STATE OF NEW JERSEY

In the Matter of Miosha Sorey,
Newark School District

CSC DKT. NO. 2019-1886
OAL DKT. NO. CSV 01522-19

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MARCH 15, 2023 (EG)

The appeal of Miosha Sorey, a Security Guard with the Newark School District, removal, effective January 7, 2019, on charges, was heard by Administrative Law Judge Andrew M. Baron, who rendered his initial decision on February 13, 2023. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, including a thorough review of the exceptions and reply, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of March 15, 2023, adopted the recommendation as contained in the attached ALJ's initial decision.

As indicated above, the Commission thoroughly reviewed the exceptions filed in this matter. The Commission makes the following comments. In her exceptions, the appellant argues that the warnings issued by the appointing authority in 2017/18 and 2018/19 for the appellant's infractions were, in fact, disciplinary actions. In this regard, she contends that she cannot now be disciplined again for those same infractions. In reviewing the warnings, the Commission agrees that many of the warning letters were disciplinary in nature. Specifically, many of the "warnings" stated that continued misconduct "will result in more harsh disciplinary action being taken . . . ." Clearly, such letters are not merely non-disciplinary warnings and constitute official written reprimands. The Commission has addressed this matter before with the appointing authority in *In the Matter of Victor Onwuzuruike* (MSB, decided August 9, 2006) and *In the Matter of Billy Grimsley* (MSB, decided June 25, 2008) and warned the appointing authority to amend its practice regarding such letters in the future. The Commission has no issue with the appointing authority

issuing warning letters. However, these letters must be worded properly to clearly indicate that they are not discipline. Accordingly, the Commission finds that incidents covered in the warning letters up to September 27, 2018, which covered incidents up to August 27, 2018, cannot be considered in the present removal matter as they were already addressed as discipline in the "warning" letters. However, the October 25, 2018, letter to the appellant was not a disciplinary action. This letter addresses additional incidents of tardiness after August 27, 2018, and specifically indicates that the matter is being *forwarded* for disciplinary action. Therefore, these incidents were properly brought forth in the present matter.

The appellant also argues that the Last Chance Agreement (LCA) was not violated in the instant matter as the discipline was not brought forth within the two-year time frame specified in the agreement. She contends that the agreement was finalized on December 7, 2016, and that the Final Notice of Disciplinary Action (FNDA) was not issued until December 26, 2018. The Commission does not agree with this contention. A review of the LCA it indicates that the appellant is "subject to immediate termination by Respondent for incurring in excess of the following enumerated infractions over the next 24 months after her reinstatement back to duty. . . . ." Therefore, it is clear that the infractions had to *occur* over the next 24 months and they were not dependent on when discipline was sought. The incidents in question all occurred prior to two years from the appellant's reinstatement following the finalization of the agreement on December 7, 2016. Accordingly, pursuant to the appellant's violation of the LCA, she was properly terminated from employment. Regardless, even if the LCA had not been violated, the Commission notes that given the current infractions, as well as the appellant's prior disciplinary history, which includes a six-month suspension for attendance-related infractions, removal from employment is clearly warranted under the tenets of progressive discipline. This penalty neither shocks the conscious nor is disproportionate to the offense in light of the appellant's prior history.

Finally, the appellant contends that the ALJ used the wrong standard of review when he found that the "district did not act in an arbitrary and capricious manner." While the appellant's argument is technically correct, it is of no moment to the outcome of this matter. Disciplinary appeal hearings at the Office of Administrative Law are *de novo*. In other words, any underlying proceedings are of no consequence and an ALJ is charged as the Commission's fact-finder. The ALJ's role is not to serve as an "appellate" reviewer of an appointing authority's actions. Rather, the ALJ must determine, based on the evidence entered into the hearing record, whether the appointing authority has established by a preponderance of the evidence that the proffered charges were sustained, and if so, the appropriate penalty to be assessed. In this matter, while the ALJ should not have used the above language, he made numerous factual findings based on the evidence entered into the hearing record before him. More significantly, the Commission's review of both the charges and the penalty after an ALJ has issued an initial decision is also *de novo*, subject only to certain limitations (*e.g.*, standards to overturn an ALJ's credibility

determinations, *etc.*). In that regard, the Commission finds that the ALJ's findings regarding the evidence in the record clearly establishes that the appellant was guilty of the infractions noted above by a preponderance of the evidence, and that removal was the proper penalty under the circumstances. The ALJ is cautioned that, in the future, not to utilize the above-noted standard of review in any manner for disciplinary appeal cases.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeals of Miosha Sorey.

