BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

IN THE MATTER OF SPENCER BRITTINGHAM, Grievant, v. STATE OF DELAWARE DEPARTMENT OF CORRECTION Agency	**DOCKET NO. 95-06-40** **OPINION AND ORDER**

BEFORE Woo, Chairperson, Burns, Vice Chairperson, Fullman and Green, Members of the Merit Employee Relations Board, constituting a lawful quorum of the Board pursuant to 29 Del Code, Section 5908(a).

And now on this date, February 1, 1996, the above-referenced matter being before the Board on January 25, 1996, the Board makes the following Finding of Fact and Conclusions of Law; to wit:

SUMMARY OF EVIDENCE

1. Spencer Brittingham was sworn and testified that he is a correctional officer at Delaware Correctional Center, Smyrna, Delaware. Mr. Brittingham testified that on the date in questions, February 4, 1995, his son was approximately fourteen (14) months old. On February 2, 1995, Capt. Holman advised Mr. Brittingham that his wife had been hospitalized at Milford Memorial Hospital for an emergency appendectomy and Mr. Brittingham left work to go to the hospital. Mr. Brittingham further testified that he called out on February 3, 1995 to Capt. Holman, and received approval to use a scheduled holiday.

2. Mr. Brittingham testified that his wife was released from the hospital on February 4, 1995, but needed care as she had surgical staples and could not move easily.

3. Mr. Brittingham testified that on February 4, 1995, he called Delaware Correctional Center and spoke to Staff Lieutenant Barwick. Lt. Barwick advised him that due to an impending

snow storm, he was not allowed to accept any call outs. Mr. Brittingham testified further that he later found out that Major Barry Hawlk had issued the "no call-off" policy for that day.

4. Mr. Brittingham testified that he had problems getting someone to come to his house, due to weather conditions, and that his wife couldn't move off the couch without assistance, due to surgical staples that were used in the operation.

5. Mr. Brittingham testified that, finally, a 70-year-old relative was able to go to his house in Milton to be with his wife and child while he went to work. Mr. Brittingham testified that the roads were bad coming from Milton, but that he did make it to work. Mr. Brittingham testified that he was concerned that his family was in jeopardy and called home during the shift. Mr. Brittingham testified further that at 7:30 p.m. he contacted Lt. Roberts to get permission to leave, but it was denied. Mr. Brittingham testified that he left the facility at the end of his scheduled shift.

6. Mr. Brittingham testified further that some employees were granted off as a result of a DCC call in on that date, as reflected in the February 4, 1995 call off roster introduced into evidence. Mr. Brittingham testified further that he wants to make sure that this doesn't happen to him or anyone else again.

7. Mr. Brittingham testified on cross-examination that he showed up for work on February 4, 1995 and that he was paid for that work. Mr. Brittingham testified that his wife needed assistance for four (4) days in providing for the child and her care.

8. Mr. Brittingham testified that he had sufficient sick leave time to use to care for his wife and that he had insufficient time to get care for his wife when his request was denied. Mr. Brittingham testified that his job is vacation/holiday relief, and works in all buildings at the facility.

9. Upon examination by the Board, Mr. Brittingham testified that his EPPA on attendance was good, other people were marked off by Lt. Barlow, and that he worked the 4 - 12 shift that

day on perimeter patrol. Mr. Brittingham testified further that there are other unassigned correction officers who could have covered his assignment.

10. Upon redirect, Mr. Brittingham testified that he was concerned as well about his child. Upon recross-examination, Mr. Brittingham testified that the child was well but was only 14 months old.

11. J. R. Morris was sworn and testified that he is a correctional sergeant at Delaware Correctional Center on the 8 - 4 shift and is the District 2 grievance representative for the Delaware Correctional Officers Association. Sgt. Morris testified that the "call off" rosters are kept in the duty office and stay in that office. Sgt. Morris testified that in snow emergencies, when Major Hawlk gives an order stopping call-offs, the shift commanders follow the Major's orders.

