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STATE OF NEW JERSEY

In the Matter of Jessica Fackler, Salem County

CSC Docket No. 2014-1440
OAL Docket No. CSV 17150-13

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: APR 15 2015 (HS)

The appeal of Jessica Fackler, a Public Safety Telecommunicator with Salem County, of her removal, effective November 6, 2013, on charges, was heard by Administrative Law Judge Bruce M. Gorman (ALJ), who rendered his initial decision on March 4, 2015. Exceptions were filed on behalf of the appointing authority, and cross-exceptions were filed on behalf of the appellant.

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 April 1, 2015, accepted and adopted the Findings of Fact as contained in the initial decision. However, the Commission did not adopt the ALJ's recommendation to reverse the removal. Rather, the Commission modified the removal to a 10 working day suspension.

DISCUSSION

The appointing authority removed the appellant on charges of chronic or excessive absenteeism or lateness. Specifically, it asserted that the appellant was absent without leave on October 19, 2013, and called out sick without the benefit of sick time on October 20, 2013. Upon the appellant's appeal to the Commission, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In his initial decision and based on the testimony of the witnesses, the ALJ found that initially in her 12-year tenure, the appellant attended work in

accordance with the normal sick leave policy. Sometime after March 25, 2007, the appellant was involved in an automobile accident and was granted a workplace accommodation. The appellant was also subsequently granted seven medical leaves of absence, many of which were for protracted periods of time. The last of these medical leaves of absence ran from May 28, 2013 to October 4, 2013. In each of the years from 2007 onward, the appellant used her full allotment of sick leave. The ALJ found that although the appellant missed a great deal of work since her automobile accident, all of her absences were excused by sick leave, approved medical leave or vacation. The unapproved absence offenses involved in the present matter were one action of tardiness on October 19, 2013, when she was 29 minutes late, and one absence from work without the benefit of sick leave on October 20, 2013. The appellant did not deny that she was tardy on October 19, 2013 nor did she deny her absence without sick leave on October 20, 2013. The ALJ also found that Undersheriff John S. Cuzzupe had informed the appellant at a September 17, 2013 workplace accommodation meeting that if she returned to work and called out sick with no available sick leave, she would be terminated immediately. The ALJ further noted that the duties of a Public Safety Telecommunicator include responding to 911 calls and dispatching emergency assistance and response to such calls.

Based on the foregoing, the ALJ determined that the appellant's tardiness on October 19, 2013 and her absence on October 20, 2013 could not be deemed conduct that continued over a long time period or recurs as she had never been absent from work for an entire shift without the benefit of approved leave prior to October 20, 2013 and had been tardy on one prior occasion on October 19, 2012. The ALJ concluded from Cuzzupe's testimony that he inappropriately considered the appellant's many approved absences to constitute chronic absenteeism and sought to rid himself of an employee who suffered from a significant medical condition that rendered her frequently absent. Accordingly, since there was no evidence of habitual absenteeism or habitual tardiness, the ALJ recommended dismissal of the charge. The ALJ also determined that, even if the charges were upheld, since one instance of tardiness and one instance of absenteeism cannot be considered egregious, the appointing authority's action in moving directly to termination, in light of the appellant's disciplinary history, which consisted of one three-day suspension and three written reprimands, violated the concept of progressive discipline. Thus, the ALJ recommended reversal of the removal.

It is also noted that the appointing authority, following the hearing in this matter, requested to amend the charges against the appellant to include a charge of inability to perform duties. In denying this request, the ALJ reasoned that an employee cannot be disciplined on charges that she has not been given "plain notice" by the appointing authority and that a *de novo* hearing on administrative appeal is appropriately limited to the charges sustained at the departmental level. The ALJ additionally determined that if the appointing authority believed that the appellant

is unable to perform her duties, it must file a new charge on that basis and provide her with proper notice of that charge.

In its exceptions, the appointing authority asserts that the record corroborates the appellant's protracted unavailability and that her service history establishes her chronic absenteeism. The appointing authority also argues that the ALJ erroneously found that it failed to apply progressive discipline. In this regard, the ALJ arbitrarily rejected the appellant's past disciplinary offenses and the "soft" remedies applied to assist her to correct matters without impoverishing her. The appointing authority further argues that the ALJ erroneously found that major discipline justifying termination may not occur without previous progressive discipline having been imposed. In this regard, it contends that a penalty of removal was justified in light of the grave public safety considerations involving Public Safety Telecommunicators, the vital public safety duties they perform, and the need to fully staff shifts to protect and serve the public. Additionally, the appointing authority argues that its request to amend the charges should be granted given that a comprehensive hearing occurred and any defects in notice amounts to no more than harmless error.

In her cross-exceptions, the appellant notes her agreement with the ALJ's initial decision. She requests that the Commission clarify that she shall be reinstated with full benefits and back pay and awarded counsel fees.

