIT COURT
The Honorable Daniel Lee Pflum, Special Judge
Cause No. 89C01-0512-PL-26

December 11, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-plaintiff City of Richmond, Indiana (the City), appeals the trial court's order reversing the discipline imposed on appellee-defendant Christopher Todd Sticco by the Board of Public Works and Safety (the Board). The City argues that the trial court improperly reweighed evidence and judged witness credibility. We agree, and reverse the judgment of the trial court.

FACTS

Sticco was employed as an engineer by the Fire Department of the City of Richmond (the Fire Department) and was a member in good standing with the Richmond Professional Fire Fighters, Inc., Local 1408 (the Union). The Fire Department's employees are governed by a Book of Rules, which sets out "basic policies and rules of the department to its members." Appellant's App. p. 154. The Book of Rules "is not all-inclusive, but is intended to be supplemented by current position descriptions, standing and special orders of the Fire Chief, general and special orders of the Board of Public Works and Safety, and applicable municipal, state, and federal laws." Id. Article X, Section 2 of the Book of Rules requires all members to "become familiar with the Rules as well as the general and specific orders of the Department." Id. at 162. Article X, Sections 12 and 13 include the following rules:

SECTION 12. Each member of the Fire Department shall report or cause to be reported to the Battalion Chief on duty at time of call, his or her inability to report to duty as scheduled before 6:45 a.m. on his or her assigned day of duty. . . .

SECTION 13. All members shall furnish to the Battalion Chief on duty a statement from a duly qualified medical practitioner concerning any or all illnesses or injuries, after a request is made by the Fire Chief or Battalion Chief of the Fire Department, on their next duty day unless additional days are required, then it needs to be brought in as soon as it is received.

Id. at 164. The Collective Bargaining Agreement (the Contract) governing the relationship between Union members and the Fire Department provides, among other things, that “[a]ny changes in Standard Operating Procedure (SOP) or Book of Rules (BOR) pertaining to working conditions and privileges, will be mutually agreed upon by the City of Richmond management and a majority vote of the union membership.” Id. at 18.

In 2004, Fire Chief Michael Crawley enacted a special rule commonly referred to as the “absenteeism policy.” Id. at 45. The absenteeism policy was designed to “handle all absenteeism on the department fairly and consistently.” Id. at 173. Among other things, the policy states that “[i]f a member has been identified as having an absenteeism problem, then they will need to bring a [doctor’s] slip every time they are off and it must be dated the day [on] which they missed work.” Id. The policy was posted in the Fire Department and personnel were aware of its existence. No employee has ever filed a complaint regarding the implementation or utilization of the absenteeism policy.

In 2003, Sticco missed seventy-nine days of work, in 2004, Sticco missed fifteen days of work, and in 2005, Sticco missed eighteen days of work. On March 3, 2005, Crawley sent Sticco a letter as a follow-up to a meeting that had occurred earlier that day. Among other things, the letter noted that Sticco’s “excessive absenteeism” was “a problem.” Id. at 178.

Thus, from that date forward, Sticco was

required to bring in a Doctors [sic] slip dated the day you are off. If you don’t you will be charged with disobeying a direct order. I will also state that if you continue to display excessive absenteeism this will result in additional action such [as], but not limited to, an adjustment in your pay for hours not worked.

Id.

On September 10, 2005, Sticco failed to report for duty on his scheduled shift. Sticco asked his minor son to phone the Fire Department to report Sticco's absence. Upon receiving the call, the Battalion Chief on duty instructed the child to tell his father to call the Fire Department as soon as possible; however, Sticco did not call as requested. On September 12, 2005, Sticco again failed to report for duty. Sticco did not call the Fire Department to report his absence. At approximately 7:05 a.m., the Battalion Chief telephoned Sticco at home and left a message on his answering machine. After Sticco received the message, he returned the call and informed the Battalion Chief that he would not make it to work that day. Subsequently, Sticco provided a doctor's slip that indicated that he had visited the doctor on September 12 and, at that time, the doctor excused his absences on September 10 and 12. Sticco, however, did not go to the doctor on September 10.

