



STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of Jerome Simmons,
Bergen County, Department of
Human Services

CSC DKT. NO. 2022-1848
OAL DKT. NO. CSV 01528-22

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ISSUED: OCTOBER 12, 2022

The appeal of Jerome Simmons, Senior Youth Aide, Bergen County, Department of Human Services, removal, effective January 24, 2022, on charges was heard by Administrative Law Judge Gail M. Cookson (ALJ), who rendered his initial decision on August 25, 2022. No exceptions were filed.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of October 12, 2022, remanded the matter to the Office of Administrative Law (OAL).

Upon reviewing this matter, the Commission has concerns regarding its procedural disposition. Specifically, it seeks to ensure that the appellant was afforded his full procedural due process at the underlying hearing as the initial decision is devoid of any defense presented. The Commission wants to confirm that the appellant was afforded the full opportunity to present any witnesses or other evidence in his defense against the charges. Accordingly, the Commission remands the matter to the OAL to have the ALJ more explicitly lay out the procedural disposition of the case to include any indications that the appellant was afforded his full opportunities to cross-examine any appointing authority witness and present any witnesses or evidence in his defense. Assuming such opportunities were provided, no further hearing proceedings are required. However, should the ALJ finds that the appellant was not provided such opportunities, she should reopen the hearing to afford such opportunities as necessary. Finally, in her subsequent initial decision, along with the above, the ALJ may expand on any of the testimony or evidence already in the record if she deems it necessary.

ORDER

The Civil Service Commission remands the matter to the Office of Administrative Law as directed above.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 12TH DAY OF OCTOBER, 2022

Deirdre' L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
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 01528-22

AGENCY REF. NO. 2022-1848

**IN THE MATTER OF JEROME SIMMONS,
COUNTY OF BERGEN, DEPARTMENT OF
HUMAN SERVICES.**

Matthew Rocco, Esq., for appellant Jerome Simmons (Rothman, Rocco & Laruffa,
attorneys)

Eric M. Bernstein, Esq., for respondent County of Bergen (Eric M. Bernstein &
Associates, attorneys)

Record Closed: August 10, 2022

Decided: August 25, 2022

BEFORE **GAIL M. COOKSON, ALJ**:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Jerome Simmons (Simmons or appellant) appeals from the decision of the County of Bergen, Department of Human Services (County or respondent), to terminate his employment as a Senior Juvenile Detention Officer, with a civil service title of Senior Youth Aide, on charges of failure to perform his duties in violation of N.J.A.C. 4A:2-2.3(a)(1), chronic or excessive absenteeism 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)(11). By Preliminary Notice of Disciplinary Action dated November 1, 2021, respondent advised appellant of the

charges. Appellant requested a departmental hearing which was held on November 30, 2021. By Final Notice of Disciplinary Action dated January 24, 2022, appellant was terminated from his position effective that same date.

Appellant filed a timely request for a hearing February 4, 2022. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on February 23, 2022, for hearing 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 plenary hearing was held on June 8, 2022, with opening statements of counsel and testimony from two witnesses for the respondent. I allowed a period of time for the parties to discuss a possible resolution of the matter. When that proved unsuccessful, I set a post-hearing briefing date of August 10, 2022. The County filed its submission; appellant opted not to file one. The record closed on that date and the matter is now ripe for decision.

FACTUAL DISCUSSION

Based upon due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

Nicholas Montiello, Ph.D., testified that he works for the County as the Division Director of the Division of Family Guidance. The Bergen County Juvenile Detention Center (Center), which employed appellant, falls under the supervision of the Division of Family Guidance and operates three hundred and sixty-five (365) days per year, seven (7) days per week, twenty-four (24) hours per day. Appellant was a Senior Juvenile Detention Officer and was assigned to the overnight shift in a supervisory position. His shift was from 11:30 p.m. to 7:00 a.m. and he worked five (5) shifts per week. He was scheduled to be off on Friday and Saturday of each week.

Montiello described that a county employee in appellant's position accrues sick days at a rate of one and one quarter (1¼) days per month or fifteen (15) sick days annually. He further testified that appellant had a history of attendance problems, which the County had tried to resolve on numerous occasions. Montiello set forth that, in

2019, appellant used ten (10) more sick days than were listed on the PNDA because it covered less than a full year, for a total of thirty-nine (39) sick days. He also stated that, in 2020, when the Covid-19 pandemic impacted the County (and the entire world), appellant qualified for a leave with pay because of his age and a (unknown) medical condition. He was on leave from his position for six (6) months. Nevertheless, in spite of Covid leave with pay and without having to use one's own sick leave, Simmons still had an additional twenty-one (21) absences for sick days. Montiello also testified that appellant had eight (8) additional absences beyond his accrued leave in 2021, which is to say he was taking sick time without pay.

Montiello explained that appellant's excessive absences caused a hardship for the County and the Center. The Center requires an adequate number of staff with appropriate supervision to operate properly. Thus, the Center had to require other employees to work overtime to cover appellant's absences. This resulted in an increase in regular and overtime pay with a corresponding impact on the Center's budget. There was also an unfairness or morale factor as employees would "get stuck" covering for his absences.

