A-8

STATE OF NEW JERSEY

In the Matter of Nicola Knox,
City of Atlantic City

CSC Docket No. 2015-787
OAL Docket No. CSR 12428-14

DECISION OF THE
CIVIL SERVICE COMMISSION

ISSUED: APR 15 2015 (JET)

The appeal of Nicola Knox, a Fire Fighter with the City of Atlantic City, of her removal effective September 18, 2014, on charges, was heard by Administrative Law Judge Bruce M. Gorman (ALJ), who rendered his initial decision on February 25, 2015. Exceptions were filed on behalf of the appointing authority and cross exceptions where 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, did not adopt the ALJ's recommendation to dismiss the charges and reverse the removal. Rather, the Commission imposed a six-month suspension and ordered that the appellant undergo a fitness-for-duty examination prior to returning to work.

## DISCUSSION

The appointing authority removed the appellant on charges of inability to perform duties, chronic or excessive absenteeism, and other sufficient cause. Specifically, the appointing authority asserted that the appellant used all of her sick leave from December 2008, when she was hired, to September 2010 when she was laid off. Additionally, the appointing authority asserted that after her return from layoff, the appellant only worked 12 full duty shifts and 38 modified light duty shifts from May 5, 2011 to June 20, 2014. Further, the appellant was paid for leaves of absences during that timeframe. Upon the appellant's appeal, the matter

was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In his initial decision, the ALJ found that the appellant had exhausted her accrued sick leave in 2009 and 2010. He also determined that the appointing authority approved the appellant's requests for light duty, sick leave, and extended contractual sick leave on various occasions from May 5, 2011 through January 14, 2014. This resulted in the appellant working 50 shifts out of a possible 358 shifts during that time frame. The ALJ noted that the appellant was authorized off duty with pay from May 5, 2011 to October 22, 2011, due to the fact that she suffered a miscarriage during her pregnancy. However, although she returned to full duty on October 22, 2011, the appellant once again learned she was pregnant which resulted in her being placed on extended sick leave from March 5, 2012 to March 14, 2013. The ALJ indicated that the appellant was approved for this leave due to the appointing authority's policy which prohibits women from performing fire suppression duties while pregnant. The appellant returned to work on March 15, 2013, but due to a surgery, her personal physician, Fernando Delasotta, medically authorized her off duty from July 22, 2013 through September 27, 2013. Subsequently, the appellant was on extended sick leave through January 20, 2014 and utilized vacation time from January 21, 2014 through March 17, 2014. Thereafter, the appellant was placed on light duty pursuant to her physician's instructions until she was terminated on September 18, 2014.

The ALJ found that the appellant's lengthy absences over an extended period of time did not establish that she was unable to perform her duties. In this regard, since no testimony or evidence was offered that established that the appellant was physically or mentally unable to perform the duties of a Fire Fighter, and Dr. Delasotta medically cleared her to return to work as of October 5, 2014, the ALJ recommended that the charges of inability to perform duties and other sufficient cause be dismissed. In addition, the ALJ explained that the appointing authority did not demonstrate that the appellant's absences constituted chronic or excessive absenteeism. The ALJ explained that, in order to show that the appellant was guilty of chronic or excessive absenteeism, the appointing authority has the burden to show that the appellant used sick leave when she in fact was not sick or that she called out sick when no sick leave was available to her. Thus, since the appellant experienced three major physical issues that rendered her unable to work, *i.e.,* a miscarriage; a pregnancy; and back surgery and the appointing authority actually approved the appellant's absences based on the medical documentation she provided, the ALJ concluded that the charges of chronic or excessive absenteeism should be dismissed. Accordingly, the ALJ recommended reversing the removal.