On September 13, 2005, Crawley sent Sticco a letter indicating that he was charging Sticco with disobeying a direct order, conduct unbecoming, neglect of duty, violation of the rules, and absence without leave. On October 6, 2005, the Board of Public Works and Safety (the Board) issued a notice of suspension to Sticco, based on Crawley's request that Sticco be suspended for thirty days without pay. On October 7, 2007, Sticco requested a formal hearing before the Board regarding the pending charges and suspension. On November 3, 2005, the Board held a lengthy disciplinary hearing at which multiple witnesses testified and multiple evidentiary exhibits were offered into evidence.

On November 10, 2005, the Board concluded that Sticco had violated certain rules, violated a direct order, and engaged in excessive absenteeism such that his conduct was

unbecoming. The Board implemented the disciplinary action requested by Crawley; namely, a thirty-day suspension without pay and a requirement that Sticco submit to a physical and psychological evaluation.

On December 8, 2005, Sticco filed a complaint seeking judicial review of the Board's decision. After the parties submitted briefs and proposed findings of fact and conclusions of law, the trial court reversed the Board's decision on March 23, 2007, finding in pertinent part as follows:

17. In making its decision the Board relied on [the absenteeism policy.]

18. The Contract, at Article 35, provided that "any changes in Standard Operating Procedure (SOP) or Book of Rules (BOR) pertaining to work conditions and privileges will be mutually agreed upon by the City of Richmond management and a majority vote of the Union membership."

19. The Book of Rules, at Article XV, provides that "all changes or additions to the above rules and regulations, including but not limited to . . . Orders of the Fire Chief's Office . . . shall be formally adopted by [the Board]."

20. . . . [T]he Absenteeism Policy had not been adopted by the Union as required by the Article 35 of the Contract.

21. The Board never approved or adopted the Absenteeism Policy, as required by Article XV of the Rules.

22. Any reliance by the Board upon the Absenteeism Policy is invalid as the Absenteeism policy had not been properly adopted.

26. Sticco abided by the requirements of Book of Rules Article X, Section 11 on September 10, 2005[,] as said Section does not prohibit the son of a Fire Fighter or anyone else from calling in at the appointed time to report that the Fire Fighter-Father was ill and would not be reporting for work that day.

27. Sticco attempted to abide by Article X, Section 12 on September 12, 2005[,] when he asked his son to call the Department to report that he was unable to work that day. Sticco's son did not reach a human being nor leave an answer on the Department's telephone system.

28. The Book of Rules does not require that the Fire Fighter turn in a Doctor's slip dated the same day as the absence but rather requires that "all members shall furnish . . . a statement from a duly qualified medical practitioner concerning any illness . . . after a request is made by the Fire Chief . . . on their next duty day.[""]

29. The evidence in the Record is without dispute that Sticco provided a Doctor's slip for each of his absences on September 12, 2005.

32. Neither the Union nor the Board agreed to [the absenteeism policy] as a modification [of] the Contract.

33. [The absenteeism policy] materially modified the "past practices" between the Union and the City as well as specific provisions of the Contract and the Book of Rules concerning how Fire Fighters would report and substantiate absences caused by illness.

34. Neither the Board nor Crawley had the authority under the Contract, Book of Rules nor [sic] "past practices" to determine that a Fire Fighter is guilty of conduct unbecoming if his medically substantiated absences were "well above the Department average for sick days for many years".

CONCLUSIONS OF LAW

10. The Board's [decision] is not based on substantial evidence; its decision is arbitrary and capricious and violates Sticco's vested rights under the Contract.

11. The Findings of the Board are erroneous and contrary to law for the following reasons:

A. . . . the uncontradicted evidence . . . showed that . . . Sticco obeyed [Article X, Section 12] when[, on September 10, 2005,] his son called the Department on the Department's

official telephone and reported to the Firefighter who was manning the telephone that his father (Sticco) was ill and would not be at work; the Rules did not require Sticco to take any further action.

B. . . . the uncontradicted evidence . . . showed that . . . Sticco's son attempted to call in [on September 12, 2005,] but was unable to do so because the Department's official telephone was not manned by a human being but instead played a 911 emergency instruction message.

C. Finding 3 of the Board concluded that Sticco had violated Article X, Section 12 because he did not provide a doctor's slip dated September 10, 2005; Article X, Section 12 . . . does not deal in any way with "a doctor's slip" requirement; Article X Section 12 deals only with reporting procedures in the case of illness of a union member.

