STATE OF NEW JERSEY

In the Matter of Allison Alerine,
Motor Vehicle Commission

CSC DKT. NO. 2014-1509
OAL DKT. NO. CSV 00301-14

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: FEBRUARY 13, 2020 BW

The appeal of Allison Alerine, Compliance Officer 1, MVC, Motor Vehicle Commission, 10 working day suspension, on charges, was heard by Administrative Law Judge Robert Bingham II, who rendered his initial decision on December 23, 2015. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on February 12, 2020, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision to modify the 10 working day suspension to a five working day suspension.

Since the penalty has been modified, the appellant is entitled to five days of back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), the award of counsel fees is appropriate 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); *James L. Smith v. Department of Personnel,* Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, charges were sustained. 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 10 working day suspension to a five working day suspension. The Commission further orders that appellant be granted five days of back pay, benefits, and seniority. The amount of back pay awarded is to be reduced and mitigated to the extent of any income 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.

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

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 12TH DAY OF FEBRUARY, 2019

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
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attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 00301-14
AGENCY DKT. NO. 2014-1509

IN THE MATTER OF ALLISON ALERINE,
MOTOR VEHICLE COMMISSION.

Arnold Shep Cohen, Esq., for appellant Allison Alerine (Oxfeld, Cohen, P.C., attorneys)

Nonee Lee Wagner, Deputy Attorney General, for respondent Motor Vehicle Commission (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: September 29, 2015 Decided: December 23, 2015

BEFORE **ROBERT BINGHAM II**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant Allison Alerine (appellant or Alerine) appeals the decision of respondent, Motor Vehicle Commission (MVC or the Commission), to impose a ten-day suspension on a charge of chronic or excessive absenteeism or lateness, by way of Final Notice of Disciplinary Action (FNDA) dated August 28, 2013. Alerine appealed to the Civil Service Commission, which transmitted the matter to the Office of Administrative Law (OAL), where it was filed on January 9, 2014, 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. The hearing was held on September 29, 2015, and the record closed at the conclusion of the proceedings. Extensions were granted, until February 1, 2016, for issuance of this decision.

FACTUAL DISCUSSION

Appellant is a "compliance officer 1 MVC,"[1] who has suffered with chronic Graves' (thyroid) disease and continues to have Epstein-Barr, which manifests periodically. By memorandum from MVC coordinator Robert Bennett, dated July 26, 2013 (J-3), appellant was notified that her sick leave for that year was exhausted and that further absences for illness would be without pay, unless appellant used available vacation or administrative leave with acceptable medical documentation. Further, between July 29 and December 31, 2013, she would be allowed only one absence monthly (excluding preapproved vacation, administrative leave, or family medical leave), provided acceptable documentation verifying the reason for the absence was submitted within seven calendar days. Approved absences under either the Federal Family and Medical Leave Act (FMLA) or the New Jersey Family Leave Act (FLA) were exempted.

Appellant was absent from work on August 12, 13, and 14, 2013. (J-7; J-6.)[2] On or about August 15, 2013, she submitted a doctor's note, dated August 13, 2013, styled "disability certificate," indicating that she had been under professional medical care and was totally incapacitated from August 12 to August 14, 2013. It further requested that she be excused from work during that time and indicated that she could return to work on August 15, 2013.

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[1] The parties agree to the following employment history. Appellant was hired on September 24, 1990, as a safety spec trainee, but was separated from employment on June 28, 1991. She was hired again (new hire) in the same position on September 9, 1991, but again separated—as safety spec 1—on November 6, 1998. She returned as a new hire, as safety spec 1, on October 5, 2001. (J-8.)

[2] Appellant's timesheet for that period reflects that she was docked 2.1 hours of vacation/general leave for August 12, 2013.

Respondent served appellant with a Preliminary Notice of Disciplinary Action (PNDA) dated August 28, 2013 (J-1), charging: (1) chronic or excessive absenteeism or lateness; (2) NJDOT/MVC disciplinary guidelines section IA, unauthorized absence and/or chronic or excessive absenteeism. As stipulated by the parties, the charge of unauthorized absence that was contained in the PNDA was dismissed at the departmental hearing, and the FNDA charged only chronic or excessive absenteeism. The recommended penalty was thus reduced from a fifteen-day suspension to a ten-day suspension.

I **FIND as FACT** all of the above, which is not in dispute.