Based on its *de novo* review of the record, the Commission disagrees with the ALJ's recommendation to dismiss the charges. The Commission does not agree with the ALJ's interpretation of the standard for upholding a charge of chronic or excessive absenteeism or lateness. In this regard, *N.J.A.C.* 4A:2-2.3(a)4 provides that an employee may be disciplined for chronic *or excessive* absenteeism. When the appellant admittedly called out sick on October 20, 2013 without any available sick time, she exceeded the allotment of sick leave to which she was entitled. Such an absence in excess of an employee's entitled allotment is, by definition, excessive. The appellant was also admittedly late on October 19, 2013. While the ALJ focused on whether the appellant's conduct could be characterized as having occurred over a long period of time or was recurring, conduct of such habitual nature is not the only type of conduct that can support a charge of chronic or excessive absenteeism or lateness. Accordingly, the appellant admittedly violated the appointing authority's attendance policy, and the charge against her has been sustained.

With regard to the penalty, the Commission's review is also *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). In determining the propriety of the penalty, several factors must be considered,

including the nature of the offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. 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 (1980). It is settled that the theory of progressive discipline is not "a fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 *N.J.* 474 (2007). In the present case, the appellant was only excessively late or absent on two occasions. In addition, the appellant had a relatively meager disciplinary history consisting of a three-day suspension and three written reprimands. Moreover, while the appellant's attendance history is problematic, most, if not all of her absences are based on legitimate and documented medical conditions. Under these circumstances, the Commission finds removal too harsh a penalty. Nevertheless, the appointing authority had a right to expect that the appellant would be present at work, willing and able to perform her vital duties of taking calls related to public safety. In this regard, Public Safety Telecommunicators are held to a high standard of conduct given that they work in a paramilitary setting and the highly safety-sensitive nature of their duties. *See In the Matter of David T. O'Brien* (CSC, decided August 1, 2012). Thus, the appellant's attendance-related offenses were serious and warrant a significant penalty. The Commission accordingly finds it appropriate to modify the penalty to a 10 working day suspension.

Regarding the appointing authority's request to amend the charges to include inability to perform duties, it is well established that the ALJ and the Commission only have jurisdiction to adjudicate disciplinary charges and specifications which were sustained at the departmental level hearing. *See Hammond v. Monmouth County Sheriff's Department*, 317 *N.J. Super.* 199 (App. Div. 1999); *Lamont Walker v. Burlington County*, Docket No. A-3485-00T3 (App. Div. October 9, 2002); *In the Matter of Charles Motley* (MSB, decided February 25, 2004). Thus, if the appointing authority believes that the appellant is unable to perform her duties, it may pursue a charge on that basis only after the appellant is reinstated to her position.

Since the penalty has been modified, the appellant is entitled to back pay, benefits and seniority pursuant to *N.J.A.C.* 4A:2-2.10, following the 10 working day suspension. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), an award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield*, 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div.

Mar. 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In this case, the Commission upheld the charge and only modified the penalty. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

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

ORDER

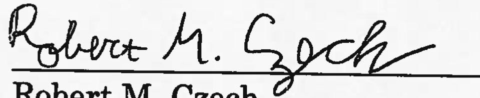
The Commission finds that the appointing authority's action in removing Jessica Fackler was not justified. Therefore, the Commission modifies the penalty to a 10 working day suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority for the period following her 10 working day suspension to the date of actual reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

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

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 1ST DAY OF APRIL, 2015



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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 17150-13

AGENCY DKT. 2014-1440

IN THE MATTER OF JESSICA FACKLER, COUNTY OF SALEM, SHERIFF'S DEPARTMENT.

Cheryl L. Cooper, Esq., for appellant, (Oandasan & Cooper, P.C., attorneys)

Michal M. Mulligan, Esq., for respondent County of Salem Sheriff's Department

Record Closed: January 18, 2015 Decided: March 4, 2015

BEFORE **BRUCE M. GORMAN**, ALJ:

STATEMENT OF THE CASE

Appellant appealed respondent's action terminating her employment for chronic and excessive absenteeism.

PROCEDURAL HISTORY

The appellant requested a fair hearing and the matter was transmitted to the Office of Administrative Law on November 27, 2013, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was heard on

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December 11, 2014 and December 15, 2014. The hearing proceeded on those dates and the record closed on January 18, 2015, after briefs were filed.

FACTUAL DISCUSSION

John Steven Cuzzupe (Cuzzupe) testified for the County. Cuzzupe serves as Under Sheriff assigned to communication for the County Sheriff's Department. He was initially employed in that capacity on March 23, 2013. Cuzzupe retired from the New Jersey State Police after twenty-six years with the rank of Captain.

Appellant was a Public Safety Telecommunicator with the Sheriff's Department. Cuzzupe identified the civil service job description for Public Safety Telecommunicator (R-1). He state that the duties of the Public Safety Telecommunicator include responding to 911 calls and dispatching emergency assistance and response to such calls. The Sheriff's Department maintains the only 911 call center in Salem County. Fire, ambulance and police emergency services throughout the county are dependent on this center. Tele Communicators must work twelve-hour shifts and must be on top of their abilities at all times. Their shifts are 6:00 a.m. to 6:00 p.m. and 6:00 p.m. to 6:00 a.m. They work four days on and three days off, followed by four days on and three days off. They are paid every two weeks.

