

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 29th DAY OF JULY, 2020

Deirdre L. Webster Cobb

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Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and 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

OAL DKT. NO. CSV 02598-20

AGENCY DKT. NO. 2020-2073

**IN THE MATTER OF DAVID PREZIOSI,
TOWNSHIP OF WEST ORANGE POLICE
DEPARTMENT,**

Frank Cioffi, Esq., appearing on behalf of appellant (Sciarra & Catrambone, LLC)

Kenneth Rosenberg, Esq., appearing on behalf of respondent (Fox Rothschild, LLC)

Record Closed: June 2, 2020

Decided: June 25, 2020

BEFORE JOANN LASALA CANDIDO, ALAJ:

STATEMENT OF THE CASE

Appellant, David Preziosi, a West Orange Police Officer, appeals his thirty-day suspension by the West Orange Township Police Department (respondent or Department). The Department contended that appellant signed up for a tactical combat training class on October 3, 2019 and failed to show without approval or notification of a

supervisor, thus violating the Department's Uniform Standards of Conduct Directive 1:6 by not reporting to training on a specified date.

PROCEDURAL HISTORY

On October 24, 2019, appellant was served with a Preliminary Notice of Disciplinary Action charging him with chronic or excessive absenteeism or lateness in violation of N.J.A.C. 4A:2-2.3(a)(4); and other sufficient cause, in violation of N.J.A.C. 4A:2-2.3. On January 20, 2020, Hearing Officer Ellen O'Connell conducted a hearing at the West Orange Town Hall. She upheld the thirty-day suspension concluding that the Department proved the charges of chronic or excessive absenteeism or lateness in violation of N.J.A.C. 4A:2-2.3(a)(4); and other sufficient cause, in violation of N.J.A.C. 4A:2-2.3 (a)(12).

On February 5, 2020, the Department served a Final Notice of Disciplinary Action, sustaining the charges and suspending appellant for thirty-days. Appellant filed a request for a hearing and the matter was then forwarded to the Office of Administrative Law (OAL), where it was filed on February 24, 2020 as a contested case. A hearing took place on June 2, 2020, via Zoom, on which date the record closed.

STATEMENT OF THE ISSUES

Did the respondent carry its burden of proving the charges referenced above by a preponderance of the credible evidence? If so, what disciplinary action, if any, is appropriate?

FINDINGS OF FACT

Based on the credible and uncontroverted testimony of all witnesses and documentary evidence presented, I make the following **FINDINGS of FACT**:

1. The appellant began his career with respondent as a dispatcher, which lasted thirteen years before becoming a police officer in July 2017.
2. On or about September 11, 2019, appellant signed up for tactical combat training, scheduled for October 3, 2019, to be held at the Picatinny Arsenal commencing at 7:00 a.m.
3. Appellant failed to appear. The class was delayed for thirty minutes in an effort to locate him.
4. Appellant admitted that he had signed up for the October 3rd training, but through inadvertence failed to appear. He decided to take the training on October 10th instead.
5. On December 19, 2017, appellant received an unsatisfactory performance notice for reporting late to work on five different days in a period of four months, from September to December 2017.
6. On January 8, 2018, appellant received a written reprimand for being late for work on two more occasions and was advised by the department of progressive discipline.
7. On January 16, 2018, appellant was fined one-day's pay for insubordination for failing to report to the proper location on January 10, 2018, and for not wearing the required suit and tie. Instead, he wore a short sleeve shirt and khaki pants.
8. On October 15, 2018, appellant failed to report a motor vehicle accident while on duty when he hit a parked car. On November 14, 2018, appellant received a fifteen-day suspension and an additional fifteen-day suspension, the latter of which was held in abeyance for one year provided he was not involved in a serious rule infraction within that year.
9. On April 20, 2019, appellant failed to report to work, stating that he was not aware of a shift change. While it was determined that he was not notified, it is, however, every officer's duty to check with the police desk for that officer's current assignment. Appellant received a sixteen-day suspension for that violation, effective June 13, 2019, for chronic absenteeism which was combined with the prior fifteen-day suspension held in abeyance.

10. For appellant's failure to appear on October 3, 2019 for tactical combat training, he received a thirty-day suspension for chronic or excessive absenteeism or lateness and other sufficient cause.

LEGAL ANALYSIS AND 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). For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959). 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).

Appellant has been charged with chronic absenteeism and lateness pursuant to N.J.A.C. 4A:2-2.3(a)(4). Chronic absenteeism although not defined in the Civil Service Act, is generally understood to be conduct that continues over a long time and recurs often. In re Ciuppa, CSV 04702-11, Initial Decision (Apr. 24, 2014), adopted, CSC (Jun. 4, 2014), <http://njlaw.rutgers.edu/collections/oal/>. 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." W. New York v. Bock, 38 N.J. 500, 522 (1962). 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 Housing Auth., 92 N.J.A.R. 2d (CSV) 750, 752.

A civil service employee who commits a wrongful act related to his duties 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). This requires a de novo review of appellant's disciplinary action. The evidence presented at the hearing as well as the testimony of all witnesses that I have deemed to be credible and uncontroverted, confirms that during the two and a half year period as a police officer, appellant had five incidents of tardiness, necessitating an unsatisfactory performance notice and then a written reprimand. In addition, he failed to appear for a newly scheduled tour of duty and lastly, failed to appear for training on October 3, 2019.

Appellant was aware as early as December 2017, that a continuation of lateness would result in progressive discipline. He continued to be disciplined on five additional occasions. Appellant's infraction on October 3, 2019, when coupled with several prior warnings and sustained suspensions makes clear that progressive discipline has been established.