12. Major Barry Hawlk was sworn and testified that he has been the Security Superintendent at Delaware Correctional Center since 1987 and is responsible for daily operations and staffing of the 353 officers assigned to Delaware Correctional Center. Major Hawlk testified the on-duty shift commander is responsible for each shift.

13. Mr. Hawlk testified that the call-off procedures at Delaware Correctional Center is that the officer contact the on-duty shift supervisor who reviews the request and logs approved call-off onto a log in the duty office.

14. Mr. Hawlk testified that his position permitted him various degrees of discretion in changing call-off procedures if the situation warranted it. On February 4, 1995 the pending snow storm caused him to provide a written order to shift supervisors that all employees calling off were to be given a direct order to report but that the shift supervisors still have a degree of discretion to permit officers to call-off.

15. Mr. Hawlk testified on cross-examination that shift supervisors use discretion when receiving calls and that the department can also decline to pay someone who calls off but, on review after the fact, the call off did not meet the proper requirements.

THE LAW

29 Del. C. § 5931. Grievances.

"The rules shall provide for the establishment of a plan for resolving employee grievances and complaints. The final two (2) steps of any such plan shall provide for hearings before the Director or the Director's designee and before the Board, respectively, unless a particular grievance is specifically excluded or limited by the Merit Rules. The director and the Board, at their respective steps in the grievance procedure, shall have the authority to grant back pay, restore any position, benefits or rights denied, place employees in a position they were wrongfully denied, or otherwise make employees whole, under a misapplication of any provision of this chapter or the Merit Rules. The rules shall require that the Board take final action on a grievance within ninety (90) calendar days of submission to the Board. Upon approval of all parties, the ninety (90) days may be extended an additional thirty (30) calendar days. (29 Del. C. 1953, § 5931; 55 Del Laws, c. 443, §6, 69 Del. Laws, c. 436, §7.)" Effect of amendments -- 69 Del. Laws, c. 436, effective July 14, 1994, rewrote this section.

CHAPTER 6.0000

Merit Rule No. 6.0310

An employee eligible for sick leave with pay may use such sick leave for absence due to illness, injury, temporary disability, exposure to contagious disease, or due to serious illness of a member of the employee's immediate family requiring the employee's personal attendance. (See definition Immediate Family, Chapter 2.) In addition sick leave can be used for appointments with doctors, dentists or other recognized practitioners, subject to prior approval of the appointing authority. An employee at his/her option may also use sick leave to provide full regular pay during periods when he/she is paid less than full pay under worker's compensation provisions. Such leave shall be charged in proportion to the difference between worker's compensation pay and full pay. Employees cannot take sick leave with pay in excess of the hours actually accrued, except as provided in 6.0324.

Under exceptional circumstances, the appointing authority may request, in writing, approval from the Director for the use of sick leave by the employee in cases requiring the employee's personal attendance for someone not included in the definition of immediate family.

FINDING OF FACT

1. Spencer Brittingham had sufficient accrued sick time when he called in on February 4, 1995 to request time off.

2. Mrs. Brittingham's illness was one that required the employee's personal attention on that date.

3. Sick time and its use is an employee benefit under Chapter 6.0 of the Merit Rules.

4. The Department of Corrections added to the merit rule by enacting a policy that requests for the use of sick leave is subject to management discretion.

CONCLUSIONS OF LAW

The Board finds by a preponderance of the evidence that Spencer Brittingham was denied a right or benefit under 29 Del. C. 5938 as a grievance on February 4, 1995 when he was denied the right to use accrued sick leave by the Department of Corrections. The Board finds that the grievance is upheld under Merit Rule 6.0310, as that when a serious illness of a member of the employee's immediate family requiring the employee's personal attendance, this request is not subject to management discretion. The rules are clear on the intent, that supervisory review is permitted as to the pay aspect.

ORDER

The grievance is upheld.

IT IS SO ORDERED

Katy K. Woo, Chairperson

Robert Burns, Vice Chairperson

Dallas Green

Gary Fullman

APPEAL RIGHTS

29 Del. C. § 5949 provides that the appointing agency shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the appointing agency. All appeal to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.

Mailing Date: 2/2/96

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