Cuzzupe identified appellant's personnel record (R-2). She commenced work as a Telecommunicator part-time in June of 2002. She became full-time in February of 2003 and was employed continuously thereafter until she was terminated on October 21, 2013. During the course of her employment, appellant had been granted medical leaves of absence on a number of occasions, including: March 25, 2007 to May 17, 2007; November 26, 2009 to December 2, 2009; July 9, 2010 to January 10, 2011; October 29, 2012 to November 7, 2012; November 7, 2012 to January 6, 2013; January 7, 2013 to February 7, 2013; and May 28, 2013 to October 4, 2013. Each of these leaves of absence was for medical reasons and was approved by the Board of Freeholders.

On February 27, 2013, one-month prior to Cuzzupe taking control of the Emergency Management Department, at the recommendation of Anthony Riccio, of Quantum Health Solutions, the County Administrator agreed to provide appellant with a work-place accommodation (J-2). The accommodation consisted of the following:

> You will be permitted to take off from work when your chronic condition requires treatment with the medication prescribed by your Primary Care Physician.
>
> In the event that medication is required after you have reported to work, you will be permitted to leave work prior to the end of our scheduled shift.
>
> When you are experiencing symptoms of your condition that require you to miss work, you will communicate with your Supervisor in a timely manner.
>
> If you exhaust your accrued sick time prior to the end of the year, you will submit necessary paperwork for Intermittent FMLA to the Human Recourses Office.

According to Cuzzupe, this accommodation was afforded to appellant because of a medical condition resulting from an automobile accident. As a result of appellant's medical condition, she was taking medication which sometimes impacted on her ability to work. Cuzzupe was particularly concerned with the second portion of the accommodation, the part that afforded appellant leave to depart work prior to her scheduled shift.

After reviewing appellant's record, Cuzzupe requested an analysis of her use of sick leave. Despite the numerous medical leaves of absences she had been afforded and the accommodations recommended by Quantum Health Solutions as a result of her medical condition, Cuzzupe concluded that appellant was utilizing sick leave to avoid working on weekends. In April she requested leave to use Comp time on a Saturday evening. Her request was approved for April 26, 2013, and April 28, 2013, but not April 27, 2013. (J-4) She then called out sick on April 27, 2013. Similarly, appellant requested the use of vacation and comp time on May 25, 2013, and May 26, 2013. She was not scheduled to work on May 24, 2013. Her request for May 26, 2013,

was approved, but her request for May 25, 2013, was not approved (J-5). Appellant then called out sick on May 25, 2013.

After the second incident, Cuzzupe determined to impose discipline. He did so by preparing a counseling action plan (J-3) dated May 28, 2013. Cuzzupe described the counseling action plan as the equivalent of a written reprimand, and all witnesses for both parties who testified thereafter agreed that within the context of the Salem County discipline system, the counseling action plan constituted a written reprimand. Cuzzupe signed the counseling action plan on May 28, 2013. However, on May 28, 2013, appellant commenced a special medical leave approved by the County Administrator (J-6) so that she could undergo what Stacy Pennington, Human Resources Director for the County described in her testimony as cervical spine fusion surgery. As a consequence of appellant's absence, Cuzzupe did not serve the counseling action plan (J-3) on appellant until she returned to work on October 8, 2013.

Cuzzupe stated that if appellant had not been going out on special medical leave, he would have suspended her for her actions on April 27, 2013 and May 25, 2013. Factually, he did not suspend her for either of those incidents. As Pennington later confirmed, until the present charges were brought against appellant, no Preliminary or Final Notice of Disciplinary Action was ever at any time filed against the appellant.

On September 17, 2013 the County convened what Cuzzupe termed an Accommodation Hearing. According to Cuzzupe, at this Hearing appellant stated she required no further accommodation. He identified a letter from appellant's physician, Diana D. Gardiner of Penn Medicine, dated August 5, 2013 (J-9). The letter stated as follows"

> Ms. Jessica Fackler is recovering slowly but appropriately from her cervical spine fusion. We anticipate Jessica to return to work on September 16, 2013. She will return to full-time employment with full duties.

At the accommodation meeting of September 17, 2013, Cuzzupe advised appellant that if she returned to work and called out sick with no available sick leave, she would be terminated.

At the conclusion of the meeting, Cuzzupe assumed that appellant was "whole" and could resume her duties. However, the County Administrator instructed her to consult with her neurologist and directed her to have him confirm in writing that she no longer required an accommodation.

Appellant's neurologist, Dr. Dennis C. Graham, submitted a Certification of Healthcare Provider Employee's Serious Health Condition Accommodation Request Form dated September 24, 2013 (J-8). That document recited that appellant suffered from a current migraine with aura. It stated that "severe HA would limit the patient's abilities". The document noted that she was being placed on medication to prevent "HA" (presumably headache) and that for at least the next six months, she would require day work only. Since a Telecommunicator was required to work fifty percent of her time on the night shift, an accommodation would be required to meet the doctor's direction.

Cuzzupe testified that when he was provided with Dr. Graham's certification, (J-8) it contained a handwritten notation at the top as follows:

10-7 Request rescinded per employee.

