



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CORRECTED DECISION

Request for Reconsideration

In the Matter of Billie Hayes,
Division of Medical Assistance and
Health Services, Department of
Human Services

CSC Docket No. 2018-3252

ISSUED: FEBRUARY 6, 2019 (ABR)

Billie Hayes, a former Quality Control Reviewer, Division of Medical Assistance and Health Services, Department of Human Services (DHS), represented by William A. Nash, Esq., requests reconsideration of the attached final decision, rendered on March 27, 2018, which granted the appointing authority's motion for summary decision and upheld the petitioner's removal and resignation not in good standing, effective April 18, 2016.

By way of background, the petitioner was served with a Final Notice of Disciplinary Action, removing him from his position effective April 18, 2016 on charges of absence from work without permission; abandonment of job as a result of absence from work; and chronic absenteeism. Specifically, the appointing authority asserted that the petitioner did not return to work or request an accommodation under the Americans with Disabilities Act (ADA) after being out on approved Workers' Compensation leave from November 6, 2014 through April 10, 2016, after a workplace injury. On April 11, 2016 at 8:30 a.m., the petitioner sent an e-mail to the appointing authority in which he requested to use seven hours of leave time. On April 12, 2016, the appointing authority advised the petitioner, in relevant part, that he had no remaining leave time available. The petitioner did not respond to the appointing authority, did not return to work and did not request time off or an accommodation. The petitioner appealed his removal and resignation not in good standing to the Civil Service Commission (Commission) which transmitted the matter to the Office of Administrative Law (OAL) for a hearing as a contested case. Subsequently, the appointing authority filed a motion for summary decision. The Administrative Law Judge (ALJ) granted the appointing authority's motion for

summary decision and upheld the petitioner's removal and resignation not in good standing. In particular, the ALJ found that the undisputed facts did not demonstrate that the petitioner or his physician ever made a request for an accommodation and that the petitioner failed to return to work on April 11, 2016 and every day thereafter. The Commission adopted the ALJ's recommendations and upheld the petitioner's removal and resignation not in good standing.

In his request for reconsideration, the petitioner argues that he meets the standard for reconsideration because the Commission made a material error by disregarding the petitioner's sworn affidavit that he did not return to work on April 11, 2016 because the appointing authority did not provide him with information about what reasonable accommodations, if any, would have been provided to him. Moreover, the petitioner argues that there was a material error in finding that a request for reasonable accommodation was not made. In this regard, the petitioner maintains that under DHS' Administrative Order 4:07 (A.O. 4:07), requests for reasonable accommodations do not need to be in writing or even use the phrase "reasonable accommodation." Rather, all that is required is that the employee make clear that assistance is needed because of his or her disability. Here, the petitioner maintains that the appointing authority knew of his need for a reasonable accommodation, based upon the appointing authority's statements in its letters dated March 9, 2016 and April 7, 2016. Specifically, he notes that the appointing authority's March 9, 2016 letter acknowledged that his physician indicated that the petitioner "may need extra time for decision making" and it indicated in its April 7, 2016 letter that it was sending him ADA accommodation forms because his physician's report indicated that he "may have a need for a work accommodation." As such, he argues that the ALJ's initial decision incorrectly stated that A.O. 4:07 did not apply. Therefore, he contends that a genuine issue of material fact exists as to whether or not the appointing authority was unaware of his need for a reasonable accommodation. Finally, the petitioner argues that the Commission made a material error by failing to recognize that he was unable to complete the ADA form because of the difficulties associated with his diagnosis. Accordingly, the petitioner argues that the foregoing issues of material fact demonstrate that he has met standard for reconsideration.

In response, the appointing authority, represented by Rimma Razhba, Deputy Attorney General, argues that the ALJ correctly found that there were no material facts in dispute in this matter that warranted an evidentiary hearing. The appointing authority contends that there was no evidence that it received a request for a reasonable accommodation, as the physician's report dated March 17, 2016 and the physician's follow-up medical note dated April 6, 2016 cleared the petitioner to return to work on April 10, 2016 without restrictions. Further, it maintains that the petitioner did not submit any medical documentation to refute the fact that he was cleared to return to work on April 10, 2016 without restrictions. The appointing authority also argues that the petitioner's claim that he was unable to

complete an ADA form lacks merit, as he was able to send an e-mail to it on April 11, 2016 and could have indicated that he needed help filling out the ADA forms, but he did not do so. Therefore, the appointing authority argues that the Commission correctly adopted the ALJ's findings that there were no genuine issues of fact in this case and the ALJ's conclusion that the petitioner's failure to return to work on April 11, 2016 constituted an absence without permission, job abandonment and excessive absenteeism.