Robert Bennett, MVC inspection services coordinator, testified that he supervised appellant in 2013 and sent her a memo/notice dated July 26, 2013 (J-3) (the memo) because she had exhausted her earned leave time, though he could not recall exactly when she ran out of time. The policy was to call in at least one half hour before starting time to explain any absence for that shift. In his supervisory capacity, Bennett had recorded appellant as being "out" on August 12, when she used vacation time (J-7a), as well as on August 13 (J-7b) and August 14 (J-7c), when her time was completely exhausted. According to Bennett, absence was defined, or calculated, in "single-day" increments. Bennett, who is authorized to recommend discipline, served appellant with the PNDA charging chronic and excessive absenteeism.

Nancy Colt, a compliance officer 2 and twenty-eight-year MVC employee, testified that she is primarily responsible for staff timekeeping, specifically, approval of eCATS reporting, as well as verification of used and available leave time as referenced in J-3.[3] According to Colt, appellant had approved FMLA as of September 4, 2013,[4] but not in either July or August, as far as she knew. If appellant had FMLA in August, her time would have been marked "absent without pay FMLA." Appellant did request a day

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[3] Verification is performed by Colt with the assistance of MVC's personnel officer who, at the time, was Angela Lamorte.

[4] Appellant's FMLA leave was authorized by Human Resources (HR); Colt could not say whether appellant would have been eligible for FMLA in August 2013.

off without pay before August 12, 2013, when she had 2.1 hours of available vacation leave. That date did not constitute unauthorized absence because the memo (J-3) allowed one absence per month. Colt's understanding was that more than 3.5 hours of leave counted as a full day. On the other hand, appellant's absences on August 13 and 14 were unauthorized. One was not allowed to convert administrative or vacation leave to sick leave and, if leave time was available it had to be used before any requested authorized leave without pay or FMLA leave.[5]

Appellant Allison Alerine testified that in July and August 2013 she was "not on FMLA time" because her doctor, Dr. Renner, was on vacation and she thus was unable to have the required paperwork completed. Appellant sent a note, dated August 9, 2013, to Stephen Murphy, Human Resources supervisor, indicating that she had submitted her leave as unpaid, but "Nancy from [her] office" changed it to sick leave. She wrote, "I hope to apply for intermittent FMLA as soon as my doctor gets back from vacation." (A-2.) Appellant subsequently applied for FMLA and was granted intermittent FMLA[6] on September 4, 2013, after Dr. Renner completed the paperwork.

From August 12 to 14, 2013, appellant's Epstein-Barr "mono-like" symptoms recurred, disabling her from even getting out of bed. The Epstein-Barr virus is an incurable and chronic condition; episodes come and go in "waves," and recovery takes two weeks to three months. She was seen by and received a doctor's note from Dr. Feliciano, in the absence of Dr. Renner, whom she saw when he returned from vacation. (A-5.) She sent the note by email to her supervisor, Robert Bennett. (A-3; A-4.) Despite having received the memo (J-3), she was (helplessly) faced with the absence of her doctor when she had her episode with disabling symptoms.

Appellant believes that she had other FMLA leave in 2013, but does not know when it expired. She did not attempt to complete paperwork for a new FMLA application before her doctor's vacation, because she had been well at the time. She had not taken a sick day in months, and then she was stricken suddenly.

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[5] FMLA leave did not have to be taken consecutively, in which case it would be "intermittent."

[6] Intermittent FMLA, to appellant's understanding, could be used as needed.

Kristina Adams, MVC employee relations coordinator, testified on rebuttal that she is responsible for the oversight of discipline, grievances and arbitration, including cases involving absenteeism. She is familiar with the MVC policy on absenteeism and the MVC's practice in 2013 of issuing a written notice of excessive absenteeism, such as the instant memo/notice to appellant (J-3), which addresses exhaustion of sick leave rather than FMLA eligibility. In that regard, an employee is permitted one additional absence per month if medical documentation is timely provided. The nature of one's illness does not factor into the determination of whether a violation has occurred.

Adams does not believe appellant had any available FMLA when the memo (J-3) was issued and does not know whether she was eligible for FMLA in August 2013.[7] However, if it had been available when the memo was issued, appellant would have applied for it and her absence never would have been questioned. The employee is responsible for presenting the required paperwork when applying for FMLA leave. To Adams' understanding, one must also have accrued 1,250 hours of work to be eligible. And even when FMLA is available, the timekeeper must apply any accrued leave time first. Further, if an employee has available vacation time, management has the discretion to permit vacation leave in lieu of sick leave, including when allotted for a single-day-monthly absence. However, after that single day is exhausted, the exercise of such discretion is not possible.