Across the top of the certification in bold capital letters was stamped the word VOID. At the same time, Cuzzupe received a copy of a letter dated October 7, 2013, written by the County Administrator to appellant (J-10). That letter recited that on October 7, 2013 she advised Stacy Pennington, Director of Human Resources, by telephone that she wanted the accommodation rescinded. The letter went on the state:

"During that conversation you were informed that if you exhausted and became deficient with your remaining accrued time, termination proceedings would follow."

Cuzzupe indicated that he approved of that determination.

Appellant returned to work on October 8, 2013, and at that time Cuzzupe provided her with a copy of the administrators letter of October 7, 2013 (J-10), as well as the Counseling Action Plan (J-3). At the bottom of (J-10) he handwrote the breakdown of the leave time which she had left for 2013. That leave time consisted of 8.7 hours of comp time, no vacation time, and no sick leave.

Cuzzupe identified portions of the Collective Bargaining Agreement between appellant's union and the County (R-1). He noted that pursuant to Article 13.2, appellant was subject to discipline for just cause. He also noted that pursuant to Article 24.4 b, abuse of sick leave was cause for discipline up to and including termination.

Cuzzupe identified an employee disciplinary report (J-11). That report cited that on October 19, 2013, appellant failed to appear for her 6:00 a.m. shift. After her house was called, she arrived late stating she had overslept. The disciplinary report goes on to recite that the next day, October 20, 2013, appellant called out sick when she had no sick time remaining.

After these incidents, Cuzzupe caused the Preliminary Notice of Disciplinary Action to be served on appellant (J-12). That notice sought her removal, a removal which was effectuated pursuant to Final Notice of Disciplinary (J-13), effective November 6, 2013.

Cuzzupe was then cross examined, during which he offered the following testimony.

He agreed that appellant is a civil service employee and retains all civil service rights. He agreed that appellant is covered by the Collective Bargaining Agreement. He agreed that appellant is covered by both the Law Against Discrimination (LAD) and by the Family Medical Leave Act (FMLA). Cuzzupe acknowledged that appellant's

absence between January 7, 2013 and February 7, 2013 was approved by the County. Similarly, he acknowledged that her absence from May 28, 2013 through October 4, 2013 was approved by the County. He admitted that during those time periods, the County had no expectation that appellant would work. He conceded that in both cases that she had been placed on special medical leave.

Cuzzupe agreed that he served the Counseling Action Plan (J-3) dealing with the incidents of April and May 2013, on the appellant on October 8, 2013, although he conceded that he provided it to her union representative at the September 17, 2013 accommodation meeting. He conceded that October 8, 2013, was the first notice provided to the appellant that he believed she had engaged in misconduct on April 27, 2013 and May 25, 2013. Cuzzupe acknowledged that he did not discuss appellant's absences on those dates with her before he prepared the Counseling Action Plan (J-3). He never made inquiry as to why she was absent on April 27, 2013 or on May 25, 2013. He conceded that the accommodation embodied in the County's letter of February 27,2013, (J-2) remained in effect on April 27, 2013 and May 25, 2013, and acknowledged that this accommodation afforded appellant the right to "take off from work when your chronic condition requires treatment with the medication prescribed by your Primary Care Physician" (J-2). He continued to contend that the overall pattern of her days off indicated that her absences were pre-meditated.

Cuzzupe acknowledged that he found no problem with appellant's work. When she returned from medical leave in October 2013, he did not send her for additional training, nor did he recommend additional training for her.

Cuzzupe acknowledged that he never issued appellant any warming about being late for work. When asked if October 19, 2013 was the first time a appellant was ever late, he responded that, "She wasn't late, she was AWOL." After reviewing her time record (J-17), Cuzzupe conceded that appellant punched in at 6:29 a.m. and left 6:00 p.m. on October 19, 2013. He acknowledged that while the Final Notice of Disciplinary Action (J-13) states that appellant was "AWOL" on October 19, 2013, factually, she was twenty-nine minutes late for work. He agreed that appellant refused to sign the

Employee Disciplinary Report (J-11) which was prepared concerning that incident because she contended it contained factual errors.

Finally, Cuzzupe was asked to review section 13.2 of the Collective Bargaining Agreement (J-1). He agreed that this section of the contract stated that, "Discipline shall be progressive in nature and corrective in aim".

Cuzzupe testified on re-direct examination. He contended that he had followed the concept of progressive discipline in his handling of appellant's case. He agreed that he could have suspended her for her conduct on April 27, 2013 and again on May 25, 2013, but chose instead to combine them into the Counseling Action Plan (J-3). In his mind, his action did not "water down" progressive discipline. At the time he determined to issue the Counseling Action Plan, he had only been employed by the County for two months. He stated that it was not his intent to minimize his ignorance; he believed he was following progressive discipline.

Cuzzupe stated that at the September 17, 2013 meeting, he instructed appellant that the first time she violated the sick leave provision, she would be terminated. He agreed that at no time did appellant waive her right to progressive discipline.

In response to questions by the Court, Cuzzupe testified that he had been employed for twenty-six years by the New Jersey State Police, ultimately rising to the rank of Captain. He stated that he understood the concept of progressive discipline. Significantly, Cuzzupe acknowledged that he believed he was required to use progressive discipline in the appellant's case. He opined that just because the appellant was not penalized for her absences on April 27, 2013 and May 25, 2013, "doesn't mean they don't count". He stated that although his actions were not progressive in penalty, they were progressive in the sense that these incidents occurred. In his mind, he complied with the concept of progressive discipline.