Therefore, based upon the foregoing facts and applicable law, I **CONCLUDE** that the respondent has proven, by a preponderance of the competent, credible evidence, the charge of chronic and excessive absenteeism.

Appellant was also charged with violating Civil Service Rule N.J.A.C. 4A:2-2.3(a)(12) other sufficient cause for failure to abide by the Department Uniform Standard of Conduct Directive 1:6-6a that reads, in part, "employees shall report for duty at the time and place specified by their assignment or orders and complete the number of hours on duty required by their assignment." J-14

There is no definition in the New Jersey Administrative Code for "other sufficient cause." Other sufficient cause is usually described in the charges brought against an officer. Appellant violated the Department's written Uniform Standard of Conduct Directive when he failed to appear for the tactical training on October 3, 2019 despite signing up for that date.

I therefore **CONCLUDE** that respondent has proven by competent and credible evidence that appellant was appropriately suspended for “other sufficient cause,” and I therefore, **CONCLUDE** that the charge of other sufficient cause should be upheld.

PENALTY

The respondent seeks to suspend the appellant for thirty working days for his actions. In his two- and one-half years as a police officer at the time of the October 3, 2019 incident, the appellant has been disciplined five times previously relating to attendance or absenteeism issues as discussed above. After having considered the proofs offered and the credible testimony of the witnesses and after having given due deference to the principal of progressive discipline, I **CONCLUDE** that appellant’s violations are significant to warrant a penalty.

An employee’s past record may be considered in determining the appropriate penalty. “Available service ratings, a history of promotions, commendations, etc., and informally and formally adjudicated disciplinary actions are relevant to penalty determinations.” West New York v. Bock, 38 N.J. 500 (1962). Although “progressive discipline” is generally applicable when considering the proper penalty to be imposed, Parlo v. Township of Edgewater Park, 7 N.J.A.R.2d (CSV) 20, in certain circumstances, substantial discipline, including removal, is appropriate, even if an employee has never been guilty of prior disciplinary offenses. Brown v. E. Jersey State Prison, 95 N.J.A.R.2d (CSV) 671. Here, respondent offered appellant’s prior disciplinary history, which is significant for tardiness and absenteeism. Therefore, I further **CONCLUDE** that under all the facts presented here, appellant’s thirty-day suspension is appropriate.

The record reflects that appellant has had prior charges of chronic or excessive absenteeism or lateness in violation of N.J.A.C. 4A:2-2.3(a)(4) which were sustained resulting in an unsatisfactory performance notice, a written reprimand, a one-day fine, a thirty-day suspension (fifteen days of which was held in abeyance), and sixteen-day suspension. In consideration of the foregoing, along with appellant’s disciplinary record,

a thirty-working-day suspension is a reasonable penalty consistent with progressive discipline. Appellant's argument that his absence on October 3, 2019 should not be considered chronic is unpersuasive. Therefore, I **CONCLUDE** that the action of the Department in suspending the appellant for thirty working days is reasonable and consistent with progressive discipline and is **AFFIRMED**.

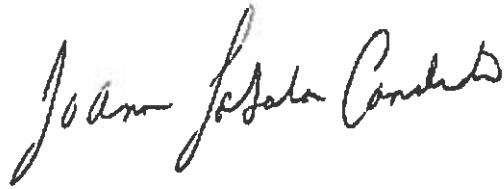
ORDER

Based upon the foregoing, respondent has proven by a preponderance of credible evidence the charges against appellant of chronic and excessive absenteeism (N.J.A.C. 4A: 2-2.3 (a) 4) and other sufficient cause (N.J.A.C. 4A: 2-2.3 (a) 12), and accordingly his appeal is hereby **DISMISSED WITH PREJUDICE**.

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.



June 25, 2020

DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency:

June 25, 2020

Date Mailed to Parties:

June 25, 2020

ljb

APPENDIX

WITNESSES

For Appellant:

David Preziosi

For Respondent:

Lieutenant Patrick Matullo
Detective Sergeant Michael O'Donnell
Chief James Abbott

EXHIBITS

Joint:

- J-1 Final Notice of Disciplinary Action dated February 5, 2020
- J-2 Preliminary Notice of Disciplinary Action dated October 24, 2019
- J-3 Memorandum from Captain Dalgauer to Feula dated October 22, 2019
- J-4 Memorandum from Lieutenant Patrick Matullo to Captain Dalgauer
- J-5 Memorandum from Lieutenant Patrick Matullo to appellant dated October 14, 2019
- J-6 2019 Training day #3 schedule and sign-up sheet
- J-7 Memorandum from appellant to Lieutenant Patrick Matullo dated October 5, 2019
- J-8 Appellant's Concise Officer History
- J-9 Performance Notice dated December 19, 2017
- J-10 Written Reprimand dated January 8, 2018
- J-11 Final Notice of Disciplinary Action dated January 12, 2018
- J-12 Memorandum from Deputy Chief Fuela to appellant dated November 14, 2018
- J-13 Final Notice of Disciplinary Action dated May 28, 2019

- J-14 West Orange Police Department Written Directive Uniform Standard of Conduct
- J-15 West Orange Police Department Written Directive Disciplinary Process
- J-16 West Orange Police Department Written Directive Internal Affairs
- J-17 Transcript of departmental hearing on January 13, 2020
- J-18 West Orange Police Department Written Directive Professional Development
- J-19 Appellant's Answers to Interrogatories
- J-20 Appellant's Answers to Requests for Admissions
- J-21 Appellant's Supplemental Answers to Requests for Admissions

Respondent:

- R-1 Hearing Officer Ellen O'Connell's Opinion and Decision