

COMMONWEALTH OF PENNSYLVANIA

Derrick Flax	:	State Civil Service Commission
	:	
v.	:	
	:	
Department of General Services	:	Appeal No. 30075
Derrick Flax		Joseph M. Gavazzi
<i>Pro Se</i>		Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Derrick Flax challenging his one-day suspension from regular Capitol Police Officer employment with the Department of General Services. A hearing was held on January 30, 2019, at the Strawberry Square Complex in Harrisburg, Pennsylvania, before Commissioner Gregory M. Lane.

The Commissioners have reviewed the Notes of Testimony and exhibits introduced at the hearing, as well as the Brief submitted by the appointing authority.<sup>1</sup> The issue before the Commission is whether the appointing authority has established good cause for a one-day suspension.

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<sup>1</sup> At the conclusion of the January 30, 2019 hearing, both parties elected to close the record by submitting Briefs. N.T. pp.109-111. A Briefing schedule was issued; however, appellant later informed the Commission that he would not submit a Brief on his behalf. The appointing authority timely submitted its Brief.

## FINDINGS OF FACT

1. By letter dated November 2, 2018, appellant was advised that he would be suspended without pay for a one-day period from his regular Capitol Police Officer employment with the appointing authority, effective on November 4, 2018. The November 2, 2018 one-day suspension letter provided the following reasons supporting the discipline:

The reasons for this suspension are noted below:

- **Violation of General Order 3.1:** Code of Ethics and General Duty Requirements, 3.1.7, Reporting for Duty, (D)
- **Violation of General Order 3.1:** Code of Ethics and General Duty Requirements 3.1.7, Reporting for Duty (I)
- **Unauthorized Absence**

The Specifics of these charges are noted below:

**General Order 3.1.7 (D):** On Sunday, October 14, 2018 at 2130 hours you contacted Sergeant Emerich to inquire about using holiday compensatory time for your shift beginning at 2300 hours. Your request was denied by Sergeant Emerich due to operational needs, specifically, platoon manning, which would have generated an eight-hour overtime situation to replace you.

**General Order 3.1.7, (I)**: Upon being told that your request for leave was denied, you told Sergeant Emerich that you are sick and will not be reporting for your shift.

**Unauthorized Absence**: Specifically, you were denied the use of holiday compensatory time by Sergeant Emerich due to operational needs. You then reported that you were sick and would be using sick time. This absence on Sunday, October 14, 2018, has been entered in to [sic] the time reporting system as AW, Unauthorized Absence.

Comm. Ex. A (emphasis in original).

2. The appeal was properly raised before this Commission and was heard under Section 951(a) of the Civil Service Act, as amended.<sup>2</sup>
3. Appellant is employed as a Capitol Police Officer with the appointing authority. Comm. Ex. A.
4. Appellant has prior discipline with the appointing authority, where he received written reprimands and verbal and written counseling on how his failure to

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<sup>2</sup> Appellant requested a hearing under Section 951(b), which was denied due to an insufficient allegation of discrimination. Comm. Ex. C; N.T. p. 9.

report to duty on multiple occasions was wrong and how to correct the misconduct for the future. N.T. pp. 95-96; AA Exs. 6, 7.

5. An officer may request time off so long as the officer has time available in the ESS bank. N.T. p. 46.
6. Appellant had time available to use within the ESS bank. N.T. p. 68.
7. If an officer requests time off and his administrative sergeant is not on duty, the officer is to communicate with the on-duty supervisor, who will decide whether the request should be approved based upon the staff roster and the appointing authority's policies. N.T. pp. 49-50.
8. As a Capitol Police Officer, appellant had a duty to copy all 1st Platoon supervisors on his email correspondences and time-off requests. N.T. p. 39; AA Ex. 1.

9. Appellant was informed that “all pre-approved annual, holiday, and comp time will be input in ESS before you utilize this time off. All Sick time usage will be input in ESS on your first day back to work.” N.T. pp. 41-42; AA Ex. 2 (emphasis in original).
10. On October 13, 2018, at 9:19 p.m., appellant sent an email correspondence solely to Administrative Sergeant Emerich, who was off duty, informing him that he needed to enter his time to use holiday time off for October 14, 2018 to attend a pre-scheduled event. N.T. p. 44; AA Ex. 3.
11. Appellant did not copy any of his supervisors when he sent his email correspondence to Sergeant Emerich. N.T. p. 44; AA Ex. 3.
12. Sergeant Emerich received a telephone call on October 14, 2018, at 5:48 p.m. from appellant asking if Sergeant Emerich approved appellant’s holiday time off request. N.T. p. 49; AA Ex. 5.
13. Sergeant Emerich informed appellant that he would report for work early to review appellant’s time-off request and the 1st Platoon’s staff roster. Additionally, Sergeant Emerich instructed appellant to call him back. N.T. p. 50; AA Ex. 5.