Gerald J. Baber (Baber) testified for the County. Baber has been employed as a Public Safety Telecommunicator since 2003. He presently serves as the Union Shop

Steward. He has never worked on the same shift with appellant, but has worked with her on overtime shifts. Baber dealt with the appellant in his union capacity on two occasions. The first occurred in the fall of 2012, concerning a grievance issue. The second involved the present action.

Baber was present at, what he termed, the removal of accommodation meeting of September 17, 2013. Also present were the appellant, Anthony Riccio of Quantum, Sheriff Chuck Miller, Under Sheriff Cuzzupe, Chief Lawrence Fisher, Human Resources Director Stacey Pennington, and Administrator Evern Ford.

Baber testified that at the meeting of September 17, 2013, the county representatives told the appellant they were going to remove the accommodation of February 27, 2013, (J-2). The testimony in this regard contradicted Cuzzupe's testimony. Cuzzupe testified only that appellant waived her accommodation. According to Baber, the County representatives told the appellant they were going to remove the accommodation as a condition of her returning to work. Baber stated the management at the 911 center wanted boots on the ground; they wanted someone who would be there one hundred fifty percent. Baber agreed that a Telecommunicator who could only work day work would have a huge impact on scheduling. Appellant's accommodation (J-2) afforded her the right to only work the day shift.

Baber testified that he believed Cuzzupe's action regarding the incidents of April 27, 2013 and May 25, 2013, constituted disciplinary action. In advising the appellant, he stressed to her that she had to take the matter seriously.

At the September 17, 2013, the County Administrator asked appellant to consult with her neurologist about her accommodation. Appellant advised the county officials that she wanted to return to work that evening. However, Baber testified that she did not fully withdraw her accommodation at that time.

Baber testified that on those occasions in 2013 when he worked with the appellant during an over-time shift, she did not seem to be herself. He was concerned

about her physical condition. Baber emphasized that the 911 call center requires a full shift from every employee. Sometimes the appellant would have trouble carrying on a conversation with him. At one point during the September 17, 2013, meeting, county officials offered to support appellant if she were to apply for a disability retirement. Baber strongly advised her to make such an application, but she adamantly refused and insisted that she wanted to go back to work.

Jeffrey L. Pompper (Pompper) testified for the County. Pompper has been employed by the County since 2008 and currently serves as Director of Emergency Services. Pompper testified that all sick time negatively impacts the Emergency Management Office. Minimum staffing levels are necessary, shift must be filled. And it is critical that each employee report to work on time. The supervisor cannot always fill the gap when an employee is missing from a shift. An unfulfilled position can result in the delay in the providing of critical services. Further, if a staff member is compelled to work overtime, the staff is impacted negatively.

Pompper testified that appellant's tardiness on October 19, 2013 and her absence on October 20, 2013, negatively impacted the staff's morale.

Stacy Pennington (Pennington) testified for the County. Pennington serves as Director of Human Resources for Salem County.

Pennington testified that on May 23, 2013, the County Administrator granted appellant special medical leave so that she could undergo additional surgeries resulting from a prior automobile accident (J-6). By that time, she had utilized her full twelve weeks (five hundred and four hours) of FMLA leave for the year. Pennington explained that the County uses a rolling year. She defined a rolling year as meaning that since appellant was going out on leave on May 28, 2013, her FMLA leave time was calculated May 29, 2012. During that twelve month period, appellant used all five hundred and four hours of FMLA leave available to her. Pennington also identified a letter she had executed on August 28, 2013, (J-7). That letter extended appellant's special medical leave from August 28, 2013 to September 16, 2013 as a result of a

certification provided by Penn Medicine Department of Neurosurgery. The letter from Penn Medicine was not placed in evidence.

Pennington was present at the September 17, 2013 accommodation meeting. She stated that the accommodation had been approved by Administrator Ford on February 27, 2013 (J-2) upon the recommendation of Anthony Riccio of Quantum Health Solutions. However, the accommodation had proven to be a hardship to the department, and the September 17, 2013 meeting, was called to review the accommodation. Specifically, the provision of the accommodation that appellant could leave work if her medications were adversely affecting her performance presented an onerous burden to the Emergency Management Department.

On October 4, 2013, appellant submitted the Certification of Healthcare Provider Serous Health Condition Request Form from Dr. Dennis C. Graham (J-8). On that form, Dr. Graham requested a continuation of the accommodation for a minimum of six months. Pennington confirmed that she stamped the word "VOID" on the certification of Dr. Graham (J-8) and wrote the handwritten words at the top of that document. On October 7, 2013, appellant called Pennington telephonically and stated she wanted the accommodation rescinded. Pennington advised her that she would be disciplined if she used sick time that she did not have. Pennington then drafted a letter for signature by the County Administrator (J-10) memorializing that telephone conversation and advising her, "If you exhaust and become deficient with your remaining accrued time, termination proceedings will follow."

