

Specifically, the ALJ noted that while the appellant was disputing his inability to perform, based mainly on the fact that he was denied a disability retirement by the Public Employee's Retirement System, there is no dispute that the appellant's own doctor indicated that the appellant could not return to work and perform the duties of the position.

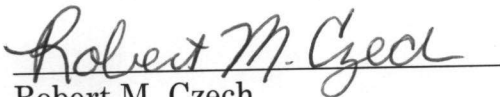
Upon an independent review of the entire record, the Commission agrees with the ALJ that since the appellant cannot perform the duties of the position, his separation from employment is required. However, under these circumstances, the Commission does not agree with the imposition of removal. In this regard, in light of the fact that the appellant's problems are based solely on his medical inability to perform the duties of his position as a result of injuries sustained at work, the disciplinary penalty of removal is unduly harsh. Further, while the Commission notes that the appellant was afforded the ability to resign previously, it does not find that he should be penalized with a disciplinary removal for, in essence, exercising his right to appeal. Therefore, the foregoing circumstances provide a sufficient basis to modify the removal to a resignation in good standing. See *N.J.A.C. 4A:2-2.9(d)*; See also, *Eugene Verdell v. New Jersey State Department of Military and Veterans' Affairs*, Docket No. A-0497-04T5 (App. Div. February 16, 2006).

ORDER

The Commission modifies the appellant's removal to a resignation in good standing.

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 16TH DAY OF DECEMBER, 2015


Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals & Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

GRANTING SUMMARY

DISPOSITION

OAL DKT. NO. CSV 09601-15

AGENCY DKT. NO. 2015-3205

**IN THE MATTER OF DARRYL DUNCAN,
DEPARTMENT OF CHILDREN AND FAMILIES
(MERCER CAMPUS).**

Frank Crivelli, Esq., for appellant Darryl Duncan (Crivelli & Barbati, attorneys)

Peter H. Jenkins, Deputy Attorney General, for respondent Department of Children and Families (Mercer Campus) (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: November 9, 2015

Decided: November 16, 2015

BEFORE **JOSEPH A. ASCIONE**, ALJ:

STATEMENT OF THE CASE

Appellant, Darryl Duncan (Duncan), age forty-eight, appeals his May 22, 2015, removal effective as of January 2, 2015, as a bus driver by the Department of Children

and Families (DCF), on charges of inability to perform duties pursuant to N.J.A.C. 4A:2-2.3(a)3. Appellant Darryl Duncan initially commenced work as a bus driver with respondent, at some time in 2007.

PROCEDURAL HISTORY

On May 1, 2015, the DCF issued a Preliminary Notice of Discipline Action (PNDA) setting forth charges under N.J.A.C. 4A:2-2.3(a)2, N.J.A.C. 4A:2-2.3(a)3, N.J.A.C. 4A:2-2.3(a)7 and N.J.A.C. 4A:2-2.3(a)12. Duncan concurrently received notice of a departmental hearing scheduled for May 22, 2015, which he did not attend. The Final Notice of Disciplinary Action (FNDA) issued identifying all of the charges set forth in the PNDA. This motion is addressed and limited to the charge of inability to perform duties. The other charges set forth in the FNDA, dated May 22, 2015, are not pursued as a favorable determination of this count eliminates the need to address any of the other issues raised in the FNDA. On August 23, 2010, Duncan experienced an injury on the job and filed a workers compensation claim the following day. He has not returned to work. On December 18, 2014, Duncan's physician reported him as permanently disabled and cannot return to his position. On December 22, 2014, DCF wrote Duncan inviting him to resign his position in good standing. The letter also advised that if DCF received no response to the letter by January 2, 2015, it would pursue his removal. Duncan did not respond to the December 22, 2014, letter.

Duncan timely appealed the FNDA, and the matter was transmitted by the Civil Service Commission to the Office of Administrative Law, where on June 30, 2015, it was filed for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On September 10, 2015, respondent moved for summary disposition, on September 30, 2015, appellant filed his opposition to the summary disposition motion¹. On October 7, 2015, respondent filed a reply brief in opposition to

¹ Appellant also cross-moved in the matter Darryl Duncan v. Public Employees Retirement System, TYP 00401-14, to consolidate this matter with the earlier matter.

the cross motion for consolidation. A prehearing telephone conference was held on November 9, 2015. The record closed that date.

UNDISPUTED FACTS

Various facts are not disputed by the parties and are set forth in the Statement of the Case and Procedural History. Accordingly, the statements made in the Statement of the Case and Procedural History I **FIND** as undisputed **FACTS**.

DISCUSSION

This matter involves appellant's proposed removal based on a continuing course of his inability to perform the normal function of his duties. Appellant received his injury on the job, filed for worker compensation and based upon his doctor's recommendations, he determined that he could not return to work. He filed for an accidental disability pension. Because of his limited years of service, he is not entitled to any service retirement and unless he is afforded either a disability or accidental disability pension, he would receive no other benefits from his employing unit. His opposition to a summary disposition is based upon the Pension Employee's Retirement System's (PERS) determination by its medical experts that he may not be totally and permanently disabled. Appellant's counsel recognizes that the Civil Service Violation action is moot if it is determined that appellant is entitled to a disability pension, but seeks the opportunity to preserve appellant's rights to return to a position, that he believes, and his doctor has informed him, is impossible for him to perform. Appellant's counsel argues the unfairness of the employer's position, seeking to remove appellant for failure to be able to perform duties, and the PERS Board of Trustees' determination to dispute his disability retirement benefits. The factual determination in the Civil Service Violation matter, is whether the appellant has failed to perform his duties. The factual determinations in the pension matter turn on many other factors and criteria.

