A-5

STATE OF NEW JERSEY

In the Matter of Wilbur George

CSC Docket No. 2014-253
OAL Docket No. CSV 17221-13

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCT 22 2014 (JET)

The appeal of Wilbur George, a Boiler Operator, Jersey City Public School District, of his six working day suspension, on charges, was heard by Administrative Law Judge Sandra Ann Robinson (ALJ), who rendered her initial decision on September 4, 2014. No exceptions were filed by the parties.

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 on October 1, 2014, did not adopt the ALJ's recommendation to modify the six working day suspension to a four working day suspension. Rather, the Commission upheld the six working day suspension.

DISCUSSION

The appellant was suspended for six working days on charges of chronic and/or excessive absenteeism. Specifically, the appointing authority alleged that the appellant was absent for a total of 18.5 days. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case.

In her initial decision, the ALJ found that the appellant's collective bargaining agreement entitled him to fifteen sick days each year and he was absent for a total of 18.5 days from July 1, 2012 through April 30, 2013. Further, the ALJ indicated that the appellant's testimony that he was sick and suffers from a number of medical conditions was not disputed. In Finding of Fact #16, the ALJ found that

the appointing authority did not provide any documentation to confirm that the appellant's absences contributed to budgetary hardships and the issuance of overtime sufficient to demonstrate a negative impact on the appointing authority's operations in this case. Additionally, in Finding of Fact #26, the ALJ determined that the appellant's testimony that he was unaware that he could turn in documentation about his sickness and absenteeism until he spoke to someone on the job was credible and not disputed. However, the ALJ also found that the appellant eventually provided medical documentation in April 2014 indicating that he has been undergoing treatment by his personal physician for his illness since January 2010. Further, the ALJ indicated that the appellant's supervisor's testimony that the appellant failed to contemporaneously provide medical documentation to excuse his absences was not disputed.

Based on the foregoing, the ALJ determined that the appointing authority had sustained the charges against the appellant. Regarding the penalty, while the ALJ concluded the appellant's behavior was "serious," she determined that progressive discipline was not warranted for the appellant's behavior since he was not previously charged with chronic or excessive absenteeism. The ALJ noted that while the appellant violated the terms of the collective bargaining agreement by exceeding the allowable number of sick days, his over 18 years of service, including promotions to higher level titles, was sufficient to mitigate the penalty. Moreover, the ALJ concluded that there was no evidence to show that the appellant's absences disrupted the workplace. Accordingly, the ALJ recommended that the six working day suspension be reduced to a four working day suspension.

Upon independent review of the record, the Commission agrees with the ALJ that the appointing authority sustained the charge of chronic and/or excessive absenteeism. However, the Commission does not agree with the ALJ's determination to modify the six working day suspension to a four working day suspension. Rather, for the reasons discussed below, the Commission finds that the six working day suspension should be upheld.

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 utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock,* 38 *N.J.* 500 (1962). Moreover, 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, 580 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." *See Carter v. Bordentown,* 191 *N.J.* 474 (2007). A review of the appellant's personnel record evidences that he has received prior minor and major disciplinary actions including a 10-day suspension in 2012. Although the 10-day suspension was not for chronic

absenteeism, the Commission can still consider it in determining the proper penalty for the current matter based on progressive discipline. Moreover, the appellant's 10-day suspension occurred less than one year prior to the instant disciplinary action. However, even disregarding the appellant's prior disciplinary history, the appellant continued to use an excessive amount of sick time despite that fact that he received written warnings on September 13, 2012 and January 17, 2013 alerting him of the excessive absences and asking him to improve his attendance.

In the instant matter, the appellant's absences for 18.5 days from July 1, 2012 through April 30, 2013 clearly constitutes chronic and excessive absenteeism. Further, the appellant's excessive use of sick time cannot be tolerated as it is clearly disruptive to the appointing authority's work operations. In this regard, with respect to Finding of Fact #16, although documents were not submitted to demonstrate the issuance of overtime or other negative impact to the appointing authority in this case, it is left without saying that the duties to be performed by the appellant on the days he was absent were either left undone or had to be completed by another employee. Thus, the appellant's absences created a hardship to the appointing authority as it had the burden of either reassigning the work or not having the work completed. Regarding Finding of Fact #26, the Commission is not persuaded that the appellant was unaware that he could submit medical documentation to the appointing authority. Given that the appellant has been employed at the appointing authority since 1996, it is unreasonable to presume that he was not aware that he needed to provide his employer medical documentation, especially after he was warned to improve his attendance on two prior occasions, in order to excuse his absences. Accordingly, the Commission does not adopt Findings of Fact #16 and #26. Regardless, the appellant's prior disciplinary history and continued excessive use of sick time provide a sufficient basis to uphold the six working day suspension.