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 15TH DAY OF MARCH, 2023

Allison Chris Myers

Allison Chris Myers
Acting 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 01522-19
CSC DKT. NO. 2019-1886

IN THE MATTER OF MIOSHA SOREY,
NEWARK PUBLIC SCHOOL DISTRICT.

Arnold S. Cohen, Esq., for Petitioner, Moisha Sorey (Oxfeld Cohen., attorneys)

Bernard Mercado, Esq., for Respondent Newark Public School District (Office of General Counsel, attorneys)

Record Closed: August 12, 2022 Decided: February 13, 2023

BEFORE **ANDREW M. BARON**, ALJ

STATEMENT OF THE CASE

Petitioner appeals a decision by Respondent, Newark Public School District (Respondent or the District), removing her from a position as a school security guard due to chronic lateness, excessive absenteeism neglect of duty and other sufficient cause in violation of a previously entered into Last Chance Agreement.

PROCEDURAL HISTORY

Petitioner was employed by Newark School as a school security guard. Due to a prior history of excessive absenteeism and tardiness, she was offered and entered into a Last Chance Agreement in connection with her conduct during the 2016-17 school year under which she agreed to limit her late arrivals to seven, and her absences to fifteen.

During the 2017-18 and part of the 2018-19 school year, her pattern of conduct in these areas continued, and she was accused of being late to work approximately fifty-nine times (59), and missing work entirely twenty-three (23) times.

As a result, petitioner was terminated from her position with the District, and, this appeal was filed, and the matter was transmitted to the Office of Administrative Law as a contested proceeding.

DISCUSSION OF UNDISPUTED FACTS

Petitioner was employed as a school security guard for the Newark School District for several years and was a member of a union, local 617 SEIU, whose purpose among other things was to represent and look out for the interest of its members who become involved in employment dispute. She started as a provisional employee in 1993, and became a permanent employee in 1997. As such, and with a history of several prior offenses, many of which involved attendance infractions, petitioner cannot argue that she was unfamiliar with District policies involving attendance and lateness for work.

Though she does not dispute most of the facts, petitioner argues that under a system of progressive discipline which has long been the norm of the Civil Service System, termination from her position in this case was an excessive and harsh penalty that was not consistent with the offense she was charged with.

The District presented three witnesses, each of whom testified to the reasons why the decision to terminate Ms. Sorey was justified.

The first witness, Ms. Mamie Oei-Eonsue, outlined the duties of security guards in the Newark schools. Among other things, at all times guards are to secure their posts, make sure that student and staff locations are properly monitored and notify school personnel if any unusual situations are going on for the safety and protection of the entire school community.

She went on to describe the District's use of the "Chonos" system, which is used for tracking attendance, absences and lateness of school personnel, and she further described the levels at which personnel receive warnings for excessive lateness and tardiness, leading all the way up to the commencement of disciplinary action, if it progresses to a higher level.

She further testified to at least fifty-nine (59) incidents of tardiness and absenteeism on Ms Sorey's part during a two-year period, and in her opinion, after being given a final chance to remain a District employee, Ms. Sorey clearly violated her Last Chance Agreement. Ms. Oei-Eonsue confirmed that at first the time Ms. Sorey was out for a legitimate Worker's Compensation claim was not counted against her, but when she failed to return at the designated day and time after receiving medical clearance, the District had to continue counting several days of unexcused absences.

Xiomara Alvarez testified in her capacity as associate labor counsel for the Newark School District Office of Employee Relations. She first confirmed that employees who are out of work due to FMLA or a Worker's Compensation claim do not have those days counted against them. In fact, when it became clear that Ms. Sorey's attendance and tardiness was becoming an issue again, she reached out to other school officials to make sure none of the medically excused days were counted against her.