Those factors and criteria do not excuse the appellant inability to perform his duties presently.

LEGAL ANALYSIS AND CONCLUSION

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil-service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her duties. N.J.S.A. 11A:1-2(a). Such an employee may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a).

A summary decision motion is the administrative law equivalent of a summary-judgment motion in the judicial branch. It is a well-recognized procedure for resolving cases in which the facts that are crucial to the determination of the matters at issue are not actually in dispute and the application to that set of material facts of the applicable law and standard of proof lead to a determination of the case without the necessity of a hearing at which evidence and testimony need be taken. The standards for determining motions for summary judgment are contained in Judson v. People's Bank & Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954). The Supreme Court later elaborated on the motion and its standard in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995). Under the Brill standard, as in Judson, a motion for summary decision may only be granted where there are no "genuine disputes" of "material fact." The determination as to whether disputes of material fact exist is made after a "discriminating search" of the record, consisting as it may of affidavits, certifications, documentary exhibits and any other evidence filed by the movant and any such evidence filed in response to the

motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. In order to defeat the motion, the opposing party must establish the existence of “genuine” disputes of material fact. The facts upon which the party opposing the motion relies to defeat the motion must be something more than “facts which are immaterial or of an insubstantial nature, a mere scintilla, ‘fanciful, frivolous, gauzy or merely suspicious.’” Judson, supra, 17 N.J. at 75 (citations omitted). The Brill decision focuses upon the analytical procedure for determining whether a purported dispute of material fact is “genuine” or is simply of an “insubstantial nature.” Brill, supra, 142 N.J. at 530. Brill concludes that the same analytical process used to decide a motion for a directed verdict is used to resolve a summary-judgment motion. “[T]he essence of the inquiry in each is the same: ‘Whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’” Id. at 536 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)). In searching the proffered evidence to determine the motion, the judge must be guided by the applicable substantive evidentiary standard of proof, that is, the “burden of persuasion” that would apply at trial on the merits, whether that is the preponderance-of-the-evidence standard or the clear-and-convincing evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law. The burden of persuasion falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987).

The appointing authority must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson v. Parsekian, 37 N.J. 143 (1962). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious

mind to the 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).

In this case, the issue is whether Duncan committed a Civil Service Violation by acknowledging his inability to perform the duties of the position by failing to report to work based upon his doctor's orders. Appellant offered no testimony that requests for accommodation were made to the employer, nor would such accommodations be appropriate if the appellant exhausted all of his vacation, sick and administrative time. Appellant's doctor's note advising respondent that appellant can no longer perform the duties of his employment is a statement against appellant's interest. It conclusively determines that appellant is unable to perform the duties of his employment. DCF's action to remove Duncan from his position for his failure to perform the duties of his position was reasonably justified.

PENALTY

Progressive discipline is required in those cases where an employee is guilty of a series of offenses, none of which is sufficient to justify removal. See Harris v. North Jersey Developmental Center, 94 N.J.A.R. 2d (CSV) (1994). Progressive discipline does not apply, however, where, as here, the offense committed is in itself sufficient to warrant removal. Id. It is not that appellant's actions are unexplained malfeasances, it is a practical matter that he is presently unable to perform the duties of his position. The employer is entitled to remove an employee who claims to be unable to perform his duties.

I **CONCLUDE** that respondent's removal of appellant for his failure to perform the duties of his position violated N.J.A.C. 4A:2-2.3(a)3, and is justified.

ORDER

I **ORDER** that Duncan's appeal is **DENIED** in all respects.

I further **ORDER** that the termination of Duncan is **AFFIRMED**. I further **ORDER** that the motion to consolidate is mooted by the granting of this summary disposition.

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.

November 19, 2015

DATE



JOSEPH A. ASCIONE, ALJ

Date Received at Agency:

11/19/15

Date Mailed to Parties:

11/19/15

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APPENDIX
LIST OF WITNESSES

For Appellant:

None

For Respondent:

None

LIST OF EXHIBITS

For Appellant:

- A-A Application for Disability Retirement, dated January 11, 2013 (2 pgs.)
- A-B Division of Pensions and Benefits letter, dated September 19, 2013 (2 pgs.)
- A-C A-C to A-I are not admitted as evidence as they are communications between appellant's counsel and others, transmittal letters to the OAL
- A-I Hearing notices and dates that do not address the issues of this hearing
- A-J October 6, 2014, report of Dr. Daniel LoPreto, Ph.D., not admitted as not relevant to the CSV matter
- A-K Not admitted, not relevant to the CSV matter

Respondent:

- R-1 Worker's Compensation claim, dated August 24, 2010 (2 pgs.)
- R-2 Appellant's timesheet, dated December 13, 2014 to January 5, 2015 (3 pgs.)
- R-3 Medical Status Report Dr. Amit, dated December 18, 2014
- R-4 Request for Resignation in Good Standing, dated December 22, 2014 (2 pgs.)
- R-5 PNDA, dated May 1, 2015 (2 pgs.)
- R-6 FNDA, dated May 22, 2015 (2 pgs.)