14. Sergeant Emerich confirmed that appellant's holiday time off request for October 14, 2018 was not pre-approved when Sergeant Emerich returned on-duty. N.T. p. 45; AA Ex. 4.
15. Sergeant Emerich reviewed appellant's request and the 1st Platoon's staff roster and determined that if appellant's request was approved, it would incur overtime for other officers. N.T. p. 51; AA Ex. 5.
16. If an officer's time off request incurs overtime and the request is not considered as a pre-scheduled holiday or compensation time off, then the administrative sergeant must deny the officer's request. N.T. p. 51.
17. Sergeant Emerich denied appellant's request due to operational needs since the appointing authority would incur overtime. N.T. pp. 50-51.
18. Appellant called Sergeant Emerich back at 9:30 p.m. and Sergeant Emerich informed appellant that appellant's request was denied due to operational needs since it would incur overtime. N.T. pp. 50, 52, 56; AA Exs. 4, 5.

19. After learning Sergeant Emerich denied his request, appellant claimed that he was sick and wanted to use his sick time for his shift on October 14, 2018. N.T. p. 52; AA Ex. 5
20. When asked by his Sergeant Emerich if he required extended leave under the Family Medical Leave Act (hereinafter “FMLA”), appellant angrily accused the administrative sergeant’s question as being discriminatory and hung up the phone. N.T. p. 53; AA Ex. 5.
21. Appellant did not report for his shift on October 14, 2018. N.T. p. 54; AA Ex. 5.
22. Due to appellant’s absence, Sergeant Emerich had to utilize another officer to fill appellant’s position that evening, which incurred overtime. N.T. p. 54.
23. Sergeant Emerich recorded appellant’s absence as absent without leave on the 1<sup>st</sup> Platoon staff roster. N.T. pp. 54-55; AA Ex. 5.
24. Appellant’s Pre-Disciplinary Conference (hereinafter “PDC”) occurred on October 26, 2018. Human Resource Analyst Caitlin E. Witmer attended the PDC. N.T. p. 96.

25. During his PDC, appellant reviewed Sergeant Emerich's email correspondence to Lieutenant Finnicle, which described what occurred on October 14, 2018. N.T. p. 97; AA Ex. 5.
26. During his PDC, appellant agreed with Sergeant Emerich's summary of what occurred on October 14, 2018 and admitted to his conduct. N.T. p. 97; AA Ex. 5.
27. After appellant's PDC, Human Resource Analyst Witmer recommended appellant's one-day suspension. N.T. p. 98.

### DISCUSSION

The issue in the present appeal is whether the appointing authority established good cause for the suspension under Section 803 of the Civil Service Act. The appellant is challenging his one-day suspension from regular Capitol Police Officer employment with the appointing authority. The appointing authority charges appellant with multiple violations against General Order 3.1. and with an unauthorized absence. Comm. Ex. A.

Under Section 803 of the Act, a regular employee may only be suspended for good cause. *Hargrove v. Pennsylvania State Civil Service Commission (Department of Corrections)*, 851 A.2d 257, 260 (Pa. Commw. 2004);

71 P.S. § 741.803; 4 Pa. Code §§ 101.21, 105.15. In an appeal challenging the suspension of a regular status employee, the appointing authority bears the burden of establishing good cause for the personnel action. *White v. Commonwealth, Department of Corrections*, 110 Pa. Commw. 496, 532 A.2d 950 (1986); 71 P.S. §§ 741.803, 741.951(a); 4 Pa. Code § 105.15. Good cause must be based upon meritorious criteria and be related to one's competency and ability to execute job duties properly. *White*, 110 Pa. Commw. at 498, 532 A.2d at 951. In addition, the criteria must be job-related and in some rational and logical manner touch upon competence and ability. *Shade v. Pennsylvania State Civil Service Commission (Pennsylvania Department of Transportation)*, 749 A.2d 1054, 1057 (Pa. Commw. 2000).