ORDER

The Civil Service Commission finds that the action of the appointing authority in imposing a six working day suspension was justified. Therefore, the Commission affirms that action and dismisses the appeal of Wilbur George.

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 OCTOBER, 2014

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals
& Regulatory Affairs
Civil Service Commission
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 17221-13
AGENCY NO. 2014-253

IN THE MATTER OF WILBUR GEORGE,
JERSEY CITY SCHOOL DISTRICT,
HUDSON COUNTY.

Wilbur George, appellant, pro se

Stephen R. Srenaski, Esq., for respondent (Florio, Perrucci, Steinhardt and Fader, attorneys)

Record Closed: July 30, 2014 Decided: September 4, 2014

BEFORE **SANDRA ANN ROBINSON**, ALJ:

STATEMENT OF THE CASE

Wilbur George, appellant, was hired by respondent the Jersey City School District (District) on January 25, 1996. He served the District as a teacher's aide to the handicapped program for three years and was reclassified as a custodial worker on August 2, 1999. Respondent promoted appellant on March 11, 2002, to the title of boiler operator and he continues in that position.

On May 20, 2013, respondent issued to appellant a Preliminary Notice of Disciplinary Action (PNDA) with charges against appellant for chronic and excessive absenteeism; the penalty was removal. Appellant requested a disciplinary hearing to prove he had not been excessively absent. On June 19, 2013, respondent held a hearing and the charges of chronic and excessive absenteeism were sustained; however, the penalty was amended to a six-working-day suspension beginning September 23, 2013, and ending September 30, 2013. A Final Notice of Disciplinary Action (FNDA) was issued on June 28, 2013.

Appellant appeals the six-working-day suspension. Respondent contends that appellant's actions and inactions, revealed during testimony, will prove that between July 1, 2012, and April 30, 2013, appellant was absent 18.5625 days and has continued to be absent despite warning and is therefore chronically absent, which justifies and warrant a penalty of a six-day suspension.

ISSUES

Is there sufficient evidence to sustain respondent's charges against appellant for chronic and excessive absenteeism? And, if sufficient cause exists, is the penalty of a six-day suspension warranted when considering the circumstances that led to the charges?

PROCEDURAL HISTORY

The Civil Service Commission Division of Appeals and Regulatory Affairs transmitted this matter to the Office of Administrative Law (OAL) on November 27, 2013, as a contested case pursuant to N.J.S.A. 52:14B-1 to B-15 and N.J.S.A. 52:14F-1 to F-13. On December 12, 2013, this case was assigned to The Honorable Robert J. Giordano for conferencing on January 3, 2014. The case was reassigned to The Honorable J. Howard Solomon on January 7, 2014, for conferencing on January 28, 2014. The case was conferenced again on March 3 and 26, 2014, with The Honorable Robert J. Giordano. On April 1, 2014, the undersigned assumed responsibility for the case and scheduled testimony to commence on July 11, 2014. On July 11, 2014,

testimony was completed. The record remained open for appellant to obtain and submit to respondent's counsel and the undersigned the following: (1). Letter from Dr. Melvin Richards dated around April 2014; (2). Letter sent to Mr. George from Jersey City School District that indicates the school district received Dr. Richard's letter; and (3) A report from Dr. Richard's that includes Mr. George's diagnosis and possible symptoms from medication. The deadline for submission was on or by Friday July 25, 2014. On July 12, 2014, the undersigned authored a letter to the parties setting forth the instructions placed on the record at the close of testimony. On July 21, 2014, OAL received from respondent a copy of a Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act) that expires February 28, 2015. On July 22, 2014, OAL received a letter from respondent's counsel pertaining to an in camera review of the certification of health care provider, hearsay, the residuum rule and an objection to the entry of the Certification of Health Care Provider into evidence. The correspondence submitted to OAL from Donna Karaffa, R.N., central office nurse at The Jersey City Public Schools, dated April 11, 2014, and date-stamped July 21, 2014, does not show that the cover page bearing Family and Medical Leave Act (FMLA) information was copied to appellant; therefore, the April 11, 2014, cover page was mailed to appellant by OAL.