In its exceptions to the ALJ's decision, the appointing authority maintains that the appellant's absences constituted chronic or excessive absenteeism. The appointing authority acknowledges that it is seeking to remove the appellant

because she has been out of work for such long periods of time. In this regard, the record clearly establishes that the appellant used all of her sick and vacation leave prior to when she was subjected to a layoff in September 2010 and she continued to use all of her leave time from May 2011, when she was rehired, through the date of her removal. Additionally, although she worked 155 shifts during that time frame, the appellant was authorized to be on light duty for a total of 152 of these shifts. The appointing authority explains that it compensated the appellant in good faith during her leaves in the amount of $243,822.28. In this regard, the appointing authority argues that the ALJ failed to recognize that the appellant was over-compensated for her abuse of sick leave and contends that she made a conscious decision to "stack" her sick and vacation time so she could receive the maximum amount of compensation for working the least amount of days.

Additionally, the appointing authority argues that the ALJ failed to consider the appellant's fitness for duty at the time the Preliminary Notice of Disciplinary Action was issued.[1] The appointing authority asserts that the appellant was unable to perform her duties since she was recovering from the injuries and illness which caused her to be authorized off duty. Further, it argues that the ALJ incorrectly found that a fitness for duty evaluation was necessary in order to determine if the appellant was fit for duty. In this regard, the undisputed medical documentation and witness testimony demonstrates that the appellant was unfit for duty. The appointing authority adds that the appellant never established that she was able to return to full duty and her inability to work in that capacity for such a long period of time establishes that the charges against her were proper.

In response, the appellant asserts that she was removed from employment simply because she took approved leave time. Specifically, the appellant contends that she did not violate any policies or procedures given that the appointing authority approved her leave requests. In addition, the appellant maintains that she was never notified that further leaves would not be approved or that she would be disciplined if she did not return to full duty. In this regard, the appellant states that the appointing authority should have provided notice that it would not approve any further requests for leave prior to her removal. Moreover, she states that the appointing authority did not require her to undergo a fitness for duty examination prior to her removal. Thus, the charge of inability to perform duties was without merit.

Upon independent review of the entire record, including the exceptions and cross exceptions filed by the parties, the Commission agrees with the ALJ's determination that the appointing authority did not sustain the charges of inability to perform duties and other sufficient cause. A history of excessive absences from

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[1] The appointing authority also argues that the ALJ failed to recognize that the medical note dated September 1, 2014 back dated the appellant's sick leave to July 5, 2013, with an estimated return date of January 20, 2014.

work, without the benefit of a fitness for duty examination, does not establish a basis to remove an employee on the charge of inability to perform duties. *See, e.g. In the Matter of Anil Thomas* (MSB, decided January 7, 2004) (Appellant who had been separated from employment based on appointing authority's allegation that he was psychologically unfit for duty without the benefit of a fitness for duty examination granted back pay and benefits). However, the Commission does not agree with the ALJ's interpretation of the standard for upholding the charge of chronic or excessive absenteeism. The ALJ found that the appointing authority did not show that the appellant abused her sick time by calling out when she was not sick or that she called out when sick leave was not available. However, *N.J.A.C.* 4A:2-2.3(a)4 provides that an employee may be disciplined for chronic or *excessive* absenteeism. Although the appellant provided medical documentation authorizing her off duty on several occasions, this does not negate the fact that the appellant's absences were chronic and excessive. Indeed, it is unrebutted by the appellant that during the times in question, she had exhausted her accrued leave. In fact, the appellant utilized contractual extended sick leave or unpaid leaves of absences. Since the appellant exhausted her available sick time and accrued leave, the fact that she provided medical documentation to cover her absences does not insulate her from a charge of chronic or excessive absenteeism. *See in the Matter of Derek Johnson, Department of Corrections* (CSC, decided July 11, 2012). Accordingly, the appellant's absences were clearly excessive and thus, that charge against her has been sustained.

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 also 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 appellant's 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. However, 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 matter, the appellant was excessively absent for a significant portion of her employment history with the appointing authority. However, while the appellant's attendance history is problematic, most, if not all of her absences are based on legitimate and documented medical reasons. Under these circumstances, the Commission finds that removal is 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 fire suppression related to public safety. Further, the appellant's use of excessive sick time cannot be tolerated as it is clearly disruptive to the appointing authority's work operations. The duties to be performed by the appellant on the days she was absent from work were either left undone or had to be completed by another employee. With regard to fire suppression, the appellant's absences created an even greater hardship to the appointing authority as it had the burden of either deploying additional Fire Fighters or paying overtime. Accordingly, given these circumstances, the Commission finds that a six-month suspension is an appropriate penalty in this matter and is neither unduly harsh nor disproportionate to the offense.