In support of its action, the appointing authority presented the testimony of Sergeant Kurt A. Emerich and Caitlin E. Witmer. In response, appellant elected to not testify on his own behalf.<sup>3</sup>

Sergeant Kurt Emerich is a Sergeant with the Pennsylvania Capitol Police, 1st Platoon. He has held the position since 2010 and is appellant's Administrative Sergeant. N.T. pp. 33, 34, 36. As an Administrative Sergeant, Emerich coordinates the 1st Platoon's staff roster within the Employee Self-Service (hereinafter "ESS") system to ensure there are enough officers on-duty within the Platoon. N.T. p. 35. The ESS is the appointing authority's computerized system that allows an officer to log in his time requests. N.T. pp. 41-42. In addition,

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<sup>3</sup> Prior to the testimony of any witnesses at the January 30, 2019 hearing, appellant moved for a continuance. N.T. pp. 21-22. Appellant asserted that the motion for a continuance was necessary for him to notify absent witnesses who were previously requested through subpoena requests that were denied by the Commission. N.T. pp. 19, 21. Counsel for the appointing authority opposed appellant's motion based upon the irrelevancy of the absent witnesses' proposed testimony regarding appellant's pre-disciplinary conference and based upon appellant's subpoena requests being denied by the Commission. N.T. pp. 21-22. Appellant's Motion for a Continuance was denied at the hearing. N.T. pp. 26-27.

Sergeant Emerich manages and determines whether an officer's time off requests should be approved pursuant to the appointing authority's policies and the 1<sup>st</sup> Platoon's staff roster. N.T. p. 36. Sergeant Emerich explained that appellant's direct supervisor would be a Lieutenant, who is a Commander. N.T. pp. 36-37.

Sergeant Emerich testified about the appointing authority's policies regarding an officer's responsibilities when he is requesting time off. N.T. p. 37. The appointing authority has a one-hour call-off protocol where an officer may call off one-hour prior to his shift. N.T. p. 37. An officer is provided eleven holidays throughout the course of the year to use. N.T. p. 45. An officer may request time off so long as the officer has time available in the ESS bank. N.T. p. 46. If an officer requests time off and his administrative sergeant is not on duty, the officer should communicate his request to the on-duty supervisor, who will decide whether the request is approved based upon the staff roster and the appointing authority's policies. N.T. pp. 49-50.

An officer is informed of his available time off for the year. N.T. p. 69-70. When an officer makes a last-minute time off request, an on-duty administrative sergeant or supervisor reviews the 1<sup>st</sup> Platoon staff roster and determines authorization for the leave immediately. N.T. p. 70. Sergeant Emerich emphasized that if all the supervisors are notified when an officer makes a time off request, they can make an immediate determination. N.T. p. 71. Under normal circumstances, if an officer has available sick time in the ESS bank and credibly requests time off because he is sick, then the officer's request to use sick time would be approved. N.T. p. 71. Also, an officer only enters his available holiday time when it has been authorized by his supervisor. N.T. p. 72. If an officer makes a time off request,

either the Administrative Sergeant, Lieutenant, or Chief would be able to authorize the request. N.T. p. 72. Appellant had available time to use within the ESS bank for the day related to this appeal. N.T. p. 68.

Pursuant to his duties as an Administrative Sergeant, on August 1, 2018 and September 22, 2016, Sergeant Emerich sent appellant email correspondences instructing him to continue to copy all 1st Platoon supervisors on email correspondences and time-off requests. N.T. p. 39; AA Ex. 1. Additionally, on August 1, 2018, Sergeant Emerich sent appellant an email correspondence informing him that “all pre-approved annual, holiday, and comp time will be input in ESS before you utilize this time off. All Sick time usage will be input in ESS on your first day back to work.” N.T. pp. 41-42; AA Ex. 2 (emphasis in original).

On October 13, 2018, at 9:19 p.m., appellant sent an email correspondence to Sergeant Emerich informing him that he entered for holiday time off for October 14, 2018 due to a pre-scheduled event. N.T. p. 44; AA Ex. 3. Appellant did not copy any of his supervisors when he sent his email correspondence to Sergeant Emerich. N.T. p. 44; AA Ex. 3. Sergeant Emerich was off from work on October 13, 2018, and according to Sergeant Emerich, Sergeant Straw was the proper on-duty supervisor, whom appellant should have directed his time off request. N.T. p. 47.