In reply, the petitioner reiterates that reconsideration is warranted based upon the clear material errors noted in his initial submission in this matter.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding.

The instant request for reconsideration is based on the assertion that a clear material error has occurred which would change the outcome of the case. However, a review of the record in this matter reveals that reconsideration is not justified. The petitioner was out on an approved Workers' Compensation leave from November 6, 2014 through April 10, 2016. The record does not indicate that the petitioner requested a reasonable accommodation or assistance with completing the ADA forms that the appointing authority sent him. Rather, the petitioner asserts that the appointing authority had notice of his need for a reasonable accommodation through the physician's report dated March 17, 2016 and a follow-up note dated April 6, 2016 that it had received. However, the record establishes that in both notes, the appellant was returned to work on April 10, 2016, without restrictions. Moreover, in the March 17, 2016 note, although the physician indicated the appellant should continue treatment, he did not indicate that the petitioner needed a reasonable accommodation at work. Thus, when the appointing authority sent its April 7, 2016 letter to the petitioner, it could not be said that it had notice from the physician that the petitioner would *require* a reasonable accommodation to return to work. The appointing authority's statement that the petitioner "*may* have a need for a work accommodation" (emphasis added) and the instruction to complete ADA accommodation forms "*if you feel* you are need [*sic*] of an ADA accommodation" clearly reflects an intent to clarify whether the petitioner needed a reasonable accommodation, not a statement that the appointing authority knew that the petitioner *required* one to return to work. Furthermore, the petitioner does not indicate what reasonable accommodation from the appointing authority he would have required in order to return to work. The petitioner asserts that he informed the appointing authority that he "would not be able to return to

work on 4/11/16 as [he] had no information about what reasonable accommodations," if any, he would receive. However, the e-mail the petitioner sent to the appointing authority on April 11, 2016 stated that he "would like to use 7 hours of AL time" without an explanation as to why he was requesting the absence. Thus, there is no evidence that the petitioner requested a reasonable accommodation directly or through his physician or that his absence was related to the lack of a reasonable accommodation. In any event, any such dispute or discrepancy would not excuse his continued absences from work in light of the physician's report and note clearing him to return to work. Accordingly, the petitioner has not met the standard for reconsideration.

ORDER

Therefore, it is ordered that this request for reconsideration be denied.

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 JANUARY, 2019

Deirdre' L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

c: Billie Hayes
William A. Nash, Esq.
Lori Mattozzi
Rimma Razhba, Deputy Attorney General
Records Center

Re: Billie Hayes

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 27TH DAY OF MARCH, 2018



Deirdre L. Webster Cobb
Acting 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 GRANTING
SUMMARY DECEISION

OAL DKT. NOS. CSV 11466-16;
11468-16; 11471-16; 11474-16
AGENCY DKT. NOS. 2017-221, 2017-219,
2015-1554, 2017-222
(CONSOLIDATED)

IN THE MATTER OF BILLIE HAYES,
DEPARTMENT OF HUMAN SERVICES,
MEDICAL ASSISTANCE AND HEALTH
SERVICES.

William A. Nash., Esq. for appellant, Billie Hayes (Nash Law Firm, L.L.C.,
attorneys)

Rimma Razhba, Deputy Attorney General, for respondent, Department of
Human Services (Christopher S. Porrino, Attorney General of New
Jersey, attorney)

Record Closed: August 7, 2017

Decided: September 15, 2017

BEFORE SARAH G. CROWLEY, ALJ:

PROCEDURAL HISTORY

Billie Hayes (appellant), was employed as a Quality Control Reviewer for the
respondent, Department of Human Services, until his removal effective April 18, 2016.

