

In the Matter of Patricia Everingham

DOP Docket No. 2001-6378

OAL Docket No. CSV 4766-01

The appeal of Patricia Everingham, a Secretarial Assistant with Monroe Township (Township), of her removal, effective April 25, 2001, on charges, was heard by Administrative Law Judge Douglas H. Hurd (ALJ), who rendered his initial decision on October 29, 2002. Exceptions were filed on behalf of the appellant, and cross exceptions were filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Merit System Board (Board), at its meeting on March 13, 2003, accepted and adopted the Findings of Facts as contained in the attached initial decision, but did not adopt the ALJ's recommendation to uphold the removal. Rather, the Board modified the removal to a 30-day suspension.

DISCUSSION

The appellant was charged with chronic excessive lateness and absenteeism, neglect of duty, and other sufficient cause. Specifically, the appointing authority asserted that the appellant had violated its policy on lateness which warranted her removal. The policy indicated that lateness in a 12-month period for a third time would result in a verbal warning; a fourth time would result in a written warning; a fifth time would result in a one-day suspension; a sixth time would result in a three-day suspension; and a seventh time would result in dismissal. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

The ALJ sets forth in his initial decision that the appellant has been an employee with the Township since January 1980. Until 2000, she had never been disciplined; however, due to her various medical conditions and mother's illness, she began experiencing attendance problems toward the end of 1999. The ALJ found that from January 2000 to April 2001, the appellant was out sick 32 days, late 28 times and did not call her supervisor on May 1, 2000 and April 25, 2001 to advise him of her absence. Further, the ALJ indicated that the appellant had been warned and disciplined for her attendance problems prior to her removal on April 25, 2001. Specifically, on February 7, 2000, the appellant received a verbal warning for her use of vacation days instead of sick time. On March 24, 2000, the appellant's supervisor notified the appellant in writing that she was abusing her sick time. On September 18, 2000, the appellant's supervisor warned her in writing that on September 14, 2000, she has been late a fourth time in a 12-month period and that a seventh lateness would result in her dismissal pursuant to the Township's policy. On October 24, 2000, the appellant had been late a fifth time and was suspended for

one day on October 25, 2000. On November 14, 2000, the appellant was late a sixth time and received a three-day suspension.

The ALJ further found that on November 20, 2000, as an accommodation for her medical condition, the appellant requested the appointing authority allow her to have a flexible start time. The appointing authority granted the request and allowed the appellant to be late 10 to 15 minutes, with the understanding that her lateness could not exceed 30 minutes and become "habitual." However, the ALJ found that on January 11, 2001, the appellant was late 33 minutes. On March 22, 2001, the appointing authority wrote the appellant a letter, advising her that her lateness was habitual and that any subsequent lateness would result in her dismissal. As indicated above, on April 25, 2001, the appellant did not call work to advise her supervisor of her absence. Therefore, the appointing authority removed the appellant from employment effective that day. While the appellant testified that she had called on April 25, 2001 and advised a co-worker that she would be absent, the ALJ found the co-worker's testimony to be credible that she did not receive any such call from the appellant. Therefore, based on these findings, the ALJ upheld the charges. With regard to the penalty, the ALJ concluded that removal of the appellant was warranted. The ALJ stated that removal was appropriate considering the various measures of minor discipline imposed on the appellant prior to her removal.

In her exceptions, the appellant argues, among other things, that the charges of neglect of duty and other sufficient cause should be dismissed. In this regard, she contends that while her absence may have resulted in some form of backlog, there is nothing in the record to show that she failed to complete a specific assignment or other work. Additionally, she states that the charge of other sufficient cause should also be dismissed, as this charge is not supported by the record. The Board agrees. While the ALJ did not specifically address these charges, a review of the record by the Board indicates that there is no factual basis to support the charges of neglect of duty and other sufficient cause. It also appears that these charges were incidental to the charge of chronic excessive lateness and absenteeism. Accordingly, the Board dismisses these charges against the appellant. However, the Board finds that the charge of chronic excessive lateness and absenteeism is amply supported by the record. The record shows that from January 2000 to April 2001, the appellant was out sick 32 days and late 28 times. Further, although the appointing authority accommodated the appellant's lateness, she also failed to call her supervisor twice. The appellant's failure to report her absence from work on April 25, 2001 resulted in the charge of chronic excessive lateness and absenteeism. The Board notes that while the appointing authority may have incorrectly specified that the appellant violated its lateness policy as opposed to its policy on reporting an absence, the appellant was well aware of the specific charges against her. It is clear that the appellant was on notice that any further attendance-related infractions would be cause for discipline. There is no basis for a dismissal of the charge of chronic

