

In its exceptions, the appointing authority argues that the appellant was charged under its comprehensive time and attendance policy, which includes NSP.PSM 3.005, indicating that an employee who calls out sick “must call the Shift Commander at least one hour prior to their scheduled time on duty.” In this regard, it contends that the appellant did not do so as the ALJ did not discredit the appellant’s supervisor’s testimony that the appellant did not call him on the days in question. Accordingly, it contends he should be found to have violated the above policy. Additionally, based on the appellant’s prior disciplinary history, it argues that removal is the appropriate penalty.

In his exceptions in support of the initial decision, the appellant indicates that he did, indeed have leave time available to cover his absences. He also argues that the ALJ’s conclusions regarding the appointing authority not establishing the charges by a preponderance of the evidence was correct and should be affirmed.

After its *de novo* review of the record in this matter, the Commission agrees that removal is not appropriate. However, for the reasons below, it finds that the appropriate penalty in this matter is a 15 working day suspension.

In her initial decision, the ALJ rejected that the appellant violated NSP.PSM 3.005. However, the Commission disagrees. Based on the specifications in the Final Notice of Disciplinary Action as well as the testimony at the hearing, it is clear that the appellant was on notice that one of the allegations against him was that he failed to follow the call-in procedure. Further, the ALJ did not explicitly indicate that the appellant’s supervisor’s testimony was not credible. Rather, she found that he did not “deny that Abrams called in but denied that Abrams called him.” However, the appellant did not indicate speaking with anyone but his supervisor. The ALJ also substantially relied on the fact that the appellant did, indeed, have sufficient leave time to cover his absences. However, absent other evidence, it cannot be concluded that the appellant properly called in. Accordingly, he would be considered in violation of NSP.PSM 3.005. Nevertheless, given the circumstances, a penalty far less severe than removal is warranted.

In determining the proper penalty, the Commission’s review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). In assessing the penalty in relation to the employee’s conduct, it is important to emphasize that the nature of the offense must be balanced against mitigating circumstances, including any prior disciplinary history. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual’s disciplinary history. *See Henry v. Rahway State Prison*, 81 N.J. 571 (1980). It is settled that the theory of progressive discipline is not a “fixed and immutable rule to be followed without question.” Rather, it is recognized that some

disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. See *Carter v. Bordentown*, 191 N.J. 474 (2007).

While the appellant does have an extensive prior disciplinary history regarding attendance-related infractions, several mitigating factors require a penalty far short of removal. First, the appellant was not guilty of the charge that he did not have sufficient leave balances to cover his absences as he did have such time.¹ Further, while the appellant violated NSP.PSM 3.005, this infraction was clearly not egregious. Finally, the circumstances surrounding his absences were emergent in nature, and while that does not excuse his violation of NSP.PSM 3.005, it certainly bears upon the severity of the penalty. Accordingly, given the above, the Commission finds that a 15 working day suspension is an appropriate penalty. This penalty should impress upon the appellant that further such infractions will not be tolerated and could lead to more severe disciplinary penalties, up to and including removal.

Since the removal has been modified, the appellant is entitled to mitigated back pay, benefits and seniority pursuant to *N.J.A.C.* 4A:2-2.10 from 15 working days after his initial removal date to the date of actual reinstatement. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), an 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. Mar. 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 this case, the Commission dismissed some of the charges against the appellant, but it has sustained a charge and imposed major discipline. Therefore, 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.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. In the interim, as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

¹ Indeed, the appointing authority withdrew this charge.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore modifies the removal to a 15 working suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority as specified above. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending any dispute as to the amount of back pay.

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

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 19TH DAY OF MAY, 2021



Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Allison Chris 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 00725-18

AGENCY DKT. NO. 2018-1874

**IN THE MATTER OF SHERMAN
ABRAMS, NORTHERN STATE PRISON,
DEPARTMENT OF CORRECTIONS,**

Arnold S. Cohen, Esq. on behalf of appellant (Law Offices of Oxfeld Cohen,
attorneys)

Sean Havern, Esq., on behalf of respondent, (Gurbir Grewal Attorney General,
attorneys)

BEFORE KIMBERLY A. MOSS, ALJ:

Record Closed: April 1, 2021

Decided: April 13, 2021

STATEMENT OF THE CASE

Appellant, Sherman Abrams (Abrams), appeals his removal by respondent, Northern State Prison Department of Corrections (NSP), on charges of chronic or excessive absenteeism or lateness. At issue is whether Abrams engaged in the alleged conduct, and, if so, whether it constitutes chronic or excessive absenteeism that warrants removal.

PROCEDURAL HISTORY

On November 23, 2017, NSP served Abrams with a Preliminary Notice of Disciplinary Action. NSP served Abrams with a Final Notice of Disciplinary Action dated December 19, 2017, sustaining charges of chronic or excessive absenteeism or lateness. Following Abrams's appeal to the Civil Service Commission the matter was transmitted to Office of Administrative Law (OAL). The appeal was filed with the OAL on January 16, 2018. A hearing was held on April 17, 2019. The parties informed me that they were attempting to resolve this matter as part of a global resolution with other matters of Abrams. On September 8, 2020, the parties informed me that they could not reach a global resolution of Abrams cases. At that time respondent advised that they were not pursuing the charge of against Abrams of taking leave without sufficient leave time. The parties submitted closing briefs on April 1, 2021, at which time I closed the record.