Pennington testified that her office prepared the Preliminary and Final Notices of Disciplinary Action (J-12, J-13). She received direction from Cuzzupe regarding the specification of the charges, but ultimately it was she and her co-worker Amy Cooper who determined which charge to file. She testified that the word "chronic" means "regularly" to her. In determining to charge "chronic" absenteeism, she did not consider appellant's several medical leaves but did consider the fact that appellant utilized all of her sick leave early in each calendar year.

Pennington agreed that appellant did not waive her rights under the Civil Service Act at either the September 17, 2013 meeting or at any other time. She agreed that appellant is a civil service employee.

Lawrence W. Fisher, Jr. (Fisher) testified for the County. Fisher was appellant's direct supervisor in the emergency management department.

Fisher identified the Employee Disciplinary Report (J-11). He confirmed that appellant was late for work on October 19, 2013. He also confirmed that she called out sick on October 20, 2013 when she had no sick leave available.

Fisher testified that it is important for the 911 unit to maintain minimum staff. If someone calls out sick, the "hole" created by that person's absence must be filled. Fisher stated that it is not always easy to find a substitute. Someone who calls out sick frequently or calls out sick on weekends causes a negative effect on morale.

Joseph Hiles (Hiles) testified for the appellant. Hiles is a Public Safety Tele-Communicator with Salem County and has served as the Union Shop Steward since late 2011.

Hiles reviewed the Counseling Action Plan dated May 28, 2013 (J-3). He testified that such a plan was considered to be a written reprimand under the Salem County Progressive Disciplinary system. Such a plan generates no evidentiary hearing. The process is handled informally between the supervisor and the employee.

Hiles reviewed the Employee Disciplinary Report concerning the October 19, 2013 and October 20, 2013 violations (J-11). He testified that other employees have been late for work and have not received disciplinary action. I found that specific testimony to be irrelevant and afforded no weight.

Hiles testified that under established past practice, employees were permitted to use what her termed "emergency comp time". The practice works as follows.

If an employee had no sick time but had comp time on the books, he/she could call out sick and then after the fact apply comp time to the day. On cross examination, Hiles admitted that Cuzzupe had terminated that practice.

The parties entered into evidence the appellant's disciplinary history (J-20). That document reflects the following.

On September 27, 2004, appellant received a three-day suspension for what appears to be unbecoming conduct. This charge had nothing to do with attendance.

On October 19, 2012, appellant received a Counseling Action Plan for tardiness on October 18, 2012.

On October 19, 2012, appellant received a written reprimand for "leaving the workplace on false premises.

On May 28, 2013, the County issued the Counseling Action Plan concerning the April 27, 2013 and May 25, 2013, incidents (J-3). I note that this plan was not served upon appellant until October 8, 2013. I also note that J-20 incorrectly uses the year "2014" twice. The facts before me show that both dates should state "2013".

In summation, appellant's prior disciplinary history consists of a three-day suspension for an unrelated offense and three written reprimands regarding attendance issues. Two of the reprimands concerns incidents on consecutive days in October of 2012.

LEGAL DISCUSSION

The Final Notice of Disciplinary Action in this matter recites one charge followed by two specifications. The charge sustained against the appellant is chronic or excessive absenteeism or lateness. The specifications recite that appellant was "AWOL" on October 29, 2013, and that she called out sick without benefit of sick time on October 20, 2013. The evidence revealed that her "AWOL" conduct on Octobers 19, 2013 consisted of being twenty-nine minutes late for work. Based upon that charge, the County seeks to remove appellant from her position as a public safety Tele Communicator.

The County expended the bulk of its case delineating the number of days when appellant was absent from work. The record reveals that appellant was a twelve-year employee of the County's Emergency Management Department. For the first part of her tenure at the County, appellant attended work within the confines of the normal sick leave policy. On an unspecified date, sometime after March 25, 2007, appellant was involved in an automobile accident. Thereafter, the Board of Freeholders granted appellant a total of seven medical leaves of absences, several for protracted periods of time. Additionally, in each of those years she utilized her fully allotted amount of sick leave. The only unexcused absence prior to October 19, 2013 was one act of lateness which appellant committed on October 19, 2012. For that action, she was given a written reprimand. Although appellant has missed a great deal of work since her automobile accident, all of her absences were excused either by sick leave, approved medical leave, or vacation. Her only unapproved offenses absences were two actions of tardiness on October 19, 2012 and October 19, 2013, and one absence from work without sick leave on October 20, 2013. The latter two offenses are the subject matter of the charges currently pending against the appellant.

Chronic or excessive absenteeism constitutes grounds for major discipline under N.J.A.C. 4A:2-2.3(a)4. Although the regulation does not defined when absenteeism will rise to the level of chronic or excessive, it is generally understood that chronic conduct is conduct that continues over a long time or recurs, Good v Northern State Prison, 97

N.J.A.R. 2d (CSV) 529.531. Just cause for dismissal can be found in habitual tardiness or similar chronic conduct. West New York, supra. 38 N.J. at 522.