D. Finding 4 . . . concluded that Sticco had violated a direct order . . . that "from this date forward you will be required to bring in a doctor's slip dated the day you are off. If you don't you will be charged with disobeying a direct order". Nothing in the Contract or the Rules contains such a requirement. Chief Crawley's order was invalid because (1) it was contrary to Article X, Section 13 and (2) changed the terms of the Contract and the Rules and (3) was not approved by the Union or the Board. Sticco had no legal duty to obey an invalid order concerning work rules. In addition, the uncontradicted evidence presented to the Board, established that Sticco presented a written doctor's statement every time Sticco was absent on account of an illness or a work[-]related injury.

E. Finding 5. . . concluded that Sticco was guilty of excessive absenteeism and therefore conduct unbecoming. The uncontradicted evidence presented to the Board showed that (1) every absence of Sticco was because of illness or work[-]related injury substantiated by a doctor's report, (2) no evidence was presented to the Board that even suggested that Sticco had been absent from work for any reason other than illness or work related injury, (3) the Chief's Absenteeism Policy was not a part of the Contract or Book of Rules and had never been approved by the Board and (4) the so[-]called "Department Average" of

sick days of other union members had nothing to do with the case before the Board.

12. This cause is remanded to [the Board] with instructions to enter a finding denying the application of [Crawley] for disciplinary sanctions against . . . Sticco.

15. The Board may conduct another hearing to determine what happens when the telephone . . . is not answered. If there was a clear concise message that would lead a reasonable person to understand that he or she could leave a non[-]emergency message then the Board may imposed [sic] sanctions on Sticco equal to that imposed on other firefighters who had a legitimate excuse to miss work but failed to call in by 6:45 a.m.

Id. at 9-12. The City now appeals.

DISCUSSION AND DECISION

I. Standard of Review

Judicial review of an administrative determination is limited to determining whether the administration possessed jurisdiction of the subject matter or whether the administrative decision was made pursuant to proper procedures, was based upon substantial evidence, was not arbitrary or capricious, and was not in violation of any constitutional, statutory, or legal principle. City of Kokomo v. Kern, 852 N.E.2d 623, 627 (Ind. Ct. App. 2006), trans. denied. Moreover, judicial review of an administrative board's decision requires that deference be given to the expertise of that board. Bird v. County of Allen, 639 N.E.2d 320, 327 (Ind. Ct. App. 1994). In other words, a reviewing court neither determines questions of witness credibility nor reweighs conflicting evidence; instead, reviewing the record as a whole, the court must determine whether the board's decision was supported by substantial evidence. Foor v. Town of Hebron, 742 N.E.2d 545, 553 (Ind. Ct. App. 2001).

II. The City's Arguments

The Board found fault with a number of Sticco's actions: (1) failure to provide a doctor's slip for the September 10 absence as soon as it was received; (2) violation of the Battalion Chief's September 10 instruction to call the Battalion Chief back as soon as possible; (3) failure to report his September 12 absence before 6:45 a.m. on that date; (4) violation of Chief Crawley's March 2005 direct order regarding the provision of doctor's slips; and (5) excessive absenteeism, which the Board found to constitute conduct unbecoming. The trial court reversed, which the City argues was an erroneous ruling.

A. September 10 Doctor's Slip

Article X, Section 13 of the Book of Rules provides as follows:

All members shall furnish to the Battalion Chief on duty a statement from a duly qualified medical practitioner concerning any or all illnesses or injuries, after a request is made by the Fire Chief or Battalion Chief of the Fire Department, on their next duty day unless additional days are required, then it needs to be brought in as soon as it is received.

Appellant's App. p. 164. This Section necessarily assumes that if an employee needs to be absent from work for multiple days and the doctor's slip requirement has been triggered, the employee must go to the doctor at the beginning of the illness or treatment for injury so that the doctor can evaluate the employee's condition and notify the Fire Department regarding how many absences will be required. As noted by Chief Crawley, the purpose of this requirement is to enable the Fire Department to "mov[e]" and "maneuver[]" its staff so that all positions will be covered and so that the employees who have to alter their schedules have as much notice as possible. Id. at 71.

