

was modified by the Commission, charges were sustained and major discipline was imposed. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C. 4A:2-2.12(a)*, counsel fees must be denied.

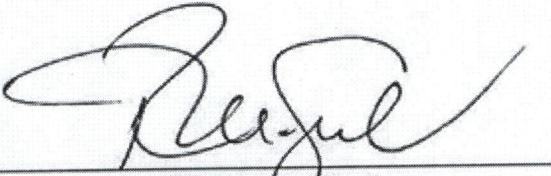
ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. The Commission therefore modifies the 90 working day suspension to a 15 working day suspension. The Commission further orders that appellant be granted 75 days of back pay, benefits, and seniority. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2-2.10*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay.

Counsel fees are denied pursuant to *N.J.A.C. 4A:2-2.12*.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R. 2:2-3(a)(2)*. After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 13, 2017



Robert M. Czedh, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
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attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 16513-16

AGENCY DKT. NO. 2017-1239

**IN THE MATTER OF FELIX COLON,
CITY OF PASSAIC, DEPARTMENT
OF PUBLIC WORKS.**

Curtiss Jameson, Esq., for appellant, Felix Colon (Jameson, Esq., attorneys)

Steven Siegler, Esq., for respondent, City of Passaic (Eric Bernstein and Assoc., attorneys)

Record Closed: June 2, 2017

Decided: June 7, 2017

BEFORE **ELLEN S. BASS, ALJ**:

STATEMENT OF THE CASE

The City of Passaic, Department of Public Works, (Passaic) seeks to impose a ninety-day unpaid suspension on the respondent, Felix Colon (Colon), who is employed by Passaic as a laborer. It contends that he has abused his leave time for several years, and charges him with chronic absenteeism, incompetency, inefficiency, neglect of duty, conduct unbecoming, inability to perform his duties, and other sufficient cause. N.J.A.C. 4A: 2-2.3. Colon replies that his absences were all legitimate, and that, to the extent the charges are sustained, the penalty imposed is unreasonable and excessive.

PROCEDURAL HISTORY

Passaic issued a Preliminary Notice of Disciplinary Action (PNDA) on August 9, 2016. A departmental hearing was conducted on or about October 6, 2016, and a Final Notice of Disciplinary Action (FNDA) was issued on October 7, 2016. Colon appealed to the Civil Service Commission on October 18, 2016, and the matter was transmitted to the Office of Administrative Law (OAL) on October 28, 2016. A hearing was conducted at the OAL on May 11, 2017. Post-hearing submissions were filed on June 2, 2017, at which time the record closed.

FINDINGS OF FACT

The pertinent facts were uncontroverted and I **FIND**:

Colon has been employed by Passaic as a laborer since January 2011. He has had only one prior disciplinary infraction during his employment, and was suspended for one day in 2013. That infraction concerned a matter other than absenteeism, the conduct presently at issue.

The Passaic Employee Handbook lists infractions that could result in discipline. Included are "unscheduled absence, or chronic, patterned or excessive absence," and "chronic or patterned tardiness." Director of Personnel Viviana Lamm indicated that a pattern of absence can include repeated use of partial sick days, and can result in a disciplinary response even if the absences are excused. Per his union contract, Colon receives 15 sick days per year, and 12 vacation days per year. If he is out sick for five days or more, his contract requires that he produce a doctor's note. In Passaic, sick days may be used only for personal illness, and not to conduct personal business, or simply because an employee prefers a day off.

Lamm reviewed Colon's attendance history from 2013 through 2015, as follows:

1. During 2013, Colon took 15.75 sick days and 20.25 vacation days.¹ He also took three administrative leave days. Some of the sick and vacation leave was taken as partial days. An analysis of how many work days were impacted by leave time reveals that Colon took sick time (either a full day or a partial day) on 24 days, and vacation time on 22 days throughout the year. No doctor's notes were supplied by Colon.

2. During 2014, Colon took 13.75 sick days, and 11 vacation days. He also took three administrative leave days. But again, a review of the number of actual days impacted by leave time reveals that Colon took some form of sick leave on 24 days. In December, there is a distinct Monday/Friday pattern of sick day use. No doctor's notes were supplied by Colon.