Appellant's certification of health care provider, submitted by respondent, was marked into evidence as Limited for the purpose of clarifying explanations made by appellant during his own testimony. Respondent's exhibits were marked into evidence, without objection, as listed in the Appendix. No additional information was received at OAL in regard to respondent's correspondence and/or the undersigned's letter of instruction, and the record was closed on July 30, 2014.

SUMMARY OF TESTIMONY

KEVIN O' REILLY

(Respondent's Witness)

Kevin O'Reilly (O'Reilly) has been employed with the Jersey City School District for thirty years in the capacity of an electrician, a special assistant to the maintenance department, and for the past three years as the Director of Facilities. O'Reilly served as president of the Local 2262 AFL-CIO union for sixteen years and is knowledgeable about the terms and conditions of appellant's employment. O'Reilly, at the time of the within disciplinary action and currently, is appellant's supervisor. O'Reilly testified as follows,

> Appellant is a boiler operator at Henry Snyder High School with responsibilities for operating the heating system, supervising custodians at night and completing his own classroom and area cleaning assignments.
>
> The Local AFL-CIO Bargaining Agreement was in place during July 1, 2013 through June 30, 2013 when disciplinary charges were brought against appellant in this matter. The maintenance supervisor for a facility takes requests for vacation, personal and sick leave days. Appellant is entitled to twenty-five vacation days each year and fifteen personal illness days. I started observing excessive absences in September 2012 and wrote appellant a letter dated September 13, 2012 to alert him of the excessive absences and ask him to improve his attendance. Between July 1, 2012 and September 13, 2012, appellant was absent five and one-half days. On January 17, 2013, I wrote to appellant again to alert him that since my September letter he had been absent another six days. Also, as of January 17, 2013, appellant was late a total of eleven days and his absenteeism did not improve. Appellant had a pattern for utilizing personal days. On eleven occasions there was a pattern of extended weekends either on a Monday or Friday, which we call bracketing. This action creates a hardship on the District, especially in regard to the safety and cleanliness of the building and the operation of the heating system. Boiler operators are hard to get, they must have a New

Jersey Black Seal license.[1] Appellant's absences create a budgetary hardship because work not done by appellant is done by another worker, who already has his/her own assignment and when they take on appellant's assignment it means the District must pay overtime.

On May 3, 2013, I wrote to Dr. Herione McNeil, Associate Superintendent of Human Resources, to request a hearing for appellant because of his chronic absenteeism of 18.5625 personal illness days since July 1, 2012. A PNDA was issued on May 20, 2013. A disciplinary hearing was conducted on June 19, 2013. Present for the hearing was: Joe Conte, Vice President of the Union, Steve Tully, Field Representative for the Union, appellant, myself, and Dr. McNeil was the hearing officer, who wrote a decision, dated June 26, 2013, wherein appellant was suspended for six days.

Appellant does have a disciplinary history:

On March 21, 2000, fourteen years ago, he was charged with neglect of duty and insubordination. The insubordination charge was dismissed. He served a two-day suspension with ninety days probation.

On February 24, 2004, ten years ago, appellant was charged with inefficiency and failure to perform duties for which he received a five-day suspension.

On October 18, 2012, two years ago, appellant was charged with conduct unbecoming an employee in public service and neglect of duties for which he received a ten-day suspension without pay along with a six-month probation period.

I was president of the Union in 2000 and in 2004 when appellant was disciplined. In October 2012, I received documents from the maintenance supervisor to prepare for that hearing.

[1] New Jersey regulates various levels of licenses required for the operation of low- and high-pressure boilers. These include Black Seal licenses for a low-pressure operator, a high-pressure operator and a high-pressure operator-in-charge. Licenses are issued through the New Jersey Department of Labor and Workforce Development. Filing fees and testing are required. Failure to appear for testing when scheduled results in cancellation of an application and forfeiture of the filing fee.