Regarding the appellant's fitness for duty, while the inability to perform duties charge has not been sustained, the Commission has trepidation ordering the appellant's reinstatement without some assurance that she is fully capable of performing the duties of her position. In this regard, the only evidence of her current fitness for duty is her own physician's opinion issued after the date of her removal. Thus, the Commission orders that, prior to her reinstatement, the appellant should be scheduled for an evaluation with a qualified physician. The selection of the physician shall be by agreement of both parties within 30 days of the date of this decision. The appointing authority shall pay for the cost of this evaluation. If the physician determines that the appellant is fit for duty, without qualification, the appellant is to be immediately reinstated to her position. If the physician determines that the appellant is unfit for duty, then the appointing authority should charge the appellant with inability to perform duties based on her current unfitness, with a current date of removal. Upon receipt of that Final Notice of Disciplinary Action, the appellant may appeal that matter to the Commission in accordance with *N.J.A.C.* 4A:2-2.8. Upon timely submission of any such appeal, the appellant would be entitled to a hearing regarding the current finding of unfitness only. Further, in that case, the appellant would not be entitled to mitigated back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.8(d)9, from the end of her six-month suspension until the date of her new removal. If she is found to be fit for duty, she would be entitled to mitigated back pay, benefits, and seniority from the end of her six-month suspension until the date of her reinstatement. Moreover, if she passes the examination, under no circumstances should her reinstatement be delayed pending resolution of any back pay dispute. Additionally, in light of the Appellate Division's decision in *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.

With respect to counsel fees, *N.J.A.C.* 4A:2-2.12 provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal. 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. A4489-02T2 (App. Div. March 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 sustained the charge of chronic and excessive absenteeism for the appellant's underlying conduct and imposed a six-month suspension. Therefore, she is not entitled to counsel fees.

## ORDER

The Civil Service Commission finds that the removal of the appellant was not justified and instead, imposes a six-month suspension. The Commission also orders, prior to reinstatement, the appellant undergo a fitness-for-duty examination. The outcome of that examination shall determine whether the appellant is entitled to be reinstated or removed, as outlined previously. Further, if subsequently removed based on that examination, the appellant would not be entitled to mitigated back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.8(d)9, from the end of her six-month suspension until the date of her new removal. However, if she is found to be fit for duty, she would be entitled to mitigated back pay, benefits, and seniority from the end of her six-month suspension until the date of her 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. The appellant shall provide proof of income earned 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 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 appellant's reinstatement. 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 Appellate Division.

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

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
P.O. Box 312
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Attachment

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. CSR 12428-14
AGENCY DKT. NO. NA

**IN THE MATTER OF NICOLA KNOX,**
**CITY OF ATLANTIC CITY FIRE DEPARTMENT.**

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**Sebastian B. Ionno,** Esq., for appellant, (Ionno & Higbee, LLC, attorneys)

**Steven S. Glickman,** Esq., for respondent (Ruderman & Glickman, P.C., attorneys)

Record Closed: January 26, 2015 Decided: February 25, 2015

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

## STATEMENT OF THE CASE

Appellant appealed respondent's action terminating her employment as an Atlantic City firefighter because of an inability to perform duties, chronic or excessive absenteeism, and other sufficient cause.

## PROCEDURAL HISTORY

The petitioner requested a fair hearing and the matter was transmitted to the Office of Administrative Law on September 25, 2014, 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 January 21, 2015. The record remained open for closing submission at the request of the parties. Submissions were received through February 3, 2015 and the record closed.