Ultimately, she was able to confirm the number of unexcused days of lateness absenteeism and early departures were in her words, "egregious and excessive", as Ms. Sorey was only permitted fifteen (15) days under Last Chance Agreement that petitioner previously signed due to prior discipline for the same type of violations.

Ms. Alvarez said she was unaware of any formal grievance being filed on behalf of Ms. Sorey but admitted that it is possible she was unaware of the filing, since a central system for tracking grievances was only put in place after Ms. Sorey's termination.

The next witness was Cassandra Wright, who at the time served as an Investigator with the Office of Risk Management.

Ms. Wright's duties and responsibilities were to oversee Worker's Compensation claims, and make sure employees had the necessary medical paperwork when going out on leave, as well as receiving proper medical clearance to return.

She too explained and relied on the "Chronos" tracking system and was able to confirm that in her opinion Ms. Sorey's lateness and absences, especially after signing a Last Chance Agreement were excessive. Ms. Wright further confirmed that despite the District arranging for Ms. Sorey to go on moderate duty after she was medically cleared to return, on her own, Ms. Sorey elected to stay out of work unexcused for at least another month beyond the time the doctor had medically cleared her to return. As such, Ms. Wright indicated that Ms. Sorey used several more days that she did not have and was not entitled to take.

Testifying on behalf of Ms. Sorey, union representative Larry Harroll indicated that he was of the belief a formal grievance had been filed, seeking among other things to have Ms. Sorey transferred back to her original school. Though the union usually attends all grievance related meetings with their members, he indicated he was unaware that Ms. Sorey had been called into meetings without being accompanied by him or one of his colleagues. Mr. Harroll only became involved with Ms. Sorey's case after her termination and had little knowledge of the events leading up to her termination.

Testifying on her own behalf, Ms. Sorey indicated that she was not initially told why she was transferred, but Barringer High School was at least thirty-five minutes away from her home. As a single parent, she admitted to difficulty getting to work on time after the

transfer occurred, as she was solely responsible for getting her child to school, and for being home when they finished their day.

Ms. Sorey admitted that she knew the hours were 8-4 at both locations, and indicated that she need physical therapy for almost a year after she was injured on the job. Even though she was cleared to return to work sooner, Ms. Sorey indicated she stayed out of work for two months, which was more than what medical officials said she needed, because she was still experiencing pain.

Ms. Sorey attributed her tardiness to the traffic on Route 280, and claimed that the reason for her early departures, even though they were often unexcused, was so she could see a specialist.

Ms. Sorey confirmed that she was aware that she had signed a Last Chance Agreement which limited her to a certain number of days absent and late, but she feels she was "singled out" for discipline, unlike other employees who did the same thing she did and were not terminated.

The District presented rebuttal testimony from 10th Avenue Urena School Principal Sandra Marques where Ms. Sorey was previously assigned, and from Office of Security Services Manager Hassan Bullock. Both Ms. Marques and Mr. Bullock confirmed several attendance and tardiness problems with Ms. Sorey prior to her transfer to Barringer, and they denied she was transferred to be replaced by a bilingual security guard.

FINDINGS OF FACT

Based on the testimony, and the evidence provided, set forth below are my **FINDINGS OF FACT:**

1. At all times relevant herein, petitioner Miosha Sorey was employed as a school security guard by the Newark School district.
2. In a large urban school district like Newark, security guards perform a vital role in the daily operation of the school to which they are assigned.

