

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 19TH DAY OF DECEMBER, 2018



Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 05604-17

AGENCY DKT. NO. 2017-2989

**IN THE MATTER OF SERENA SWAGGERTY,
ATLANTIC COUNTY DEPARTMENT
OF COMMUNITY DEVELOPMENT
AND ECONOMIC ASSISTANCE,**

Joseph Waite, Field Representative, American Federation of State, County and Municipal Employees New Jersey, AFL-CIO (AFSCME), for appellant, Serena Swaggerty, pursuant to N.J.A.C. 1:1-5.4(a)(6)

Jennifer P. Starr, Esq., Assistant County Counsel, for respondent, Atlantic County Department of Community Development and Economic Assistance, (James F. Ferguson, County Counsel, attorney)

Record Closed: October 9, 2018

Decided: November 20, 2018

BEFORE JEFFREY R. WILSON, ALJ:

STATEMENT OF THE CASE

Appellant, Serena Swaggerty, a Clerk-1, appeals the designation of "resignation not in good standing", effective February 21, 2017, because she was a "no call/no show" on February 14, 15, 16, 17 and 20, 2017.

PROCEDURAL HISTORY

The Preliminary Notice of Disciplinary Action (PNDA) was filed on February 27, 2017. The Final Notice of Disciplinary Action (FNDA) was filed on April 10, 2017, with the single sustained charge that alleged violation of N.J.A.C. 4A:2-2.3(12) – Other Sufficient Cause. The matter was transmitted to the Office of Administrative Law (OAL) where it was filed on April 24, 2017. The matter was heard on October 9, 2018, and the record closed.

FACTUAL DISCUSSION AND FINDINGS

Based on the testimony of the witnesses and examination of the documentary evidence, I **FIND** the following **FACTS** are undisputed:

The appellant began employment with the respondent in 2015, classified as a Clerk-1. Her primary duties were answering phones and filing. The appellant requested a leave of absence and submitted a prescription blank from Robert Williams, Jr., M.D., that listed the dates of leave from February 7, 2017, to March 5, 2017¹. (R-4.)

On February 9, 2017, Birdie Cody, Chief of Administrative Services, issued a letter to the appellant that acknowledged receipt of the prescription blank but informed her that such requests for medical leave must be submitted on a "Request for Leave of Absence" and "Medical Certification" forms. (R-5.) The letter went on to inform the appellant that she did not have a minimum of 1,250 service hours in the prior twelve months under the Family and Medical Leave Act (FMLA) to qualify for a leave of absence and that the appellant was expected to return to work on February 14, 2017. The letter further indicated:

Should you not return to work on February 14th, you will not be approved for additional leave time and will be subject to

¹ It was stipulated that the prescription blank was mistakenly dated "2/7/16". The actual date of the prescription blank was February 7, 2017.

the conditions of the County's attendance policy P.S. 5.11 Unauthorized Absence, which states "Unauthorized absences for five consecutive days without notice and approval, or the failure to report to duty within five days after the expiration of any authorized leave, shall be considered a resignation not in good standing, consistent with New Jersey Department of Personnel regulations." (R-5.)

The appellant was a no call/no show on February 14, 15, 16, 17 and 20, 2017. However, on February 17, 2017, the appellant faxed a Medical Certification to Pat Rowan, in the Human Resources Department. (R-6.) She did not provide a copy to Ms. Cody or anyone else in her unit as required. There was no evidence that Ms. Rowan ever forwarded the Medical Certification to Ms. Cody or anyone on the appellant's unit.

The respondent did not question the authenticity of the Medical Certification submitted on February 17, 2017. However, the respondent indicated they had no objection modifying the resignation not in good standing to a resignation in good standing.

LEGAL ANALYSIS AND CONCLUSIONS

Pursuant to Atlantic County Policy P.S. 5.11 – Unauthorized Absence:

Unauthorized absences for five consecutive days without notice and approval, or the failure to report to duty within five days after the expiration of any authorized leave, shall be considered a resignation not in good standing, consistent with New Jersey Department of Personnel Regulations.

Accordingly, N.J.A.C. 4A:2-6.2(b) states:

Any employee who is absent from duty for five or more consecutive business days without the approval of his or her superior shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing. Approval of the absence shall not be unreasonably denied.

Here, it is undisputed that the appellant was informed that her request for medical leave under the FMLA was denied on February 9, 2017, and that her failure to report to

work on February 14, 2017, would meet with specific consequences. It is further undisputed that the appellant failed to report to work on February 14, 15, 16, 17 and 20, 2017. There was no competent evidence provided that the appellant's request for a medical leave under the FMLA was unreasonably denied because it is also undisputed that the appellant did not have a minimum of 1,250 service hours in the prior twelve months under the FMLA to qualify for a leave of absence.