Respondent then called Ellen Busted as a witness. Busted testified that she is the Director of Personnel for the County and has held that position since January 1, 2021. Prior to that time, she served as the Assistant Director of Personnel and Benefits Coordinator for seven (7) years. Busted testified that she oversees all employee benefits including payroll, on-boarding all new employees, as well as discipline. She testified that appellant is over sixty (60) years old and purportedly has underlying medical conditions. Busted then identified the prior disciplinary action against appellant for excessive absences.

There was no cross-examination of Busted.

ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to

public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). Governmental employers also have delineated rights and obligations. The Act sets forth that it is State policy to provide appropriate appointment, supervisory, and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

Nevertheless, "[t]here is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). 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. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against him and, if so, the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). In this matter, the County bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

For evidence to be credible it must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). 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) (citation omitted). 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). Credibility, or, more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in

itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954).

I **CONCLUDE** that the County has clearly proven chronic or excessive absenteeism, in violation of N.J.A.C. 4A:2-2.3(a)(4). Courts have consistently held that excessive absenteeism need not be accommodated, and that attendance is an essential function of most jobs. See, e.g., Muller v. Exxon Research and Eng'g Co., 345 N.J. Super. 595, 605-06 (App. Div. 2001); Svarnas v. AT&T Communications, 326 N.J. Super. 59, 78 (App. Div. 1999) ("An employee who does not come to work cannot perform any of her job functions, essential or otherwise.").

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 workplace. LaBerth v. Hunterdon Developmental Center, 2019 N.J. CSC LEXIS 1046, *29 Initial Decision (August 21, 2019) <http://lawlibrary.rutgers.edu/oal/search.html> As the Honorable David Fritch, A.L.J., cited in LaBerth, 2019 N.J. CSC LEXIS 1046, *27-28:

After reasonable consideration is given to an employee by an appointing authority, the employer is left with a serious personnel problem, and a point is reached where the absenteeism must be weighed against the public right to efficient and economic service. An employer is entitled to be free of excessive disruption and inefficiency due to an inordinate amount of employee absence.

[Terrell v. Newark Housing Authority, 92 N.J.A.R.2d (CSV) 750, 752.]

As cited by respondent in its submission, King v. Cumberland County, 97 N.J.A.R.2d (CSV) 664 (1997), is a case that has very similar circumstances to within matter. There, appellant was disciplined for being late twenty-five (25) times in 1995 from her position as a juvenile detention officer. Thereafter, she was again reprimanded for reporting off sick after her regularly accrued sick leave had been exhausted. When appellant continued to call out sick, she was terminated. In King, the ALJ found that the testimony established appellant's continued abuse of sick time and chronic lateness, and that it had caused morale problems at the Detention Center.

In the within matter, I have found that the respondent has established, without contradiction, and based on the preponderance of credible and documentary evidence, that in the ten (10) months preceding the issuance of these charges, appellant was absent on sick leave for sixty-eight (68) days, or fifty-three (53) days of unpaid time over the maximum fifteen (15) days accrued for that year. In addition, Simmons was given warnings for excessive use of sick time in each of the five (5) years preceding the disciplinary proceedings resulting in this appeal and had been disciplined three (3) prior times for the same offense, including a recent major. Thus, I **CONCLUDE** that his attendance over the last several years shows a clear pattern of excessive and chronic absenteeism. Such use of time clearly constitutes excessive use of sick time, and under N.J.A.C. 4A:2-2.3(a)(4). Insofar as the failure to show up to work is plainly a neglect of work and one's duties, I do not find it necessary to consider the other duplicative charges in the FNDA.

Having concluded that these excessive absences have been proven by the preponderance of the credible – in fact, undisputed -- evidence, I must determine the proper penalty or discipline to be assessed. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is the appropriate analysis for determining the reasonableness of the penalty. See Bock, supra, 38 N.J. at 523-24. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of the concept of progressive discipline is the nature, number and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential. In addition to considering an employee's prior disciplinary history when imposing a penalty under the Act, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Ibid. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline

may include removal, disciplinary demotion, a suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

In this case, I **CONCLUDE** that appellant's excessive absenteeism has resulted in fifteen (15) disciplinary warnings, two (2) minor disciplinary actions and a major discipline, which have failed to correct his pattern of chronic and excessive time usage. Moreover, his failure to show up is a financial burden on the respondent and an unfair burden on his colleagues. Accordingly, I **CONCLUDE** that appellant's termination by the County must be affirmed.

ORDER

Accordingly, it is **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action of the County of Bergen against appellant Jerome Simmons terminating his employment is hereby **AFFIRMED**.

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, P.O. 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.



August 25, 2022

DATE

GAIL M. COOKSON, ALJ

Date Received at Agency:

8/25/22

Date Mailed to Parties:

8/25/22

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APPENDIX

LIST OF WITNESSES

For Appellant:

None.

For Respondent:

Nicholas Montello

Ellen Busteed

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

None.

For Respondent:

- C-1 Final Notice of Disciplinary Action, dated January 24, 2022
- C-2 Preliminary Notice of Disciplinary Action, dated November 1, 2021
- C-3 Final Notice of Disciplinary Action, dated May 3, 2021
- C-4 Simmons Absence Record, calendar year 2019
- C-5 Simmons Attendance Record, calendar year 2020
- C-6 Simmons Attendance Record, calendar year 2021
- C-7 Memoranda and Written Warnings re Attendance, various dates
- C-8 Notice of Minor Disciplinary Action, dated April 3, 2019
- C-9 Notice of Minor Disciplinary Action, dated June 28, 2018