On October 14, 2018, at 5:48 p.m., Sergeant Emerich received a telephone call from appellant asking if he approved appellant’s holiday off request. N.T. pp. 49, 62. Sergeant Emerich told appellant that he would review appellant’s

request when he reported for work at approximately 9:30 p.m. N.T. p. 50. Sergeant Emerich also instructed appellant to call him back after 9:30 p.m. and after he reviewed the 1<sup>st</sup> Platoon staff roster. N.T. p. 50.

When he returned on-duty, Sergeant Emerich confirmed that appellant's time-off request for October 14, 2018 was not pre-approved. N.T. p. 45; AA Ex. 4. Sergeant Emerich reviewed appellant's time-off request and the 1<sup>st</sup> Platoon's staff roster and determined that if appellant's request was approved, it would incur overtime for other officers. N.T. pp. 51, 64. If an officer's time-off request incurs overtime and the request is not considered as a pre-scheduled holiday or compensation time off, then the administrative sergeant must deny the officer's request. N.T. p. 51. As a result, Sergeant Emerich denied appellant's request. N.T. pp. 50-51.

Sergeant Emerich explained the consequences had he approved appellant's time-off request. N.T. pp. 51-52. Within the 1st Platoon's staff roster, there are at least two officers assigned to a car, which is considered minimum manpower because two officers are in the Communication Center with one supervisor. N.T. p. 51. If appellant's request was granted, then there would only have been three patrolmen and one supervisor for the night, which would result in overtime. N.T. pp. 51-52.

Appellant called Sergeant Emerich back at 9:30 p.m. and Sergeant Emerich informed appellant that appellant's time-off request was denied due to operational needs since it would incur overtime. N.T. pp. 50, 52, 56, 67; AA Ex. 4. After learning Sergeant Emerich denied his request, appellant stated that he was sick and wanted to use his sick time for his shift on October 14, 2018. N.T. p.

52. In response, Sergeant Emerich asked if appellant would require a long-term absence for a medical illness under FMLA. N.T. pp. 53, 54. According to Sergeant Emerich, appellant became angry, accused Sergeant Emerich of asking a question he would not have asked of a white officer, stated that he would contact Lieutenant Finicle, and then hung up the telephone. N.T. p. 53. Sergeant Emerich emphasized that appellant's request to use sick time was inappropriate because appellant first attempted to use unapproved holiday time for a pre-scheduled event and then attempted to use available sick time immediately after hearing his first request was denied. N.T. pp. 71-72.

Appellant did not report for his shift on October 14, 2018. N.T. p. 54. Consequently, Sergeant Emerich had "to utilize another officer to fill Officer Flax's position that evening, which did incur overtime." N.T. p. 54. Sergeant Emerich testified that appellant's absence was considered absent without leave. N.T. pp. 54-55. Since appellant did not report for his shift, Sergeant Emerich informed Lieutenant Finnicle and Deputy Superintendent Brown what occurred through email correspondence. N.T. p. 57; AA Ex. 5. Lieutenant Finnicle is the 1st Platoon manager and supervisor, who oversees all officers within the 1st Platoon. N.T. pp. 59-60. According to Sergeant Emerich, Lieutenant Finnicle reviews any issue or matter that arises in the 1st Platoon. N.T. pp. 59-60.

Caitlin E. Witmer is a Human Resource Analyst with the General Government Delivery Center within the Office of Administration and has held the position for eight years. N.T. pp. 81, 82. As a Human Resource Analyst, Witmer participates in the disciplinary process for the appointing authority. N.T. p. 83.

Witmer attends PDCs and makes recommendations on disciplinary action. N.T. p. 83. Witmer also has the authority to review an officer's official personnel file regarding disciplinary actions. N.T. pp. 85-86.

According to Witmer, on January 31, 2017, appellant received a written reprimand. N.T. p. 86. Specifically, the January 31, 2017 written reprimand stated the following:

On Wednesday, January 18, 2017, you were scheduled for overtime from 0700 hours to 1015 hours. You were not present for roll call at 0700 hours. You have been late or failed to show up for work six times since the beginning of the rating period commencing July 1, 2016. You received one verbal warning and four written counseling for either being late for work or not showing up for pre-scheduled overtime.