On cross-examination O'Reilly responded,

> Appellant has worked for the District since 1996 and there were no disciplinary actions before with regard to chronic and excessive absenteeism. I never disciplined appellant for his attendance. Appellant is the worst offender of absenteeism who is without excused absences. Some people who have approved leave of absences have more absences.[2]
>
> From July 1, 2012 through April 30, 2013, appellant had chronic and excessive extended days and extended weekends.
>
> I did not receive a medical letter indicating appellant was undergoing medical care. In fact, I never received any medical documents about appellant.[3]

WILBUR GEORGE

(Appellant)

Appellant testified as follows,

> I have been absent because of illness on-and-off for about ten years. I have diabetes, hypertension, back-spasms and headaches. I am sick. I take eight pills a day and two injections daily. I must force myself to go to work. My regular shift is in the evenings from 2:30 p.m. to 10:00 p.m. I try to take what days are available to me.

On cross-examination appellant responded,

> I did not know I could turn in documents about absenteeism until I spoke to someone on the job.
>
> At the disciplinary hearing I showed everyone my pills and bottles. I did not know I should have had or needed to

[2] O'Reilly did not dispute appellant's recollection that C.T., a custodial worker, has more absences than appellant.

[3] Appellant's question to O'Reilly included information that during April 2014 appellant submitted a letter (via inter-office mail) to respondent's medical office on Claremont Avenue in Jersey City. The document was prepared and signed by Dr. Melvin Richards (Newark Avenue, Jersey City) and is the Certification of Health Care Provider, which was in appellant's file in respondent's office. The Certification contains a written statement from Dr. Richards that appellant has been under his care for the same diagnosis since January 2010 .

present a medical report. I did get a medical letter from Dr. Melvin Richards and I sent it to the Jersey City Board of Education Medical Department on Claremont Avenue, during April 2014. I received a letter from the medical department to inform me that Dr. Richards document had been received by the medical department.

FINDINGS OF FACT

Based on the testimony and evidence presented and having had the opportunity to observe and determine the credibility of the witnesses, I **FIND** that:

1. Appellant has been employed by the Jersey City School District (District) for eighteen and one-half years;

2. Appellant was hired by respondent in January 1996 to serve as a teacher's aide to the handicapped program. On August 2, 1999, the District reclassified him as a custodial worker. On March 11, 2002, the District promoted appellant to the title of boiler operator and he continues in that position;

3. On May 20, 2013, respondent issued a PNDA with charges against appellant for chronic and excessive absenteeism with a penalty of removal;

4. On June 19, 2013, appellant had a disciplinary hearing and the charges of chronic and excessive absenteeism for 18.5625 days were sustained. However, the penalty was amended to a six-working-day suspension beginning September 23, 2013, and ending September 30, 2013;

5. On June 28, 2013, a FNDA was issued on June 28, 2013;

6. O'Reilly has been employed with the Jersey City School District, for thirty years;

7. O'Reilly served as president of the Local 2262 AFL-CIO union for sixteen years and is knowledgeable about the terms and conditions of Collective Bargaining Agreement to which appellant adheres;

8. O'Reilly is currently the Director of Facilities and appellant's supervisor;

9. O'Reilly testimony that the Local AFL-CIO Bargaining Agreement was in place during July 1, 2013, through June 30, 2013 when disciplinary charges were brought against appellant is not disputed;

10. O'Reilly's testimony appellant is entitled to twenty-five vacation days each year and fifteen personal illness days, is not disputed;

11. O'Reilly's testimony that he started observing excessive absences of appellant in September 2012 is not disputed;

12. O'Reilly's testimony that he (O'Reilly) wrote two letters to appellant, dated September 13, 2012, and January 17, 2013, to alert him of the excessive absences and ask him to improve his attendance, is not disputed;

13. O'Reilly's testimony that between July 1, 2012, and September 13, 2012, appellant was absent five and one-half days, and between the September and January letters he was absent another six days, totaling eleven days, is not disputed;

14. O'Reilly's testimony that appellant had a pattern for using his personal illness days and on eleven occasions he "bracketed" or extended weekends either on a Monday or Friday, is supported by the documentary evidence and is not disputed;

15. O'Reilly's testimony that boiler operators are hard to get and they must have a New Jersey Black Seal, is not disputed;