FACTUAL DISCUSSION

I **FIND** the following stipulated **FACTS**:

Abrams was hired on December 31, 2012 by the Department of Corrections as an operating engineer repairer. Anthony Del Valle was Abrams supervisor at all times alleged in the Final Notice of Disciplinary Action (FNDA). Abrams has the following disciplines:

1. March 17, 2016, official reprimand for calling out of work when he did not have any time left.
2. December 12, 2016, official reprimand for unauthorized call off.
3. January 30, 2017, three-day suspension for unauthorized call off.
4. February 19, 2017, five-day suspension for unauthorized call off.
5. March 6, 2017, fifteen-day suspension for unauthorized call off.

TESTIMONY

Nikiva Harris

Nikivia Harris (Harris) works for the DOC as a Personnel Assistant One in Human Resources. Her position covers East Jersey State Prison, Northern State Prison (NSP) and the Adult Diagnostic and Treatment Center. She knows the policies and procedures of the DOC. The time and attendance policy of DOC states that good attendance is imperative. The DOC requires regular and timely attendance from all employees and compliance with call off procedures. Administrative leave time, vacation time, compensatory time and sick leave must be approved by the supervisor in advance. NSP has a sick leave and attendance policy.

Harris knows that Abrams was an employee of NSP. The FNDA charged him with chronic excessive absenteeism for October 31, 2017, November 1, 2017 and November 2, 2017. Harris believed that Abrams did not have enough sick time to cover the absences. Harris does not know Abrams outside of work.

If an employee calls out who does not have the time to cover the time off, the time is called intermittent unauthorized time. Harris does not know the amount of available time Abrams had as of October 31, 2017 or November 2017.

The working day at NSP is eight hours for Abrams. In 2017 Abrams used eighty-six sick hours and sixty-two vacation hours.

Anthony DeValle

Anthony DeValle (DeValle) is the chief operating engineer in the powerhouse department of NSP. Employees at the powerhouse are essential because someone must always be on site at the powerhouse. If an engineer is not at his post it could be catastrophic. There could be a leak of toxic materials or an explosion at the powerhouse.

of vacation time, on October 21, 2017, Abrams used eight hours of vacation time. On September 22, 2017, Abrams used eight hours of vacation time and on September 23, 2017, Abrams used eight hours of vacation time.

FINDINGS OF FACT

Having reviewed the testimony and evidence, I make the following findings of **FACT:**

On September 9, 2020, respondent sent a letter stating:

“On September 8, 2020, during a phone conference this office notified the court that the discipline charge based on lack of sufficient leave time would no longer be pursued by the Department of Corrections. A previous error was discovered, and it was determined that Mr. Abrams did in fact have leave time available. The Department will move forward concerning Mr. Abrams alleged failure to follow call out procedures. The charge still qualifies as an A-1 violation under the Department’s disciplinary policy, HRB 84-17.”

Abrams testified that he called DeValle to inform him that Abrams would be out on October 31, 2017, November 1, 2017 and November 2, 2017. DeValle stated that he did not receive the calls. DeValle did not deny that Abrams called in but denied that Abrams called him. DeValle stated the procedure for calling off is for the employee to call the call center.

Administrative leave time, vacation time, compensatory time and sick leave must be approved by the supervisor in advance. NSP has a sick leave and attendance policy. A direct supervisor gives approval for time off.

The employee time and attendance policy of NSP Internal management procedure # P.C.S.E.A. 001 under procedures for requesting time off states:

Directors are responsible for establishing absenteeism guidelines. A call-in procedure should be written and communicated to all employees. In accordance with the Human Resources Employee Handbook, requests to take administrative leave time (Except in an emergency) vacation time, compensatory time, and sick time must be approved in advance.

DelValle was Abrams supervisor. Abrams father has Alzheimer's disease. When Abrams called out it would be because of Abrams father. DelValle tried to help him but the situation became unbearable. There is always one engineer on duty . If someone calls out, the person on duty must stay until coverage is found. He gave Abrams the attendance and sick leave policy.

DelValle did not speak to Abrams on October 31, 2017, November 1, 2017 or November 2, 2017. Abrams called someone but not him. When calling off the employee has to call center control. He does not recall discussing comp time instead of overtime with Abrams. Employees cannot call off and use a vacation day. Employees can only call off using sick days or administrative leave days. Comp time is treated like vacation time.

Sherman Abrams

Abrams was hired by the DOC on December 31, 2012, as an operating engineer repair. Abrams took off October 31, 2017, November 1, 2017 and November 2, 2017 because his father was sick, and he could not leave him. Usually Abrams' wife takes care of his father, but she could not on these days. Abrams called DelValle stating that he needed time off, either vacation or comp time. DelValle told him that he had time. Abrams wanted use emergency vacation time or comp time. Emergency vacation time is when you cannot come in. Comp time is when you have worked overtime and can be compensated with hours of time off in lieu of actual pay. Abrams had comp time on October 31, 2017. He believed that he could use comp time and DelValle authorized his use of comp time.