Based upon the testimonial and documentary evidence, and having had the opportunity to observe the appearance and demeanor of the witnesses, all of whom testified in a candid and forthright fashion, I also **FIND** as **FACT**:

Appellant had exhausted her FMLA leave when the memo/notice (J-3) was issued on July 26, 2013. She had not begun to process paperwork for continued FMLA leave prior to the onset of symptoms from a flare-up of her Epstein-Barr condition in August 2013. On August 12, 2013, appellant was out of work, using the remainder of

[7] Adams is only familiar with the basics of what is required for FMLA leave.

her available leave, 2.1 hours of vacation time. However, pursuant to the terms of the memo, she actually had an allowed rather than unauthorized absence on that date. On the other hand, her absences on August 13 and 14 were unauthorized, as she was absent from work without prior approval or any available leave whatsoever. At that time, her doctor was away on vacation and, upon his return, he provided the paperwork for renewal of her FMLA leave, which again became available on September 4, 2013.

LEGAL ANALYSIS AND CONCLUSIONS

Under the Civil Service Act, a public employee may be subject to major discipline for various employment-related offenses or for just cause, N.J.S.A. 11A:2-6, including chronic or excessive absenteeism or lateness, N.J.A.C. 4A:2-2.3(a)(4). On appeal from the imposition of such discipline, the appointing authority has the burden of proving justification for the action, N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a), and proving the employee's guilt by a preponderance of the competent, relevant, and credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). Preponderance may be described as the greater weight of the credible evidence. State v. Lewis, 67 N.J. 47 (1975).

Although the regulation does not define when absenteeism will rise to the level of chronic or excessive, it is generally understood that chronic conduct is conduct that continues over a long time or recurs frequently, Good v. N. State Prison, 97 N.J.A.R.2d (CSV) 529, 531. "Excessive" is defined as "exceeding a normal, usual, reasonable, or proper limit." American Heritage Dictionary 638 (3d ed. 1992); see also Rios v. Paterson Hous. Auth., CSV 3009-02, Initial Decision (August 1, 2005), adopted, Comm'r (September 13, 2005), <http://njlaw.rutgers.edu/collections/oal/>; In re Dias, City of E. Orange Police Dep't, CSV 07078-12, Initial Decision (September 23, 2013), adopted, Comm'r (November 7, 2013), <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.

A violation for chronic or excessive absenteeism has been found where an employee is absent and has no leave time available despite previously having FMLA leave. In re Hudgins, Atl. City, Dep't of Public Works, CSV 1068-12, Initial Decision (August 22, 2012), adopted, Comm'r (October 17, 2012), <http://njlaw.rutgers.edu/collections/oal/> (removal upheld for sixteen days' absence without leave after expiration of prior FMLA leave). Though Hudgins, whose child suffered from severe birth defects, was "exactly the sort of employee for whom the Family Medical Leave Act, donated leave, and leave without pay were intended," his leave had expired; rather than then seeking "the various leave options open to him," he "sat on his hands and did nothing." Ibid.; see also In re Bell, City of Orange Township, Final Decision (December 18, 2013) (removal modified to sixty-day suspension for ten days' absence without approval or notification); In re Wells, Hudson Cnty. Dep't of Corrections, OAL Dkt. Nos. CSV 4690-14 and CSV 4692-14 (consolidated), Initial Decision (November 23, 2015). In Wells, a twenty-day suspension was imposed for absence from work on three days in June 2013. Wells had called out sick on those dates and had previously exhausted his accumulated sick time. Notably, "Appellant's action with respect to requesting and ultimately obtaining intermittent FMLA leave as of July 22, 2013, occurred after his absences on June 15, 18 and 27, 2013, which form the basis for the discipline in issue." Ibid.

Here, appellant was charged with chronic or excessive absenteeism under N.J.A.C. 4A:2-2.3(a)(4) on grounds that she was absent without authorization for three days. However, pursuant to the memorandum, she was allotted one day per month which, as applied, gave her an allowed absence on August 12, 2013. Her absences on August 13 and 14, however, were unauthorized, as she was absent from work without prior approval or any available leave time. Appellant thus had two days out from work that exceeded the normal or proper limit of authorized leave. Therefore, although I do

not find chronic absenteeism due to the minimal number of days involved, I **CONCLUDE** that respondent has sustained its burden of proof as to the charge of excessive absenteeism.

Penalty

With regard to penalty, consideration must generally be given to the concept of progressive discipline involving penalties of increasing severity. West New York v. Bock, 38 N.J. 500 (1962). However, progressive discipline is not a "fixed and immutable rule to be followed without question." Carter v. Bordentown, 191 N.J. 474, 484 (2007). It is well established that when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest, progressive discipline need not apply. In re Herrmann, 192 N.J. 19, 28 (2007); In re Stallworth, 208 N.J. 182 (2011).[8]

In discussing the application of progressive discipline, the Court has emphasized the importance of "fairness and generally proportionate discipline imposed for similar offenses." In re Stallworth, supra, 208 N.J. at 192.