The County cites In the Matter of Rasan Mushin, Mercer County Department of Corrections, 2011 WL 6524201 (N.J. Adm.) in support of its action. In that case, the appellant was hired in March of 2009. By April of 2010, Mushin accumulated five separate charges for chronic absenteeism without sick leave. In accordance with the table of offenses and penalties in place in Mercer County at the time, the fifth charge warranted removal. The Administrative Law Judge on appeal affirmed the removal.

In this case, appellant is a twelve year veteran of the Salem County sheriff's Department. Prior to October 20, 2013, she had never been absent from work for an entire shift without benefit of approved leave (she was tardy on one prior occasion). By no possible definition could her tardiness on October 19, 2013 and/or her absence on October 20, 2013 be deemed "conduct that continues over a long time or recurs".

What was evident from his testimony is that Cuzzupe considered appellant's numerous excused absences to constitute chronic absenteeism. To him, the only thing that mattered was appellant was not appearing to work her shift. Notwithstanding the fact that appellant had never before been absent from a shift without the use of approved sick leave, at the September 17, 2013 accommodation meeting, Cuzzupe informed appellant that if she returned to work and called out sick with no available sick leave, she would immediately be terminated. The only possible conclusion to be drawn from that statement is that Cuzzupe considered appellant's many approved absences to constitute chronic absenteeism. Nothing in the law permits such a construction.

What is apparent is that Cuzzupe wanted to rid himself of an employee who suffered from significant medical condition that rendered her frequently absent. That such might well be the case was buttressed by the testimony of Baber, who states that the County had offered to support an application for permanent disability if appellant chose to file one. If appellant truly is physically incapable of performing the job, then the County should have filed a charge under N.J.A.C. 4A:2-2.3(a)3 – Inability to perform

duties. But in order to sustain such a charge, the County would have been forced to require appellant to undergo a physical examination and/or a functional capacity evaluation. The County produced no evidence at time of trial to indicate that it had performed either step. Instead, the County attempted to terminate appellant by filing the simpler charge of chronic absenteeism. If the County truly believes that appellant is physically unable to perform her job, then it must file a new charge against her under N.J.A.C. 4A:2-2.3(a) 3, and provide appellant with proper notice of the charge.

Appellant has not denied that she was tardy for work on October 19, 2013 nor did deny that she was absent without sick leave on Octane 20, 2013. Had she been charged with simple absonteesim, and not chronic absenteeism, she would have been appropriately subject to discipline. But since the charge here is chronic absenteeism, and since there is no proof of any kind of habitual absenteeism or habitual tardiness, the charge against her cannot be sustained and must be **DISMISSED**.

Even if a charge of simple absenteeism were sustained, that charges would not warrant termination. Progressive discipline is the law in New Jersey. West New York v. Bock, 38 N.J. 500 (1962). Progressive discipline can only be bypassed if the conduct is egregious. In Re Hermann, 192 N.J. 19 (2007). By no possible definition can one instance of tardiness and one instance of absenteeism be considered egregious. Consequently, progressive discipline would apply.

Indeed, Cuzzupe testified that he believed progressive discipline should be applied. He further testified that "in his mind" he had applied progressive discipline. Unfortunately for the County, factually Cuzzupe did not apply progressive discipline, but instead moved directly to termination. The County action violated the concept of progressive discipline. Petitioner received a written reprimand for her tardiness in October of 2012. If the counseling action plan of May 28, 2013 is also considered to be a written reprimand, then appellant's entire disciplinary history consists of two written reprimands. Consequently, had the County properly charged appellant with simple absenteeism, she would have been subjected at most to a small suspension of less

than five days, a minor discipline that would not have permitted an appeal to the Office of Administrative Law.

For all the reasons set forth above the charge of chronic and excessive absenteeism must be **DISMISSED**.

ORDER

I **ORDER** that respondent's action sustaining a charge of chronic and excessive absenteeism against the appellant be **DISMISSED**.

I **ORDER** that respondent's action terminating appellant's employment be **REVERSED.**

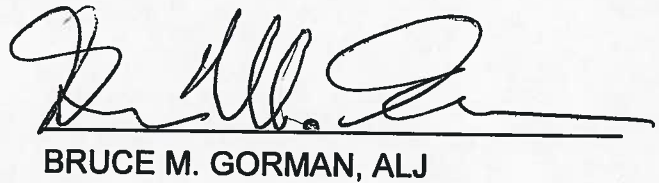
I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 4, 2015

DATE



BRUCE M. GORMAN, ALJ

Date Received at Agency: March 4, 2015

Date Mailed to Parties: March 4, 2015

/jb

WITNESSES AND DOCUMENTS IN EVIDENCE

WITNESSES

For Appellant:

Joseph Hiles

For Respondent:

John Steven Cuzzupe
Gerald J. Baber
Jeffrey L. Pompper
Stacy Pennington
Lawrence Fisher

EXHIBITS

For Petitioner:

P-1 Elmore Family Practice Letter, dated 4/29/13

For Respondent:

R-1 Job Specification Public Safety Telecommunicateor
R-2 Salem County Employee Record for Appellant
R-3 Performance Evaluation, dated 9/9/13