AA Ex. 6. Furthermore, on September 18, 2018, appellant received a second written reprimand. N.T. pp. 90-91; AA Ex. 7. Specifically, he was reprimanded because on August 24, 2018, and on September 7, 2017, appellant failed to report for his overtime shifts. N.T. p. 93; AA Ex. 7.

Witmer attended appellant's PDC on October 26, 2018. N.T. p. 96. During appellant's PDC, appellant read Sergeant Emerich's email correspondence to Lieutenant Finnicle. N.T. p. 97; AA Ex. 5. After appellant read Sergeant Emerich's email correspondence, appellant verbally agreed with Sergeant Emerich's statements of what occurred and admitted to his conduct. N.T. pp. 97, 101; AA Ex. 5. After appellant's PDC, Witmer recommended appellant's one-day suspension. N.T. p. 98. Witmer explained that her recommendation was based upon appellant's prior discipline and the appointing authority's progressive disciplinary steps. N.T. p. 98.

While appellant cross-examined the appointing authority's witnesses, he did not present any witnesses, nor did he testify on his own behalf in support of his appeal in response to the appointing authority's presentation.

Having carefully reviewed the record, the Commission finds that the appointing authority has met its burden of good cause to suspend appellant for one day. In support of our conclusion, we find credible the testimonies of Sergeant Emerich and Witmer.<sup>4</sup>

The appointing authority established that if an officer requests time off and his administrative officer is not on-duty, the officer should also communicate with the on-duty supervisor and copy all supervisors in the email correspondence.

In this matter, on October 13, 2018, appellant requested to use holiday time for a prescheduled event on October 14, 2018 through email correspondence solely sent to Sergeant Emerich. Since appellant's email correspondence was only sent to his administrative sergeant, who was off-duty when appellant sent the correspondence, no on-duty supervisor was notified of his request. When Sergeant Emerich reported for duty on October 14, 2018 and reviewed appellant's request in conjunction with the 1st Platoon's staff roster, he confirmed that appellant's request would incur overtime for other staff. The appointing authority credibly explained that if an officer's time off request incurs overtime and the request is not considered as a *pre-scheduled* holiday or compensatory time off, then the administrative sergeant must deny the officer's request. When appellant heard that his request was denied due to operational needs, appellant quickly claimed he was

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<sup>4</sup> It is within the purview of the Commission to determine the credibility of the witnesses. *State Correctional Institution at Graterford, Department of Corrections v. Jordan*, 95 Pa. Commw. 475, 478, 505 A.2d 339, 341 (1986).

sick and requested to use sick time for his shift on October 14, 2018. When Sergeant Emerich asked if appellant required FMLA leave, appellant angrily accused the administrative sergeant of asking him a discriminatory question. He then stated that he was going to contact his Lieutenant and hung up the phone. Sergeant Emerich did not approve appellant's last-minute request to use sick leave and when appellant failed to report for duty, he recorded appellant as being absent without leave on the 1<sup>st</sup> Platoon staff roster.

In further support of appellant's one-day suspension, the appointing authority described appellant's prior disciplinary conduct, which includes multiple incidents where appellant failed to report for duty. Based upon his absences, appellant received written reprimands and verbal and written counseling. Appellant was informed that his failure to report for duty on each occasion was wrong and how to correct his misconduct for the future.

Appellant's unauthorized absence on October 14, 2018 constitutes a failure by appellant to properly execute his job duties, which negatively reflects upon appellant's competency and ability. *White, supra*. Therefore, the appointing authority clearly established good cause for appellant's one-day suspension. Accordingly, we enter the following:

CONCLUSION OF LAW

The appointing authority has presented evidence establishing good cause for suspension under Section 803 of the Civil Service Act, as amended.

ORDER

AND NOW, the State Civil Service Commission, by agreement of two of its members,<sup>5</sup> dismisses the appeal of Derrick Flax challenging his one-day suspension from regular Capitol Police Officer employment with the Department of General Services and sustains the action of the Department of General Services in the one-day suspension of Derrick Flax from regular Capitol Police Officer employment effective on November 4, 2018.

State Civil Service Commission

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Gregory M. Lane  
Commissioner

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Bryan R. Lentz  
Commissioner

Officially Mailed: July 24, 2019  
Emailed: July 24, 2019

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<sup>5</sup> Commission Chairman Teresa Osborne, who took office March 22, 2019, did not participate in the discussion of or decision for this appeal.