The appellant has been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. As detailed above, the appellant's conduct was such that she violated this standard of good behavior. As such, I **CONCLUDE** that the respondent has met its burden of proof on this issue. I **CONCLUDE** that appellant's actions violated N.J.A.C. 4A:2-2.3(a)(12).

DISCIPLINARY ACTION

In appeals concerning major disciplinary actions brought against classified employees, the burden of proof is on the appointing authority. N.J.A.C. 4A:2-1.4(a). The standard of proof in administrative proceedings is 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); In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

The Act and the regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1 et seq. New Jersey's Civil Service Act is construed liberally in order to protect employees from arbitrary discipline. Mastrobattista v. Essex Cty. Park Comm'n, 46 N.J. 138, 147 (1965); Prosecutors, Detectives and Investigators Ass'n v. Hudson County Bd. of Freeholders, 130 N.J. Super. 30, 41 (App. Div. 1974); Scancarella v. Dep't of Civil Serv., 24 N.J. Super. 65, 70 (App. Div. 1952).

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. 11:2-6; N.J.S.A.

11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. Grounds for discipline include, among other things, insubordination, chronic or excessive absenteeism or lateness, conduct unbecoming a public employee, and other sufficient cause. See N.J.A.C. 4A:2-2.3(a)(2), (4), (6), and (12).

I **CONCLUDE** that the appellant's failure to report to work as directed and failure to provide proper notice of her absence was sufficient to warrant disciplinary charges. The respondent had a right to expect that the appellant would be present at work, willing and able to work. Unauthorized and "no call / no show" absences cause disruption in the public work place and create a hardship for the remaining employees, who must absorb the job duties of a person who cannot or will not perform them. I, therefore, **CONCLUDE** that the respondent has met its burden of proof regarding other sufficient cause in this case.

PENALTY

Principles of progressive discipline should be considered in the disciplinary actions of civil service employees. The determination of whether a specific act supports discipline requires an evaluation of the conduct in terms of its relationship to the nature of the position itself and an evaluation of the actual or potential impairment of the public interest that may be expected to result from the conduct in question. Golaine v. Cardinale, 142 N.J. Super. 385, 397 (Law Div. 1976). The frequency, number and continuity of the employer's warnings indicate the progression of the discipline. Ibid. On appeals from disciplinary action, the Merit Board may redetermine guilt or modify a penalty originally imposed. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980). The Board is empowered to substitute its own judgment on the appropriate penalty, even if the local appointing authority has not clearly abused its discretion. Id. at 579. The Board must consider an employee's past record, including both mitigating factors and prior discipline when determining the appropriate penalty to be imposed. The frequency, number and continuity of the employer's warnings, previous discipline and other measures indicate the progression of the discipline.

Here, there was no evidence provided that there were any prior disciplinary actions against the appellant or that her work performance was in any way lacking. It must be noted that the respondent did not question the authenticity of the Medical Certification submitted on February 17, 2017, or call into question the doctor's diagnoses listed in the same. Furthermore, the respondent indicated they had no objection modifying the resignation not in good standing to a resignation in good standing.

N.J.A.C. 4A:2-6.2(f) authorizes that the appointing authority or the Commission may modify the resignation not in good standing to an appropriate penalty or to a resignation in good standing

ORDER

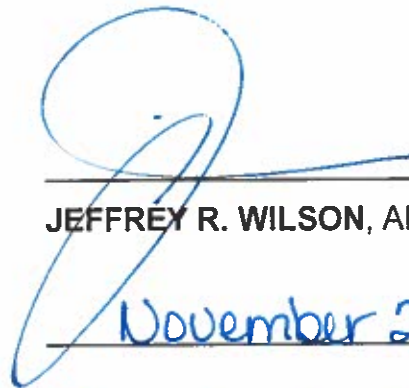
It is hereby **ORDERED** that the resignation not in good standing shall be modified to a resignation in good standing.

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, PO 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.

11-20-18
DATE



JEFFREY R. WILSON, ALJ
November 20, 2018
November 20, 2018 (Emailed)

Date Received at Agency:

Date Mailed to Parties:

JRW/dm

APPENDIX

WITNESSES

For Appellant:

Serena Swaggerty, appellant

For Respondent:

Birdie Cody, Chief of Administrative Services

EXHIBITS

For Appellant:

None

For Respondent:

- R-1 Preliminary Notice of Disciplinary Action, dated February 27, 2017
- R-2 Final Notice of disciplinary Action, dated April 10, 2017
- R-3 Atlantic County Policy P.S. 5.11 – Unauthorized Absence
- R-4 Doctor's Note, dated February 7, 2016
- R-5 Birdie Cody Letter, dated February 9, 2017
- R-6 FMLA Certification, dated February 16, 2017
- R-7 Birdie Cody Letter, dated September 15, 2016
- R-8 Birdie Cody Letter, dated February 1, 2016
- R-9 FMLA Hour Eligibility as of August 25, 2016
- R-10 FMLA Hour Eligibility as of February 7, 2017