16. O'Reilly's testimony about absences creating budgetary hardships and the issuance of overtime was not proven to have actually happened in this case; no documents were submitted to demonstrate a negative impact in this case;

17. O'Reilly's testimony regarding appellant's disciplinary history, specifically that fourteen years ago he was charged with neglect of duty and served a two-day suspension with ninety days probation; ten years ago he was charged with inefficiency and failure to perform duties and served a five-day suspension; two years ago he was charged with conduct unbecoming an employee in public service and neglect of duties and served a ten-day suspension without pay along with a six-month probation period, is not disputed;

18. O'Reilly's testimony that appellant worked for the District since 1996 and there were no disciplinary actions before with regard to chronic and excessive absenteeism, is not disputed;

19. O'Reilly's testimony that he never disciplined appellant for his attendance, is not disputed;

20. O'Reilly's testimony that appellant is the worst offender of absenteeism who is without excused absences, was not refuted;

21. O'Reilly's testimony that he did not receive a medical letter indicating appellant was undergoing medical care and that he never received any medical documents about appellant, is not disputed;

22. Appellant's testimony that he has been absent because of illness on-and-off for about ten years, was not disputed;

23. Appellant's testimony that he has diabetes, hypertension, back-spasms and headaches, was supported by documentation, Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act), found in respondent's file at the District office, is not disputed and was not refuted;

24. Appellant's testimony that he is sick and takes eight pills a day and two injections daily, is believable and was not disputed;

25. Appellant's testimony that he must force himself to go to work some afternoon, is believable and was not disputed;

26. Appellant's testimony that he was unaware he could turn in documents about his sickness and absenteeism until he spoke to someone on the job, is credible and was not disputed;

27. Appellant's testimony that he showed everyone his pills and bottles at the disciplinary hearing, was not disputed;

28. Appellant's testimony that he did not know he should have had or needed to present a medical report at the disciplinary hearing, is credible;

29. Appellant's testimony that he did get a medical letter from Dr. Melvin Richards and sent it to the Jersey City Board of Education Medical Department on Claremont Avenue, during April 2014, is supported by respondent's acknowledgment that the medical document was received by the District and was placed in appellant's file.

LEGAL ANALYSIS

Public employees rights and duties are governed and protected by the provisions of the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, and the regulations promulgated pursuant thereto, N.J.A.C. 4A:1-1.1 to 4A:2-6.2. However, public employees may be disciplined for a variety of offenses involving their employment, including the general causes for discipline as set forth in N.J.A.C. 4A:2-2.3(a). An appointing authority may discipline an employee for sufficient cause, including failure to obey laws, rules and regulations of the appointing authority. N.J.A.C. 4A:2-2.3(a)(11). If sufficient cause is established, then a determination must be made on what is a reasonable penalty. In attempting to determine if a penalty is reasonable, the employee's past record may be

reviewed for guidance in determining the appropriate penalty for the current specific offense. W. New York v. Bock, 38 N.J. 500 (1962).

The appointing authority has the burden of proving the disciplinary charges against appellant by a preponderance of the credible evidence. In Re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1956, 1962). On appeal of the appointing authority's decision, both guilt and penalty must be re-determined. Henry v. Rahway State Prison, 81 N.J. 571 (1980); Bock, supra, 38 N.J. 500. The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). The preponderance may also be described as the greater weight of evidence in a case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Testimony to be believed, must not only proceed from the mouth of a credible witness, but must be credible in itself. Spagnuolo v. Bonnet, 16, N.J. 546, 554-55 (1954).

The concept of progressive disciplinary action is described in Bock, supra, 38 N.J. at 519. A civil service employee who commits a wrongful act related to their duties may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). Depending upon the incident complained of and the employee's past record, major discipline may include a maximum six-month suspension or removal. Bock, supra, 38 N.J. at 522-24.

As noted above, in appeals concerning major disciplinary actions, the burden of proof is on the appointing authority to show that the action was justified by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). In the instant case appellant was charged with violations of the Collective Bargaining Agreement between the School District of Hudson County and Local 2262 AFL-CIO, as same pertains to chronic and excessive absences after exceeding the allowable number of days per year for vacation, personal and sick leave days. Respondent contends that appellant continued to be excessively absent after receiving warning letters to improve attendance.