Appellant was charged with absence from work without permission; abandonment of job as a result of absence from work; and chronic absenteeism. The Preliminary Notice of Discipline (PNDA) was served on April 18, 2016, and a Final Notice of Discipline (FNDA) served on June 10, 2016. The appellant filed an appeal, and that matter was transmitted to the Office of Administrative Law as a contested matter on July 28, 2016. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. On March 24, 2017, respondent filed a motion for summary decision on the within charges.¹ Opposition to the motion was filed by the appellant on July 13, 2017. A response to the opposition was filed by the respondent on August 7, 2017.

FACTUAL DISCUSSION

The essential facts in this case are not disputed and are as follows:

1. The appellant was out on approved worker's compensation leave from November 6, 2014, through April 10, 2016, as a result of a workplace injury that he sustained on or about November 5, 2014.
2. The appellant was given several extensions on his leave, and was cleared to return to work on April 10, 2016, by his treating physician, Dr. Vasko Gulevski.
3. Dr. Gulevski submitted a return to work form dated April 6, 2016, in which he certifies that Billie Hayes was seen or treated in his office on that date and may return to work on April 10, 2016.
4. Treatment Notices from Dr. Gulevski dated March 17, 2016, were also provided to the employer.

¹ There are several other disciplinary matters that are pending against the appellant, which have been consolidated with this matter. The within motion only relates to OAL Docket No. 11466-16.

5. Neither the notes or the return to work certification from Dr. Gulevski request an accommodation for the appellant under the ADA. The appellant never requested an accommodation.
6. On April 7, 2016, in response to the return to work notice, the respondent sent a letter to the appellant which advised that "you may have a need for a work accommodation, therefore, I am enclosing the American with Disability Act (ADA) accommodation forms for you review and completion."
7. The appellant did not respond to the correspondence or ask for an accommodation either in writing, or verbally.
8. On April 11, 2016, the date the appellant was to return to work, he sent an email at 8:30 a.m. which stated "I would like to use 7 hours of AL time today 4-11-16. Thanks."
9. The appellant was advised by the respondent on April 12, 2016, that he was not permitted to call out or request time off by email, and must have direct contact with a person at work. The letter further advised appellant that he had no remaining time available, and was therefore, "out on authorized leave as of Monday, April 11, 2016."
10. The appellant did not respond to this letter and had no further contact with the respondent, by phone or email. The appellant did not return to work on April 12, 2016, April 13, 2016, April 14, 2016, or April 15, 2015. The appellant did not request time off or an accommodation.
11. On Monday, April 18, 2016, a Preliminary Notice of Disciplinary Action (PNDA) was issued, charging the appellant with a violation of N.J.A.C. 4A:6-1.10, regarding approval for leave of absence.
12. A second PNDA was issued on charging appellant with being absent from work without permission or proper notice, and job abandonment in violation of N.J.A.C. 4A:2-6.2(c).

The foregoing facts are not disputed and I **FIND** them as **FACT**:

STATEMENT OF ISSUE

The issue presented in this Motion for Summary Decision is whether the respondent is entitled to a decision as a matter of law on the discipline related to unauthorized leave, job abandonment and excessive absenteeism. The respondent has opposed the motion on the grounds that a request for an accommodation was made, and thus, the respondent was required to respond to such a request before terminating the appellant. The appellant has provided no evidence that a request for an accommodation was ever made.

LEGAL ARGUMENT AND CONCLUSION

Pursuant to N.J.A.C. 1:1-12.5(b), a summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This rule is substantially similar to the summary judgment rule embodied in the New Jersey Court Rules, R. 4:46-2. See Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). In connection, therewith, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. Id. at 75. In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in determining the motion:

[A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial'.

[Brill, supra, 142 N.J., at 540 (citations omitted).]

Pursuant to N.J.A.C. 1:12-59(b), "an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined by an evidentiary proceeding." The non-moving party must present more than his own self-serving facts to establish the existence of a material issue of fact. Fargas v. Gorham, 276 N.J. Super. 135, 139 (Law. Div. 1994).