Here, it is undisputed that on March 3, 2005, Chief Crawley explicitly directed Sticco that from that point on, Sticco was “required to bring in a Doctors [sic] slip dated the day you are off.” Id. at 178. Chief Crawley’s request to Sticco triggered the Article X, Section 13 requirement that if a physician is excusing an employee of the Fire Department from multiple days of work, the employee is required to provide the slip as soon as it is received. Instead of complying with that requirement, on or after September 12, Sticco brought in a doctor’s slip that included his September 10 and September 12 absences. Id. at 58. By failing to bring in the slip on September 10, therefore, Sticco violated Article X, Section 13 of the Book of Rules.¹

B. Failure to Call Battalion Chief on September 10

The Board also found that Sticco violated the Book of Rules by failing to call his Battalion Chief on September 10. Sticco’s son had called in his absence and the Battalion Chief told the son to tell his father to call back as soon as possible. Appellant’s App. p. 81. Sticco did not do so.

The Board found that this conduct violated Article X, Section 12 of the Book of Rules, which governs the way in which personnel are required to call in their absences: “[e]ach member of the Fire Department shall report or cause to be reported to the Battalion Chief on duty at time of call, his or her inability to report to duty as scheduled before 6:45 a.m. on his or her assigned day of duty.” Id. at 164. The fact that Sticco’s son called in his

¹ Although the Board found that this action violated Section 12, we can only assume that the Board’s order contains a scrivener’s error, inasmuch as it is Section 13, not Section 12, that contains the requirement regarding doctor’s slips. Appellant’s App. p. 209.

father's absence does not violate this section, nor does the fact that Sticco disobeyed the Battalion Chief's order to call back. Thus, we can only find that the Board erroneously found this conduct to have violated Article X, Section 12. However, it could have found that this conduct constituted "[n]eglect or disobedience of orders," as provided for by Article XIII, Section 1 of the Book of Rules. Id. at 169. Moreover, given that we conclude herein that the Board's other findings regarding Sticco's behavior were not erroneous, we find that the error regarding the finding on Sticco's failure to return the Battalion Chief's call is not reversible.

C. Failure to Report September 12 Absence Before 6:45 a.m.

The Board also found that Sticco failed to report that he would be absent on September 12 before 6:45 a.m. on that day and that this failure constituted a violation of Article X, Section 12. The trial court found that this finding was not supported by substantial evidence because "the uncontradicted evidence . . . showed that . . . Sticco's son attempted to call in but was unable to do so because the Department's official telephone was not manned by a human being but instead played a 911 emergency instruction message." Id. at 11.

We cannot agree that the evidence on this issue was "uncontradicted[.]" Specifically, the Fire Department presented evidence that on September 12, Sticco was lying in bed with an ankle injury and that he had a cell phone with him, but instead of calling his employer himself, he gave the phone to his son. Sticco heard his son attempt to call the Fire Department and knew that his son had neither spoken to a person nor left a message prior to 6:45 a.m. Sticco testified that although the majority of telephone lines at the Fire Department were not equipped with voicemail, the Battalion Chief—to whom all absences were required

to be reported—did have voicemail on his line. Id. at 130. Sticco’s son testified that after one failed attempt at reporting the absence, he threw the phone back to his father and said, “Dad, I called and didn’t get an answer and you probably need to call back.” Id. at 108. Sticco did not call back. At approximately 7:05 a.m., the Battalion Chief called Sticco, who did not answer, and left a message. Only then did Sticco return the call and finally speak to the Battalion Chief to report his absences of September 10 and 12.

Because there is conflicting evidence in the record regarding Sticco’s behavior on September 12, we are required to defer to the Board’s findings of fact on the issue. Foor, 742 N.E.2d at 553. We find, therefore, that the trial court impermissibly reweighed the evidence in reversing the Board on this finding.

D. Violation of Chief Crawley's March 2005 Direct Order

In March 2005, Chief Crawley directed that from that point on, Sticco was “required to bring in a Doctors [sic] slip dated the day you are off. If you don't you will be charged with disobeying a direct order.” Appellant's App. p. 178. Sticco missed work on September 10 and 12 but, according to his own testimony, he did not see his physician until September 12. The doctor's slip that was dated September 12 also excused Sticco's September 10 absence. At the hearing, Chief Crawley emphasized that following the March 3, 2005, letter, Sticco was on explicit notice that if he did not comply with the doctor's slip requirement, he was disobeying a direct order. Id. at 73. Chief Crawley does not inform the Union of every direct order that he gives and is permitted to give direct orders without Union approval. Id. at 73-74.