CREDIBILITY

When witnesses present conflicting testimonies, it is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. Credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story in light of its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see also Polk, supra, 90 N.J. 550. Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463 (1999). A fact finder bases decisions about credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837 (1973). The finder of fact is not bound to believe the testimony of any witness, and credibility does not automatically rest on the side of the party with more witnesses. In re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved, but may not be disregarded at an administrative proceeding. Middletown Twp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962).

In the instant case, the respondent's witness and the appellant are credible. Appellant's testimony regarding his lack of knowledge about the need to present medical evidence at the disciplinary hearing is believable. The testimony of respondent's witness that appellant has never before been disciplined for chronic or excessive absenteeism is of importance in discussing appellant's disciplinary history, as is the information from respondent that other personnel have worst records of absenteeism then appellant, but some other employees have excused absences due to medical conditions that have been documented. Respondent's disclosure after the conclusion of testimony that the District's medical department had received a document from Dr. Richard's strengthens the credibility of appellant's testimony. The strength of the consistent testimony and the demeanor of the witnesses were taken into consideration prior to finalizing an Order in this case.

DISCIPLINARY HISTORY

An employee's past disciplinary record may be reviewed to determine the appropriate penalty for the offense. Bock, supra, 38 N.J. 500. The concept of "progressive discipline," the imposition of penalties of increasing severity, is an appropriate consideration in determining the reasonableness of the penalty. In addition to considering an employee's prior disciplinary history when imposing a disciplinary penalty, 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.

In the instant matter, appellant has been employed with the appointing authority since January 25, 1996, more than eighteen and one-half years and he never before was disciplined for chronic and excessive absenteeism. Appellant has only three other incidents of discipline that involved: in March 2000 and October 2012, neglect of duty; in February 2004, inefficiency and failure to perform duties; and in October 2012, conduct unbecoming an employee in public service.

PENALTY

Unless the penalty is unreasonable, arbitrary or offensively excessive under all of the circumstances, it should be permitted to stand. Ducher v. Dep't of Civil Serv., 7 N.J. Super. 156 (App. Div. 1950). An appellant's record of performance must be considered when attempting to determine if the judgment of the appointing authority was unreasonable, arbitrary or capricious. Bock, supra, 38 N.J. 500.

In regard to chronic and excessive absenteeism, appellant received two written warning letters from his supervisor O'Reilly, dated September 13, 2012, and January 17, 2014. When appellant did not adhere to the warning letters a PNDA was issued. There is no progressive discipline for appellant's chronic and excessive absenteeism because appellant has never been charged before with such an infraction.

Appellant's overall record of discipline (three disciplines in eighteen and one-half years of service with the District) prior to the within discipline is slight. Respondent's

promotions of appellant are noted: August 1999 from teacher's aide in handicapped program to custodial worker; and March 11, 2002, from custodial worker to boiler operator with Black Seal license. Since the commencement of appellant's employ with the District he has continued studies to heighten job titles and positions in the District.

The penalty of a six-day suspension that amounts to a major disciplinary action for the first offense of chronic and excessive absenteeism is thinkable, but not warranted in this case, strongly because of appellant's long history of service with the District and documented evidence that he has a sickness that can significantly slow him down. Consideration was given to respondent's closing argument that included a reminder that during the disciplinary and OAL hearing medical documentation was not presented. However, it cannot be disputed that respondent, in good faith, searched for and found the medical document that appellant testified had been sent to the District medical department on Claremont Avenue. It is understood that the medical documents was provided to respondent after the June 28, 2013, FNDA and after the filing of the within OAL appeal. However, the testimony of appellant that he did not know he should have or could have submitted medical documentation of his illness was strongly taken into consideration. And, taken into strong consideration is Dr. Richards's note on the medical document that he (M.D.) has been treating appellant for the same diagnosis since 2010, which covers the period of chronic and excessive absenteeism in this matter.[4]

CONCLUSION

Based on the law, the facts, the testamentary and documentary evidence and having had the opportunity to observe demeanor and assess credibility I **CONCLUDE** that respondent has established that appellant was absent for personal illness on 18.5625 days between July 1, 2012, and April 30, 2013, which exceeds the fifteen-personal-day illness time allowable under the Collective Bargaining Agreement for the year July 1, 2012, to June 30, 2013. I **CONCLUDE** that appellant's overall work performance during eighteen and one-half years of employment has been satisfactory