The material facts in this case are undisputed. The appellant had been on approved leave for seventeen months as a result of a work-related injury. On April 6, 2016, appellant's treating physician cleared him to return to work on April 10, 2016. The certification contains no request for an accommodation, nor do the treatment notes which were submitted with the certification for return to work. The respondent sent a form letter to the appellant regarding his return to work, which included a statement that he "may" qualify for an accommodation, and if so, he should request it. The April 7, 2016, letter provided documentation to assist in the event a request for an accommodation was made. However, neither appellant or his doctor ever requested an accommodation, either verbally or in writing.

The appellant has argued that Dr. Gulevski stated that appellant would need an accommodation and requested such an accommodation on his behalf. However, no documentation to support this argument has been submitted. The documentation which was provided by the appellant made no such request. Neither the certification or the treatment notes from Dr. Gulevski request an accommodation. The appellant has not presented any material facts in dispute to warrant a hearing. The appellant's reliance on Administrative Order 4:07 is misplaced. These rules, are only applicable when a request for an accommodation is made. There is no evidence that any such request was ever made. The undisputed facts demonstrate that no request was ever made and appellant failed to return to work on April 11, 2016, and every day thereafter.

I therefore **CONCLUDE** that appellant's failure to return to work on April 11, 2016, constituted an absence without permission. I also **CONCLUDE** that the appellant's refusal to return to work for five consecutive days without leave or

permission constitutes job abandonment as well as excessive absenteeism. Accordingly, the charges are hereby **SUSTAINED**.

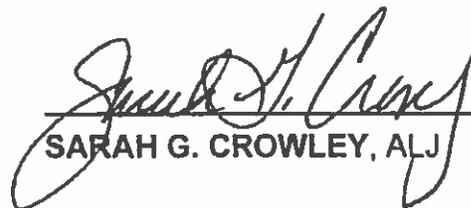
It is therefore hereby **ORDERED** that the respondent's motion for summary decision be and hereby is **GRANTED**, and the appeal is hereby **DISMISSED**.

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.

September 15, 2017
DATE



SARAH G. CROWLEY, ALJ

Date Received at Agency:

September 15, 2017 (mailed)

Date Mailed to Parties:

September 15, 2017 (mailed)

/mel

APPENDIX

BRIEFS RELIED ON

For Appellant:

Appellant's opposition to Motion for Summary Decision, dated July 13, 2017

For Respondent:

Respondent's motion for Summary Decision, dated March 22, 2017.

EXHIBITS

For Appellant:

A-1 Affidavit of appellant

For Respondent:

- R-1 Administrative Order 4:08
- R-2 RWJUHH Occupational Health Patient Visit Summary and Instructions dated November 10, 2014
- R-3 Dr. Vasko Gulevski Medical Report dated March 17, 2016
- R-4 Return to Work Note dated April 6, 2016
- R-5 Letter from Christine Boriolo, ADA Coordinator to Billie Hayes dated April 7, 2016
- R-6 E-mail from Billie Hayes to Sharon Metro dated April 11, 2016
- R-7 E-Mail from Sharon Metro to Billie Hayes dated March 10, 2016
- R-8 Memorandum from John Karl, Jr., Employee Relations Coordinator to Billie Hayes dated April 12, 2016
- R-9 Preliminary Notice of Disciplinary Action dated April 18, 2016 (Case Id. 16-016)

- R-10 Preliminary Notice of Disciplinary Action dated April 18, 2016 (Case Id. 16-020)
- R-11 Preliminary Notice of Disciplinary Action dated April 19, 2016 (Case Id. 16-021)
- R-12 E-Mail from John Karl to Billie Hayes dated June 9, 2016
- R-13 Hearing Officer Report dated June 17, 2016 (Case Id. 16-016)
- R-14 Hearing Officer Report dated June 17, 2016 (Case Id. 16-020)
- R-15 Hearing Officer Report dated June 17, 2016 (Case Id. 16-021)
- R-16 Final Notice of Disciplinary Action dated June 22, 2016 (Case Id. 16-016)
- R-17 Final Notice of Disciplinary Action dated June 22, 2016 (Case Id. 16-020)
- R-18 Final Notice of Disciplinary Action dated June 22, 2016 (Case Id. 16-021)