3. Last minute absences and lateness of a security guard can be problematic for the school principal, and difficult to get coverage from someone else.
4. During the 2018-19 school year, after she was transferred to a different school within the district which was further away from her home, Ms. Sorey was late for work approximately twenty-three (23) times, and called in sick in excess of fifteen (15) times, which was more than the maximum amount of days she had previously agreed to in connection with prior discipline, which resulted in the memorialization of a "Last Chance Agreement."
5. Without explanation, prior to the commencement of the 2018-19 school year, Ms. Sorey was transferred from her regular post at the 10th Street School, which was only a ten-minute commute from her home, to a school more than thirty-five (35) minutes away, at Barringer High School. Barringer was a school of 2000-3000 students, whereas her prior assignment had students from kindergarten through third grade.
6. The transfer was a significant inconvenience for Ms. Sorey who as a single parent, was responsible for the care and transportation of a young child. Though Ms. Sorey she felt the transfer was personal, she said the District explained that they needed a bilingual security guard at her former school. The District denies this was the reason for the transfer.
7. Repeated efforts by Ms. Sorey to be transferred back or to a school closer to her home were denied.
8. During the 2017-18 school year, Ms. Sorey was injured on the job, that resulted in her missing several days from work, and for which she filed a Worker's Compensation claim against the District.
9. .The District utilizes a "Chronos" tracking systems for all employee absences, as well as for employees who come to work late or leave early.
10. The "Chronos" system generates letters to District employees, based on a 1-7 rating scale, with a three being least intrusive as a verbal warning, and a seven leading to a formal meeting and disciplinary action.
11. Excused time away from work due to an injury on the job, is not considered excessive absenteeism, unless an employee goes beyond the allowed and approved time away.

12. Prior to the filing of the charges that give rise to this appeal, petitioner was not on an approved leave for Worker's Compensation.
13. Before the District terminated petitioner, there were at least twenty-eight (28) more sick days she had utilized that she was not authorized to take.
14. The maximum number of sick days petitioner had available for 2018-19 was eleven.
15. Petitioner was involved in a "lunchroom brawl" that she tried to stop, and which ultimately led her to seek medical care, take leave under FMLA, and ultimately file a Worker's Compensation claim.
16. She was authorized to return to work on October 10, 2017, but did not return as recommended, and continued to stay home. Initially, she was approved to return on "light duty" but she still failed to return in accordance with the medical doctor's recommendation.
17. One of the excuses Petitioner provided for not returning was she still did not feel she could handle the duties of the job due to her injury, and the times she was given for medical appointments by Concentra conflicted with her work hours.
18. Prior to filing the charges that gave rise to the termination, school officials checked and re-checked to make sure they were not penalizing petitioner for days she was authorized to remain home in connection with the job-related injury she sustained.
19. Some time after she was terminated, Ms. Sorey entered into a settlement agreement under the Worker's Compensation claim for approximately twenty-five thousand dollars.
20. During the 2017-18 and 2018-19 school year, Ms. Sorey's chronic absences and lateness resulted in the issuance of at least seven Attendance Improvement Memorandums.
21. Ultimately, the District concluded that her continued excessive absenteeism and lateness warranted termination from her job. **I FIND**, after considering all of the circumstances, that termination was an appropriate course of action by the District.

LEGAL ANALYSIS AND CONCLUSION

N.J.S.A. 11A:1-1 through 12-6 the "Civil Service Act, established the Civil Service Commission in the Department of Labor and Workforce Development in the executive branch of the New Jersey State government. N.J.S.A. 11A:2-1. The Commission establishes the general causes that constitute grounds for disciplinary action, and the kinds of disciplinary action that may be taken by appointing authorities against permanent career-service employees. N.J.S.A. 11A:2-20. N.J.S.A. 11A:2-6 vests the Commission with the power after a hearing, to render the final administrative decision on appeals concerning removal, suspension or fine, disciplinary demotion, and termination at the end of the working test period, of permanent career service employees.

N.J.A.C. 4A:2-2.2(a) provides that major discipline includes removal, disciplinary demotion and suspension or fine for more than five working days at any one time. An employee may be subject to discipline for reasons enumerated in N.J.A.C. 4A:2-2.3 (a)(2), (3), (6), (7) and (12).

In appeals concerning such major disciplinary actions, the burden of proof is on the appointing authority to establish the truth of the charges by a preponderance of the believable evidence. N.J.A.C. 4A:2-1.4; N.J.S.A. 11A:2-21, See also: Atkinson v. Parkesan, 37 N.J. 143 (1962).

N.J.A.C. 4A:2-2.3 (a)(6) does not define conduct unbecoming. However, the Appellate Division has held that conduct unbecoming a public employee is "any conduct which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services. See: Karins v. Atlantic City, 152 N.J. 532, (1998).