[4] The period for which a FNDA was issued in this matter is July 1, 2012, to April 30, 2013.

as evidenced by respondent's promotions of appellant to higher and more responsible positions. I **CONCLUDE** that the chronic and excessive absenteeism did cease for periods, but the absences started up again when sickness did not permit appellant to leave his home to go to work and/or to be on time for work. Chronic and excessive absenteeism is serious but in this case did not disable District operations to the point compromising heat operations and sanitation issues because the District knew and has known since 2012 that appellant was having difficulty with attendance, which he never had before. I **CONCLUDE** that appellant has presented good cause for his chronic and excessive absenteeism and inability to adhere to the requirements of the Collective Bargaining Agreement. I **CONCLUDE** that the Doctrine of Progressive Discipline should be implemented because this is appellant's first disciplinary action for chronic and excessive absenteeism. I **CONCLUDE** that the imposition of a penalty of a six-day suspension, a major disciplinary action, should be amended as Ordered.

ORDER

It is **ORDERED** that the determination of respondent, Jersey City School District, Hudson County, in finding appellant guilty of violating the terms of the Collective Bargaining Agreement Between School District of The City of Jersey City, Hudson County, New Jersey and Local 2262 AFL-CIO, January 1, 2011, to December 31, 2013, pertaining to exceeding the number of days authorized for Leave of Absence for Personal Illness is hereby **AFFIRMED**. However, I **ORDER** that respondent's subsequent determination regarding the implementation of a major disciplinary action in the form of a six-day suspension be deemed inappropriate based on the circumstances disclosed in this case such as the eighteen and one-half years of satisfactory service to the District, promotions of appellant to higher positions in the District, the slight number of infractions over eighteen and one-half years, specifically only two minor infractions and one major infraction, neither involving chronic or excessive absenteeism, the disclosure of appellant's illnesses and medical treatment, and the absence of an accommodation for appellant especially in light of respondent's acknowledgment that other employees have worst attendance records but they have excuses and receive accommodations. I **ORDER** that appellant and respondent meet as soon as possible to discuss appellant's medical needs and physical limitations, so as to determine if an

accommodation in the number of work days and hours and/or type of work should be modified. I **ORDER** that the major disciplinary action penalty of a six-day suspension be **AMENDED** to a four-day suspension.

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 Merit System Board does not adopt, modify or reject this decision within forty-five (45) 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 (13) 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.

Sandra Ann Robinson

September 4, 2014
DATE

SANDRA ANN ROBINSON, ALJ

Date Received at Agency: September 4, 2014

Date Mailed to Parties:

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APPENDIX

WITNESSES

For Appellant:

Wilbur George

For Respondent:

Kevin O'Reilly

EXHIBITS

For Appellant:

P-1 Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act), expires February 28, 2015 **ID Limited**

For Respondent:

R-1 Collective Bargaining Agreement between School District of The City of Jersey City, Hudson County, New Jersey and Local 2262 AFL-CIO, January 1, 2011, to December 31, 2013

R-2 Letter to Wilbur George from Kevin O'Reilly, Executive Director of Facilities, dated September 13, 2012

R-3 Letter to Wilbur George from Kevin O'Reilly, dated January 17, 2013

R-4 Memo from Kevin O'Reilly to Dr. Hermione McNeil hearing request – Wilbur George, dated May 3, 2013

R-5 July 2012 to April 2013 calendars showing Wilbur George's absences from work

R-6 Letter to Wilbur George from Mirna Weglarz, with Preliminary Notice of Disciplinary Action, dated May 20, 2013

R-7 Disciplinary hearing sign-in sheet, dated June 19, 2013

R-8 Final Notice of Disciplinary Action, dated June 28, 2013

R-9 Dr. Hermione McNeil's Disciplinary Hearing Decision, dated June 26, 2013

R-10 Personnel Action Notice, dated July 1, 2013

R-11 Employee Disciplinary Tracking Form for Wilbur George

R-12 Employee Absence Report for the periods of 7/1/12 - 6/30/13 and 7/1/13 – 6/30/14; and Employee Absence Detailed Report for the period of 9/1/13 to 12/9/13