Abrams states that he has an abundance of comp time. He did not know that he was listed as taking unauthorized time off on October 31, 2017, November 1, 2017, and November 2, 2017.

DelValle had denied vacation time to Abrams prior to October 27, 2017. He did not ever authorize comp time for Abrams. On October 17, 2017, Abrams used six hours

Supervisors have the responsibility to ensure that scheduled time off is reasonably coordinated to maintain optimal effectiveness.

An NSP policy stated that no one could call off any time except sick time.

On the days in question, Abrams could not get anyone to care for his father. Abrams father has Alzheimer's disease and cannot be let unattended. Abrams wife usually stays with his father, but she could not on the days in question. Harris did not know why Abrams absences of October 31, 2017, November 1, 2017, and November 2, 2017, were marked as unauthorized absences.

Abrams did have available compensation time to cover the days in question.

LEGAL ANALYSIS AND CONCLUSION

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the charges of chronic or excessive absenteeism is **NOT SUSTAINED**.

The purpose of the Civil Service Act is to remove public employment from political control, partisanship, and personal favoritism, as well as to maintain stability and continuity. Connors v. Bayonne, 36 N.J. Super. 390 (App. Div.), certif. denied, 19 N.J. 362 (1955). The appointing authority has the burden of proof in major disciplinary actions. N.J.A.C. 4A:2-1.4. The standard is by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962). Major discipline includes removal or fine or suspension for more than five working days. N.J.A.C. 4A:2-2.2. Employees may be disciplined for insubordination, neglect of duty, conduct unbecoming a public employee, and other sufficient cause, among other things. N.J.A.C. 4A:2-2.3. An employee may be removed for egregious conduct without regard to progressive discipline. In re Carter, 191 N.J. 474 (2007). Otherwise, progressive discipline would apply. W. New York v. Bock, 38 N.J. 500 (1962).

Hearings at the OAL are de novo. Ensslin v. Twp. of N. Bergen, 275 N.J. Super. 352 (App. Div. 1994), certif. denied, 142 N.J. 446 (1995).

Conduct that occurs over a period of time, or frequently recurs, is considered "chronic," and may be the basis of discipline or dismissal. N.J.A.C. 4A:2-2.3(a)(4). "Just cause for dismissal can be found in habitual tardiness or similar chronic conduct." West New York v. Bock, 38 N.J. 500, 522 (1962). While a single instance may not be sufficient, "numerous occurrences over a reasonably short space of time, even though sporadic, may evidence an attitude of indifference amounting to neglect of duty." Ibid.

The FNDA lists as the incident giving rise to the charges and dates on which they occurred as

Based on the time and leave reporting system provided by human resources, you called off on 10/31/17, 11/1/17, and 11/2/17. You did not have approved leave on file or sufficient leave balance to cover these days. These dates are unauthorized absence. Your actions violated the sick policy and employee attendance policy.

Respondent argues that this charge includes all attendance related infractions including failure to follow call out procedures. However, the FDNA specifically states that Abrams did call off on the days in question. It does not state that he violated the call out procedure. The conduct that is the subject of the FDNA is calling out without approved leave or sufficient leave to cover the days.

The specification states that Abrams did not have approved leave on file, but he did have unused compensation time on file. Abrams was not charged with the Internal Management Provision NSP.PSM 3.005, no show, no call unexcused absence. He also had an emergency regarding care for his father. There is a provision to use time other than sick time in emergency situations.

Under the circumstances, I **CONCLUDE** that major discipline is not appropriate

ORDER

Based on the foregoing findings of fact and applicable law, it is hereby **ORDERED** that the respondent's action in the removal of appellant is hereby **REVERSED**

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.

April 13, 2021



DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency:

April 13, 2021

Date Mailed to Parties:
ljb

April 13, 2021

WITNESSES

For Petitioner

Sherman Abrams

For Respondent

Nikiva Harris

Anthony DeValle

EXHIBITS

For Appellant

A-1 Statement of Earnings and Deductions for Sherman Abrams
dated February 26, 2018

For Respondent

- R-1 Not in Evidence
- R-2 Final Notice of Disciplinary Action
- R-3 Work History of Sherman Abrams
- R-4 Department of Corrections Human Resources Bulletin 84-17
- R-5 Not in Evidence
- R-6 Not in Evidence
- R-7 Not in Evidence
- R-8 Department of Corrections Internal Management Procedure #PCS.EA.001
- R-9 Department of Corrections Internal Management Procedure #PCS.PSM.3.005
- R-10 Employee Attendance Policy
- R-11 August 2017 Calendar
- R-12 September 2017 Calendar

R-13 October 2017 Calendar

R-14 November 2017 Calendar

R-15 December 2017 Calendar

R-16 Key/Legend of Calendars

R- 17 Balance of Leave Calendar

R-18 Powerhouse Memorandum Regarding Sick Leave/ Attendance

R-19 Not in Evidence