There are a multitude of cases that discuss and uphold the right of a government entity to discharge/terminate an employee pursuant to N.J.A.C. 4A:2-2.2. In re Overton, OAL Dkt. No. 8542-07, 2008 N.J. AGEN. LEXIS 525, Final Decision (April 23, 2008) involved a building maintenance worker who was removed from his position due to being

convicted of driving a township vehicle while under the influence of alcohol, and where the employee had received several accommodations for alcoholism prior to the termination. See also: In re Dakalis, OAL Dkt. No. CSV 6744-07 2008, NJ AGEN. LEXIS 717 Merit System Board Decision (June 11, 2008) and See: In re Griffin-Staples, Dept. of Children & Families, OAL Dkt. No. CSV 8810-07, 2008 N.J. AGEN. LEXIS, 1513 Initial Decision (May 27, 2008), wherein a worker at a residential treatment center was removed for being found to have engaged in inappropriate physical contact with a patient, but since there was no showing that the worker intended to harm the patient, the penalty of removal was determined to be too harsh, and a 60-day suspension imposed instead. See also: Matter of McCall CSV 02729-19 Agency. Ref. No. 2019-1978 (July 21, 2022).

In each of the aforementioned cases discussed above, there was another intervening act, just as there was by Petitioner Sorey, who with knowledge that she already had an excess amount of unexcused absences, tardiness, and early departures from work, she continued to repeat the same pattern of disrespect and neglect of her job.

Based on petitioner' prior work history, which was previously memorialized in a Last Chance Agreement, **I CONCLUDE** that in terminating Ms. Sorey, the District did not act in an arbitrary and capricious manner, as several times before she had incurred discipline from work, both minor and major, which as a veteran employee shows she was familiar with the policy of progressive discipline under the Civil Service law.

I FURTHER CONCLUDE that by incurring several more unexcused absences thereafter, constitutes an intervening act which undermines the District's confidence in her, as well as falling into the category of destroying public respect for other school security guards who had to cover for her when she was often absent, late or left work early.

As such, **I MUST CONCLUDE** that the District has met its burden of justifying the termination of Ms Sorey, that she has already received the benefit of progressive discipline under the Civil Service system, and any discipline in relation to her continued excessive absenteeism and lateness short of termination would not be appropriate.

ORDER

It is hereby **ORDERED** that petitioner's appeal is **DENIED** and the District's decision to terminate her employment is **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 was mailed to the parties, any party may file written exceptions with the **DIRECTOR** recommended decision**, 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.

February 13, 2023
DATE

ANDREW M. BARON, ALJ

Date Received at Agency: February 13, 2023

Date E-Mailed to Parties: February 13, 2023

lr

APPENDIX

WITNESSES

For Petitioner

Miosha Sorey

Larry Howell

For Respondent:

Mamie Osei-Bonsu

Xiomara Alvarez

Cassandra Wright

Sandra Marques

Hassan Bullock

EXHIBITS

For Petitioner:

P-1 Order

P-2 Affidavit

P-3 Worker's Comp Records

For Respondent:

R-1 Notice of Disc. Action 8/26/23

R-2 Notice of Disc. Action 11/4/13

R-3 Notice of Disc. Action 10/28/14

R-4 Final Notice of Civil Service Commission 12/7/16

R-5 Notice of Disciplinary Action 12/28/18

R-6 Attendance Improvement Program Memo

R-7 Second Attendance Improvement Memo

R-8 Third Attendance Improvement Memo 4/17/18

R-9 Fourth Attendance Improvement Memo 6/5/189/14/18

R-10 Fifth Attendance Improvement Memo 9/14/18

R-11 Sixth Attendance Improvement Memo 9/27/18

R-12 Seventh Attendance Improvement Memo 10/25/18

R-13 Kronos Time report 2017-18 school year

R-14 Kronos time exceptions report 2017-18 school year

R-15 Kronos time report 2018-19 school year

R-16 Kronos time exceptions report 2018-19 school year

Joint Exhibits

J-1 7/19/18 email

J-2 Medical transcription

J-3 Physician's activity report