3. During 2015, Colon used 16.5 sick days, and 11.25 vacation days. Because he used his time to take partial days, 27 work days were impacted by his sick leave usage, and 13 work days were impacted by his vacation time. Colon supplied a doctor's note indicating he would be out of work due to anxiety from December 7 through December 11, 2015.

In late 2015, concerns arose about Colon's health. He apparently advised the then Director of the Department of Public Works that he was seeing a psychiatrist, and that he was taking psychiatric medication. Since Colon operated heavy equipment, his employer became concerned about his fitness for duty. Colon was sent for a medical examination at Barnabas Health on February 9, 2016; it was recommended that his medication be reviewed as it did have a sedative effect. On February 11, 2016, Colon's psychiatrist, Dr. Kim, related via letter that he had adjusted the administration of the medication to address this concern. Colon again was examined at Barnabas Health on February 11, 2016, and was declared fit for duty.

¹ He had carried over some vacation days from the prior year.

Colon worked until July 20, 2016. During 2016, he used 15.75 sick days. He exhausted his allotment of paid sick time, and his vacation time, and went on an unpaid status. He did submit two doctor's notes that verified that he was ill. One from Dr. Kim, dated June 27, 2016, indicated that Colon could not work for medical reasons from June 28, 2016 until July 9, 2016. A second letter from Dr. Kim stated that Colon should be excused from June 28, 2016 until August 9, 2016. But that letter was delivered to Passaic on July 19, 2016, and inexplicably is dated August 9, 2016.

Lamm explained that so long as Colon's illness was verified via a doctor's note, Passaic would not suspend him or terminate his employment; hence he was placed on an unpaid leave during the period from July 20, until August 9, 2016. But she explained that it was imperative that Colon complete an FMLA (Federal Medical Leave Act) packet, per Passaic protocol. Despite numerous attempts to secure Colon's cooperation, to include seeking the intervention of his attorney, the packet was never completed.

Accordingly, on the day his doctor indicated that Colon was fit to return for duty a PNDA was issued, and he was suspended until September 6, 2016, for a total of 20 days. The discipline ultimately imposed by Passaic, and as affirmed at the local hearing, was a ninety-day suspension; the remaining time was served from October 11, 2016, through January 17, 2017.

Counsel for Colon shared for the record that his client does have a pending worker's compensation claim, in which he alleges that his absences were due to workplace induced stress and anxiety.

CONCLUSIONS OF LAW

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which

it relied by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Both guilt and penalty are redetermined on appeal from a determination by the appointing authority. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

Here, Passaic has charged Colon with chronic absenteeism, incompetency, inefficiency, neglect of duty, conduct unbecoming, inability to perform his duties, and other sufficient cause. N.J.A.C. 4A: 2-2.3. "Neglect of duty" has been interpreted to mean that an employee has neglected to perform and act as required by his or her job title. Ortiz v. City of Newark, CSV 12056-04, Initial Decision (February 8, 2006), modified, Merit System Board (April 6, 2006), <<http://njlaw.rutgers.edu/collections/oal/>> (citing Avanti v. Dep't of Military and Veterans Affairs, 97 N.J.A.R.2d (CSV) 564). "Neglect of duty" includes official misconduct as well as negligence. Clyburn v. Twp. of Irvington, CSV 7597-97, Initial Decision (September 10, 2001), adopted, Merit System Board (December 27, 2001) <<http://njlaw.rutgers.edu/collections/oal/>>. "Inefficiency" has been defined as the failure of an employee to adhere to proper procedures. See Okosa v. Union County Human Servs., CSV 5279-99, Initial Decision (July 20, 2000), modified, Merit System Board (September 15, 2000), <<http://njlaw.rutgers.edu/collections/oal/>>.

In judging whether an employee's absenteeism is chronic or excessive, relevant factors include, among others, the number of absences, the time span between the absences, and the negative impact on the work place. See Harris v. Woodbine Developmental Ctr., CSV 4885-02, Initial Decision (February 11, 2003), adopted, Comm'r (March 27, 2003), <<http://njlaw.rutgers.edu/collections/oal/>>; Hendrix v. City of Asbury, CSV 10042-99, Initial Decision (April 10, 2001), adopted, Comm'r (June 8, 2001), <<http://njlaw.rutgers.edu/collections/oal/>>; Morgan v. Union Cnty. Runnells