> [P]rogressive discipline is a flexible concept, and its application depends on the totality and remoteness of the individual instances of misconduct that comprise the disciplinary record. The number and remoteness or timing of the offenses and their comparative seriousness, together with an analysis of the present conduct, must inform the evaluation of the appropriate penalty.

[8] Where, however, the employee's inability to perform duties is based upon a medical condition, not willful misconduct, separation from employment by resignation in good standing, rather than removal, is appropriate. In re Gore-Bell, CSV 3975-06, Final Decision (December 21, 2007), <http://njlaw.rutgers.edu/collections/oal/> (Board modified the removal of county correction officer to a resignation in good standing where inability to perform was due to glaucoma in her right eye); see also Verdell v. Dep't of Military and Veterans Affairs, CSV 6774-02, Final Decision (August 12, 2004), <http://njlaw.rutgers.edu/collections/oal/>, aff'd, No. A-0497-04T5 (App. Div. February 16, 2006), <http://njlaw.rutgers.edu/collections/courts/> (court affirmed Board's modification of the removal of appellant, an insulin-dependent diabetic who suffered unforeseen medical episodes, to a resignation in good standing).

[Id. at 199.]

Here, the parties jointly stipulate that appellant's disciplinary history consists of the following offenses: (1) unauthorized absence, chronic and excessive absenteeism, and failure to follow policy and procedure, on January 6, 2012, for which she received an official written reprimand, and (2) falsification of a doctor's note for which she received a thirty-day suspension without pay, by way of settlement agreement dated February 16, 2012. The parties further stipulate that the final charge of falsification of a doctor's note was derived from charges reflected in the settlement agreement (J-5a), including those contained in a PNDA dated January 31, 2012 (PNDA D20120048) (J-5b), namely: chronic or excessive absenteeism or lateness, conduct unbecoming, and other sufficient cause. The instant infraction occurred in August 2013, over one year later. Notably, petitioner had a sudden disabling episode from a long-standing illness, she promptly provided a doctor's note covering the days that she was absent, and she was able to reinstate intermittent FMLA soon thereafter. Additionally, it is significant in my view that appellant's unauthorized absences were for just two days rather than a more considerable period of time.

Therefore, having considered appellant's disciplinary history along with the facts and circumstances presented, I **CONCLUDE** that appellant's penalty should be **MODIFIED** to a five-day suspension.

DECISION AND ORDER

Based upon the foregoing, respondent justifiably charged appellant with excessive absenteeism, but the facts and circumstances do not warrant a penalty of a ten-day suspension. Accordingly, I **ORDER** that the charges of excessive absenteeism are **SUSTAINED**, but the penalty of a ten-day suspension is hereby **MODIFIED** to a five-day suspension, for the reasons set forth above.

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, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, 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.

December 23, 2015

DATE

ROBERT BINGHAM II, ALJ

Date Received at Agency: 12/23/15

Date Mailed to Parties: 12/23/15

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APPENDIX

EXHIBITS

Joint Exhibits:

J-1 Preliminary Notice of Disciplinary Action, dated August 28, 2013

J-2 Final Notice of Disciplinary Action, dated November 13, 2013

J-3 New Jersey Motor Vehicle Commission memorandum, Written Notice of Excessive Absenteeism, dated July 26, 2013

J-4 New Jersey Motor Vehicle Commission letter, dated August 6, 2014

J-5a Settlement Agreement and Certification, dated February 16, 2012

J-5b Preliminary Notice of Disciplinary Action, dated January 31, 2013, and Final Notice of Disciplinary Action (blank)

J-6 Timesheet for period ending August 23, 2013

J-7 Timesheet/Log, dated August 12, 2013

J-7b Timesheet/Log, dated August 13, 2013

J-7c Timesheet/Log, dated August 14, 2013

J-8 Handwritten Employment History

For Appellant:

A-1 Not in Evidence (same as J-3)

A-2 Email from Allison Alerine to Stephen Murphy, dated August 9, 2013

A-3 Novel WebAccess printout, dated August 15, 2013

A-4 Email from Allison Alerine to Robert Bennett, dated August 15, 2013

A-5 Disability Certificate, dated August 13, 2013

For Respondent:

None

WITNESSES

For Appellant:

Allison Alerine

For Respondent:

Robert Bennett

Nancy Colt

Kristina Adams