



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Sherman Abrams,
Northern State Prison, Department
of Corrections

CSC Docket No. 2021-1989

Request for Reconsideration

ISSUED: SEPTEMBER 7, 2021 (SLK)

Sherman Abrams, an Operating Engineer Repairer, Northern State Prison, Department of Corrections (DOC), represented by Arnold Shep Cohen, Esq., requests reconsideration of *In the Matter of Sherman Abrams* (CSC, decided May 19, 2021) which imposed a 15 working day suspension.

In his request, the petitioner presents that the Final Notice of Disciplinary Action (FNDA) indicated that the initial charges against him were that he did not have approved leave on file or a sufficient leave balance available to cover the absences on October 31, 2017, November 1, 2017 and November 2, 2017. He presents that on September 9, 2020, the DOC withdrew the charge that he lacked sufficient leave time as it discovered that he did have the leave time available. However, the DOC indicated that it was still moving forward with the alleged failure to follow call-out procedures. Therefore, the petitioner argues he could properly use his accumulated compensation (comp) days to cover the three emergency days. He also asserts that the Civil Service Commission (Commission) erred in disagreeing with the Administrative Law Judge (ALJ) that the days were approved before he used them. The petitioner states that his uncontroverted testimony was that comp days were the only days he had available to cover the three emergency days, it was agreed that they were the only days he had available, he used them, and therefore, they must have been considered approved. Otherwise, he would not have been permitted to use those days. The petitioner presents that although the DOC charged him with failing to use approved time, it was not because he used his accumulated comp days. Rather, the actual charge was not having “approved time on file.”

The petitioner argues that the Commission committed a clear material error when it substituted its credibility findings for those made by the ALJ, which goes against State statutory and case law, unless the record indicates that the ALJ findings were arbitrary, capricious or unreasonable. However, the Commission did not even argue that the ALJ's findings were such and simply substituted its credibility findings for the ALJ's. The petitioner states that in making credibility findings, the ALJ concluded that he did not violate the DOC's call-out procedures. He contends that the ALJ could either have believed him or his supervisor. The petitioner asserts that the Commission based its determination on the erroneous claim that the ALJ allegedly did not explicitly indicate that the testimony of the petitioner's supervisor was not credible. However, he argues that this logic flies in the face of the ALJ's clear findings. First, the ALJ found that the petitioner did not speak about taking off the three days in question with anyone other than his supervisor. Second, the ALJ concluded that his supervisor was not truthful when he denied that the petitioner called him to use his comp days. Third, the ALJ found that the petitioner said that he only spoke to his supervisor. Fourth, after hearing conflicting testimony, the ALJ concluded that the charges were baseless. Fifth, the petitioner contends that the ALJ could not be more explicit conveying that she did not believe the supervisor. Therefore, the ALJ found no violations of DOC policy. He reiterates that the policy required calling his supervisor and the ALJ found that he called his supervisor. The petitioner contends that to rule differently is to make credibility findings to which the Commission has no right to make as the ALJ's findings were not arbitrary, capricious or unreasonable. Moreover, the ALJ found that the petitioner banked accrued comp days to cover the three days in question, which indicates that the ALJ believed the petitioner when he stated that he spoke to his supervisor and he could not have used the days unless his supervisor approved it.

Regarding the Commission's findings, the DOC claimed that the petitioner violated NSP.PSM 3.005 (3.005), which requires that an employee who calls out sick must notify the shift commander at least one hour prior to their scheduled time on duty. Otherwise, they are found to be a no call no show, unexcused absence. The petitioner said that he called the shift commander, his supervisor, and the shift commander disagreed in testimony. Therefore, he argues that the Commission's logic finding that he violated DOC policy was illusory. The petitioner believes that the Commission must have reasoned that the ALJ somehow unknowingly determined that he violated 3.005 although the ALJ recommended dismissing the charges. He presents that the Commission reasoned "absent other evidence, it cannot be concluded that the petitioner properly called in." However, he emphasizes that the ALJ found no basis for supporting the charges.

Concerning the ALJ's reasoning to the contrary, the petitioner presents that the ALJ made a credibility finding that the supervisor knew of the time off request and approved the request. Otherwise, he would not have had sufficient accrued comp time to cover the leave in question and the charges would have been sustained. The

ALJ found that the petitioner's supervisor confirmed that he had the accrued comp time and authorized his use of comp time, which is why the ALJ recommended that the charge of chronic or excessive absenteeism not be sustained. The ALJ found that although the DOC argued that its charges included failure to follow call-out procedures, the ALJ noted that the FNDA specifically states that the petitioner did call off on the days in question and it does not state that he violated call-out procedures. Therefore, the ALJ found that the conduct that is the subject of the FNDA is calling out without approved leave or sufficient leave to cover the days. The petitioner was not charged with violating 3.005 no show, no call, unexcused absence. He also states that he had an emergency regarding care for his father and there is a provision to use time other than sick time in emergency situations.