<u>Joint:</u>

J-1 CBA Articles 13 Discipline 24 Sick Leave and 29 Leave of Absence without Pay
J-2 Accommodation Latter, dated 2/27/13
J-3 Counseling Action Plan
J-4 Comp Request Denial Slip, dated 4/22/13
J-5 Comp and Vacation denial slip, dated 5/20/13
J-6 Letter from County to Appellant, Granting Special Medical Leave, 5/23/13
J-7 Letter from County to Appellant regarding Resumption of Work, 8/28/13
J-8 Voided Certification of Health Care Provider Serious Health Condition Accommodation Request Form, dated 10/7/13
J-9 Penn Medicine Letter, dated 8/5/13
J-10 Letter Rescinding Accommodation Meeting Request, dated 10/7/13
J-11 Employee Disciplinary Report, dated 10/19/13
J-12 Preliminary Notice of Disciplinary Action, dated 10/21/13
J-13 Final Notice of Disciplinary Action, dated 11/6/13
J-14 Not Admitted
J-15 Personnel Action Request Form, dated 11/3/13
J-16 Time Card 10/4/13 to 10/17/13
J-17 Time Card 10/1813 to 10/30/13
J-18 Vacation Time Check, dated 1/2/14
J-19 Stipulation of Facts
J-2- Stipulation of Past Disciplinary Action

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. CSV 17150-13

AGENCY DKT. NO. 2014-1440

IN THE MATTER OF JESSICA FACKLER, SALEM COUNTY SHERIFF'S DEPARTMENT.

Cheryl L. Cooper, Esq., for appellant, (Oandasan & Cooper, P.C., attorneys)

Michal M. Mulligan, Esq., for respondent County of Salem Sheriff's Department

Record Closed: January 18, 2015 Decided: March 4, 2015

BEFORE **BRUCE M. GORMAN**, ALJ:

This matter comes before me on respondent, County of Salem's Motion seeking an Order "Remanding the Matter to the County of Salem for the specification of additional charges of major discipline according to N.J.A.C. 4A:2-2.3". This Motion comes following the conclusion of a plenary hearing in the above matter. At the conclusion of the case, the County moved to conform the pleadings to the evidence. The appellant was charged with a violation of N.J.A.C. 4A:2-2.3(a)4–chronic or excessive absenteeism or lateness. At the conclusion of the trial, the County sought to amend the charges post trail to a violation N.J.A.C. 4A:2-2.3(a)3 inability to perform duties. It may not do so.

The law in this area is well-settled. The employee who is covered by the Civil Service Rules and Regulations is entitled to "Notice" and an "opportunity to be heard" prior to any major discipline being imposed against her. *N.J.A.C. 4A:2-2.5(a).* The

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New Jersey Administrative Code provides: "An employee must be served with a Preliminary Notice of Disciplinary Action setting forth the charges and statement of facts supporting the charges (specifications), and afforded the opportunity for a hearing prior to imposition of major discipline...." *N.J.A.C. 4A:2–2.5(a).*

A civil service employee cannot be legally tried or found guilty on charges of which he or she has not been given plain notice by the appointing authority, and a *de novo* hearing on administrative appeal is limited to the charges made below. *West New York v. Bock,* 38 *N.J.* 500 (1962). In *Bock*, the employee was removed from his position for chronic absenteeism and neglect of duty, although charges preferred against him were limited to three specific instances of tardiness. *Id.* at 505. Finding the appointing authority failed to provide Bock with sufficient notice that he was being charged with other violations for which he could be dismissed, the Supreme Court held "[p]roperly stated charges are a *sine quo non* of a valid disciplinary proceeding." *Id.* at 522. It is elementary that an employee cannot legally be tried or found guilty on charges of which he has not been given plain notice by the appointing authority. To do otherwise, the Court surmised, "offends elemental concepts of procedural due process." *Department of Law and Public Safety v. Miller*, 115 *N.J. Super.* 122, 126 (1971). The Court reasoned that there could be no adequate preparation for the hearing where the notice did not reasonably apprise the employee of the charges. *Id.* The De novo hearing on the administrative appeal is limited to the charges made below." *Kramer v. Civil Service Commission, 120 N.J.L. 599, 1 A.2d 197 (Sup.Ct.1938)*; *Orange v. DeStefano, 48 N.J. Super. 407, 419, 137 A.2d 599 (App. Div. 1958).*

In summation, once the case has gone to trial, the County cannot after the fact attempt to amend the charges. If the County wishes to charge the appellant with the inability to perform her duties, it must file a separate Final Notice of Disciplinary Action.

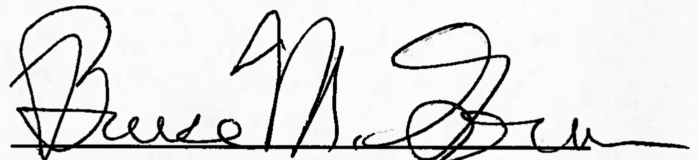
The County's Motion is **DENIED**.

ORDER

I ORDER that the County's Motion to amend the charges against appellant post-trial be **DENIED.**

This order may be reviewed by the **CIVIL SERVICE COMMISSION** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6

March 4, 2015
DATE


BRUCE M. GORMAN, ALJ

Date Received at Agency: March 4, 2015

Date Mailed to Parties: March 4, 2015

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