Specialized Hosp., 97 N.J.A.R.2d (CSV) 295; Bellamy v. Twp. of Aberdeen, Dep't of Pub. Works, 96 N.J.A.R.2d (CSV) 770. It is further recognized that "numerous occurrences" of habitual tardiness or similar chronic conduct "over a reasonably short space of time, even though sporadic, may evidence an attitude of indifference amounting to neglect of duty." West New York, supra, 38 N.J. at 522. And "excessive absenteeism is not necessarily limited to instances of bad faith or lack of justification on the part of the employee who was frequently away from [his or] her job." Terrell v. Newark Hous. Auth., 92 N.J.A.R.2d (CSV) 750, 752; see also Bellamy, supra, 96 N.J.A.R.2d at 772.

I **CONCLUDE** that the County has met its burden of proving charges of neglect of duty, inefficiency and excessive absenteeism against Colon.² His pattern of constantly taking sick time, and doing so for partial days, was a disruption to the workplace. His conduct demonstrated a disregard for his obligations to his employer. Although toward the end of several years of such conduct Colon began to support his absences with doctor's notes, the case law makes it clear that considering the pattern of sick time abuse reflected on this record, his absences from the workplace were excessive. It would have been impossible for Colon, with attendance of this sort, not to have neglected his duties. Colon's failure to cooperate with FMLA procedures compels me to sustain the charge of inefficiency.

PENALTY

In this de novo review of the County's disciplinary action I am required to reevaluate the penalty on appeal. N.J.S.A. 11A:2-19; Henry, supra, 81 N.J. 571; Bock, supra, 38 N.J. 500. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline may include removal, disciplinary demotion, suspension or a fine of no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job

² The charges of conduct unbecoming and incompetency arise from the same facts, and are subsumed in the charges of neglect and inefficiency and excessive absenteeism.

security and protecting them from arbitrary employment decisions. Progressive discipline is not “a fixed and immutable rule to be followed without question.” Carter v. Bordentown, 191 N.J. 474, 531 (2007). The question to be answered is “whether such punishment is ‘so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one’s sense of fairness’” Ibid.

I **CONCLUDE** that the penalty imposed here was excessive, and was shocking to my sense of fairness. Passaic has never before sought to discipline Colon for his poor attendance. He has been employed by Passaic for over six years; has only one minor incident on his disciplinary record; and has never been the subject of major disciplinary action. I **CONCLUDE** that the appropriate penalty is a fifteen-day suspension.

ORDER

It is **ORDERED** that the charges against Colon are **AFFIRMED**. It is further **ORDERED** that the penalty of a ninety-day suspension be **REDUCED** to a fifteen-day suspension. The amount of back pay shall be mitigated in accordance with the guidelines set forth in N.J.A.C. 4A:2-2.10(d)(3).

I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five 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 days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 7, 2017

DATE

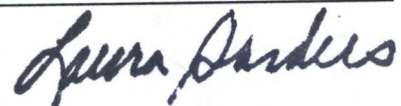


ELLEN S. BASS, ALJ

Date Received at Agency:

Date Mailed to Parties:

JUN 8 2017



**DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**

APPENDIX

WITNESSES

For Appellant:

None

For Respondent:

Viviana Lamm

EXHIBITS

For Appellant:

- A-1 Letter dated August 17, 2016
- A-2 Letter dated August 31, 2016
- A-3 Hearing Officer's Report
- A-4 Memorandum dated January 22, 2016
- A-5 Additional copy of R-20
- A-6 Annotated copy of R-25
- A-7 Letter dated August 19, 2016, with attachments
- A-8 Docketing, Worker's Compensation

For Respondent:

- R-1 PNDA
- R-2 Employee Handbook
- R-3 Collective Bargaining Agreement
- R-4 CAMPS transaction history
- R-5 Time records
- R-6 Attendance records, 2013

- R-7 Summary
- R-8 Time Records
- R-9 Attendance records, 2014
- R-10 Summary
- R-11 Time Card Report
- R-12 Attendance records, 2015
- R-13 Summary
- R-14 Time Card Report
- R-15 Attendance records, 2016
- R-16 Summary
- R-17 Email
- R-18 Prescription blank
- R-19 not admitted
- R-20 Work status form
- R-21 Doctor's note
- R-22 Work status form
- R-23 not admitted
- R-24 Doctor's note
- R-25 Doctor's note
- R-26 Notice of minor disciplinary action