excessive lateness and absenteeism on this procedural ground because the hearing at the OAL is *de novo* and any procedural defects which may have occurred at the departmental level were addressed and corrected during the OAL hearing. See *Ensslin v. Township of North Bergen*, 275 N.J. Super. 352, 361 (App. Div. 1994), *cert. denied*, 142 N.J. 446 (1995); *In re Darcy*, 114 N.J. Super. 454 (App. Div. 1971). The appellant had the opportunity to present her case before the ALJ with regard to her absence on April 25, 2001 and her prior lateness.

Regarding the penalty, the Board disagrees with the ALJ that removal of the appellant is warranted. In determining the proper penalty, the Board's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Board also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 N.J.A.R. 2d (CSV) 463. Upon an independent review of the record and in consideration of the appellant's length of service, her prior disciplinary history, the nature of her offense, and the dismissal of the charges of neglect of duty and other sufficient cause, the Board concludes that removal is too harsh a penalty.

The appellant has served the appointing authority for over 21 years and has only received minor discipline relating to her recent attendance problems. In this regard, pursuant to the appointing authority's policy on lateness, the appellant received a one-day suspension in October 2000 for being late a fifth time and a three-day suspension in November 2000 for being late a sixth time in a 12-month period. The appellant's long record of service and prior disciplinary history are mitigating factors to reduce her removal to a 30-day suspension. Additionally, the Board notes that it is not bound by the appointing authority's attendance policy. See *In the Matter of George Roskilly* (MSB, decided November 20, 2002); *In the Matter of Gregory McDaniel* (MSB, decided November 20, 2002). Instead, the Board is guided by the principles of progressive discipline. In this case, the appointing authority's policy on lateness does not follow the principles of progressive discipline, as it does not impose major discipline prior to an employee's removal. Nevertheless, the appellant's failure to notify her supervisor of her absence is a serious infraction. While not egregious enough to warrant removal, the appellant's infraction warrants major discipline of a 30-day suspension. In this regard, the Board recognizes that the appellant's conduct is unacceptable, especially in light of her prior attendance-related infractions and the attempt of the appointing authority to accommodate her on her lateness. The Board is mindful that the suspension should serve as a warning to the appellant that future offenses may result in a more severe penalty. Accordingly, the foregoing circumstances provide a sufficient basis to modify the removal imposed by the appointing authority to a 30-day suspension. See *N.J.S.A. 11A:2-19* and *N.J.A.C. 4A:2-2.9(d)*.

Moreover, since the penalty has been reduced, the appellant is entitled to back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10. However, the appellant is not entitled to counsel fees. *N.J.A.C.* 4A:2-2.12(a) provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. See *Johnny Walcott v. City of Plainfield*, 282 *N.J. Super.* 121, 128 (App. Div. 1995); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In this case, the Board dismissed the incidental charges of neglect of duty and other sufficient cause. Nevertheless, the Board has sustained the charge of chronic excessive lateness and absenteeism and imposed major discipline, *i.e.*, a 30-day suspension. Therefore, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. See *In the Matter of Bazyt Bergus* (MSB decided December 19, 2000), *aff'd*, *Bazyt Bergus v. City of Newark*, unpublished, Docket No. A-3382-00T5 (App. Div. June 3, 2002); *In the Matter of Mario Simmons* (MSB, decided October 26, 1999). Consequently, since the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12, she is not entitled to counsel fees.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's recent decision, *Dolores Phillips v. Department of Corrections*, unpublished, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Board's decision will not become final until any outstanding issues concerning back pay are finally resolved. In the interim, as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to her permanent position.

ORDER

The Board finds that the appointing authority's action in removing the appellant was not justified. Therefore, the Board modifies the removal to a 30-day suspension. The Board further orders that the appellant be granted back pay, benefits and seniority for the period following the suspension to the date of actual reinstatement. The amount of back pay awarded is to be reduced and mitigated to the extent of any income earned or that could have been earned by the appellant during this period. 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. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

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

The parties must inform the Board, 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 Board 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
MERIT SYSTEM BOARD ON
THE 13TH DAY OF MARCH, 2003

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