The petitioner states that the testimony demonstrated that the charges initially focused on him allegedly taking unauthorized sick time when he did not have time available and the ALJ found that he testified truthfully that he had available comp time. However, the petitioner presents that two witnesses disagreed and the ALJ found that they were not truthful in asserting that he did not have available time. Further, the petitioner's supervisor initially claimed that he did not speak with the petitioner before the three days in question were taken. Later, his supervisor said that he checked, which is how he knew that the petitioner lacked the authorized days. Subsequently, his supervisor realized his contradiction, and he tried to rehabilitate himself by asserting that he looked over his record before the petitioner took a vacation a few days earlier. However, this made the story even more unbelievable as the supervisor maintained that the vacation was a few months earlier. The petitioner indicates that his supervisor would not have reviewed his comp time if he had not spoken with him. Additionally, since the petitioner took emergency comp days in the past, he knew the procedure and he would not have taken the days in question if his supervisor had not authorized them. Therefore, the petitioner argues that the ALJ correctly determined that the DOC did not meet its burden of proof, and recommended that no discipline should be imposed.

The petitioner presents that while the DOC argued that its charge includes all attendance-related infractions including failure to follow call-out procedures, the FNDA specifically states that the petitioner did call-out on the day in question and does not state that he violated call-out procedures. Therefore, the petitioner asserts that the conduct that is the subject of the FNDA is calling out without approved leave or sufficient leave to cover the days. He reiterates that the FNDA does not state that he was charged with violating policy 3.005. The petitioner contends that it was intellectually dishonest for the Commission to rule that the ALJ did not make a credibility determination as to the leave approval. The petitioner believes that the ALJ's recommendation must be adopted, the charges must be dismissed, and he must be made whole, including being awarded back pay, seniority, counsel fees and all emoluments of employment.

In response, the DOC, represented by Sean P. Havern, DAG, states that the FNDA that was issued to the petitioner included charges that encompassed all attendance-related infractions, including failure to follow call-out procedures. The DOC argues that the petitioner failed to meet the standard for reconsideration as the Commission's decision does not contain any clear material error. The Commission found that the petitioner was charged with violating the call-out policy as the record demonstrated that he did not properly call into the center keeper as required by policy, which warranted discipline. It asserts that the Commission correctly identified and remedied the unsupported finding that the petitioner was not charged with violating the call-out policy. The DOC indicates that the Commission relied on both the FNDA and testimony to indicate that this was part of the charges against the petitioner. The DOC presents that the FNDA stated "Your actions violated the sick policy and employee attendance policy." It presents that these policies explicitly include call-out procedures that must be followed by employees. There was no basis for the ALJ finding that the petitioner was not charged with violating the call-out policy and the Commission properly rejected this conclusion.

The DOC states that its policies are clear that when a power house employee wishes to call-out, they must call the center keeper, not their supervisor. It presents that the petitioner testified that he only spoke with his supervisor regarding the days in question. Therefore, the DOC asserts that by the petitioner's own admission, he did not follow the call-out procedure. It indicates that the petitioner argues that he was only required to call his supervisor when attempting to use sick time. However, this is incorrect as policy 3.005 and a September 26, 2016, memorandum sent to all power house employees wishing to use sick time, directed employees to call the center keeper prior to their shift start. However, the petitioner did not testify that he called the center keeper and, therefore, he violated the policy. While the DOC disagrees that the ALJ found that the petitioner's supervisor not credible and the petitioner credible, even if true, it argues that this does not demonstrate that the petitioner followed call-out procedures. Further, it contends that even if everything the petitioner says is true, he still violated the call-out policy by not calling the center keeper.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) provides that a petition for reconsideration shall be in writing signed by the petitioner or his or her representative and must show the following:

1. The new evidence or additional information not presented at the original proceeding, which would change the outcome and the reasons that such evidence was not presented at the original proceeding; or
2. That a clear material error has occurred.

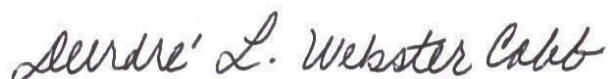
In this matter, the record indicates that the petitioner was served a FNDA which indicated that “Your actions violated the sick policy and employee attendance policy.” Further, a review of the ALJ’s Initial Decision indicates that the DOC submitted a September 9, 2020, letter acknowledging a previous error was discovered and the petitioner did have leave time available. However, the letter stated that the DOC was moving forward concerning the petitioner’s failure to follow call-out procedures. Additionally, the record indicates that the DOC testified during the hearing that the petitioner violated internal policy 3.005, which required the petitioner to call the center keeper for his call-outs on the days in question. Therefore, although the ALJ concluded that the petitioner was not charged with violating policy 3.005, the record indicates that based on the FNDA, the DOC’s September 9, 2020, and testimony during the hearing, the petitioner had sufficient notice that he was charged with violating this policy. See *In the Matter of Alex Navas*, Docket No. A-4786-18 (App. Div. April 19, 2021). Therefore, the Commission’s finding that the petitioner was charged with violating policy 3.005 was not the Commission substituting its own credibility findings for those made by the ALJ as the petitioner argues, as this determination was not based on the credibility of the witnesses, but based on the notice as provided in the record. Further, the record indicates that the petitioner did not indicate that he spoke with anyone but his supervisor. However, the record indicates that the call-out procedures required the petitioner to call the center keeper. Therefore, as there is nothing in the record that indicates that the petitioner called the center keeper for the days in question, as indicated in the prior decision, “absent other evidence, it cannot be concluded that the petitioner properly called in.” Accordingly, there is no basis to indicate that the Commission made a clear material error in its decision and the request for reconsideration is, therefore, properly denied.

ORDER

Therefore, it is ordered that this request 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 1ST DAY OF SEPTEMBER, 2021



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