If Sticco believed that the direct order was wrongly given, he could have filed a grievance pursuant to the Union Contract, which provides that “all grievances must be filed within ten (10) administrative working days of the event or occurrence forming the basis for the grievance” Id. at 187. Sticco did not file a grievance with respect to Chief Crawley's order; thus, he was required to comply with that order. We can only conclude, therefore, that the Board properly found that by failing to go to a doctor on September 10 and obtain a slip on that date, Sticco violated the direct order contained in the March 3, 2005, letter.

Both parties spend significant portions of their respective briefs arguing about the enforceability of the absenteeism policy. The trial court concluded that the policy was not

enforceable and that, consequently, Sticco was not required to obtain a doctor's slip on September 10. We need not consider the enforceability of the absenteeism policy, however, inasmuch as Chief Crawley's March 3, 2005, letter contained an instruction to that effect, which not only constituted a direct order but also, as stated above, triggered the requirement in Article X, Section 13 of the Book of Rules providing that if the employee will miss multiple days, he must get a doctor's slip notifying the Fire Department about how many days will be missed and bring that to the Department as soon as it is received. Thus, we will not analyze the propriety of the absenteeism policy.

E. Excessive Absenteeism

Finally, the Board found that Sticco was absent from 79 days of work in 2003, 15 days in 2004, and 18 days in 2005. Id. at 210. It concluded that "[e]xcessive absenteeism is conduct unbecoming," and found that Sticco's absenteeism during those three years was excessive. Id. The trial court, on the other hand, concluded that

The uncontradicted evidence presented to the Board showed that (1) every absence of Sticco was because of illness or work[-]related injury substantiated by a doctor's report, (2) no evidence was presented to the Board that even suggested that Sticco had been absent from work for any reason other than illness or work[-]related injury, (3) the Chief's Absenteeism Policy was not a part of the Contract or Book of Rules and had never been approved by the Board and (4) the so[-]called "Department Average" of sick days of other union members had nothing to do with the case before the Board.

Id. at 12.

First, the evidence was not uncontradicted regarding whether Sticco properly documented his myriad work absences. Although Sticco testified that he always provided a proper doctor's slip when he missed work, Chief Crawley testified that he had received slips

from Sticco that were blank as to the reason for his absence, that merely stated “off work,” and that were delivered multiple days after absences. Id. at 70. Under these circumstances, we must leave it to the Board as factfinder to weigh the conflicting evidence, and the trial court here impermissibly reweighed the evidence.

Second, it may be true that there was no evidence suggesting that Sticco had been absent for reasons other than illness or work-related injuries, but the Board did not make such a finding. It did not base its conclusion regarding Sticco’s excessive absenteeism on the reasons for his absences; it merely concluded that the number of absences were excessive.

Third, we note again that we need not decide the propriety or enforceability of the absenteeism policy. The Board did not base its excessive absenteeism conclusion on the policy or any directives contained therein.

Finally, at the hearing, Chief Crawley testified that the average number of annual sick days used by Fire Department employees is three to four. Id. at 50. The City’s Human Resources Director testified that the average number of annual sick days used by City employees is four that that employees are terminated after incurring ten sick day absences. Id. at 89-90. Contrary to the trial court’s conclusion, evidence regarding the average annual sick days used by Fire Department and City employees is relevant to determine whether a given employee’s absences are excessive. Sticco acknowledged that he missed 18 days in 2005, 15 days in 2004, and 79 days in 2003. Id. at 131. Under these circumstances, it was for the Board to evaluate the evidence and determine whether Sticco’s absenteeism was excessive. It was also for the Board to determine whether Sticco’s excessive absenteeism

constituted conduct unbecoming. In our view, it is apparent that the trial court erroneously second-guessed the Board in this regard.

In sum, we conclude that although the Board erroneously found that Sticco's failure to return the Battalion Chief's call on September 12 violated Article X, Section 12 of the Book of Rules, its remaining findings are supported by substantial evidence and not otherwise improper. We are confident that the Board would have imposed the same disciplinary sanction on Sticco—thirty-day suspension without pay and a physical and psychological evaluation—even without the violation regarding the failure to return the phone call. We also find that in reversing the Board, the trial court improperly reweighed the evidence and judged the credibility of witnesses.

The judgment of the trial court is reversed.

DARDEN, J., and BRADFORD, J., concur.