## FACTS

Pursuant to a Final Notice of Disciplinary action dated September 17, 2014 appellant was terminated from her position as a firefighter with the Atlantic City Fire Department for inability to perform duties, chronic or excessive absenteeism, and other sufficient cause. At the outset of the case, counsel for the City conceded that "other sufficient cause" (N.J.A.C. 4:A2-2.3) (A-12) was included in the charges as "catch all", and was subsumed in the other two charges.

Thomas J. Culleny, Jr., (Culleny) testified for the City. Culleny has been employed by the Atlantic City fire Department for fourteen years and has served in the position as battalion Chief for two years. Culleny participated in the preparation of the Disciplinary Action Notices in this case. He identified the initial Preliminary Notice of Disciplinary Action (R-1). He also identified an Amended Preliminary Notice of Disciplinary Action (R-2). Culleny explained that difference between the notices was that the initial notice (R-1) only addressed issues through September of 2013, while the Amended Preliminary Notice of Disciplinary Action (R-2) addressed events through January of 2014. Culleny also identified the Final Notice of Disciplinary Action (R-3).

Culleny identified appellant's attendance records for 2009 and 2010 (R-4, R-5). He explained that those documents demonstrated that appellant had utilized all of her authorized sick leave during those two years.

Culleny identified appellant's attendance record for 2011 (R-6). He explained that in 2010, appellant and more than two-dozen other firefighters were subjected to a layoff. In May of 2011 firefighters were reinstated. With the exception of appellant, all of them were rehired pursuant to what he referred to as Safer Grant. The Safer Grant required that anyone hired there under be actively involved in fire fighting. Appellant could not be hired under the Safer Grant because she had a medical problem and could not come back to work immediately. Consequently, she was rehired under the City budget.

Upon being rehired, appellant was immediately placed on a leave of absence with pay from May 5, 2011 through October 22, 2011. When she returned on October 22, 2011 she was assigned to full duty. However, commencing November 15, 2011 she utilized sick and vacation time and did not work for the rest of the calendar year.

Culleny identified appellant's attendance sheet for 2012. Commencing March 5, 2012, appellant was on approved extended sick leave. Culleny explained that pursuant to Article 16c2 of the Collective Bargaining Agreement between the City and Firefighter's Union, such extended sick leave was automatically required because appellant was in her fourth year of employment (R-16). That extended sick leave continued throughout 2012 and into 2013.

Culleny then identified appellant's attendance sheet for 2013 (R-8). That attendance sheet showed that appellant's extended sick leave continued through March 14, 2013. She returned to work on March 15, 2013 but worked only light duty. Culleny defined light duty as eight hours per day Monday through Friday. She could not engage in firefighting. Appellant then used vacation from March 28, 2013 through May 10, 2013. When she returned on May 15, 2013 she worked light duty through May 29, 2013. She then alternated between sick leave and light duty until she again was granted extended sick leave for the balance of the calendar year. Culleny noted that commencing July 22, 2013 through September 27, 2013 the record showed that appellant was absent without pay. However, that time was subsequently converted to extended sick leave by order of the City administration.

The 2014 attendance schedule (R-9) revealed that appellant was on extended sick leave through January 20, 2014. From January 21, 2014 through March 17, 2014 she utilized vacation time. Thereafter, she was placed on light duty pursuant to her doctor's instructions until she was terminated on September 18, 2014.

Culleny summarized the City's position by noting the following. During 2011, appellant was scheduled to work 118 shifts. She only worked 12 shifts. The balance of the time, she was out on vacation, sick leave, or extended sick leave. In 2012, appellant was scheduled to work 182 shifts. During that year, she did not work any of those shifts. During 2013, appellant was scheduled to work 118 shifts. After utilizing sick leave and vacation time, she worked only thirty eight shifts, all of them on modified duty. Finally, Culleny noted that between May 5, 2011 and January 20, 2014 the City paid appellant the sum of $243,823.28.

Culleny the identified the medical documentation applying to appellant's absences in 2013 and 2014. He identified a physician's statement dated September 17, 2013 (R-11) from Dr. Fernando Delasotta, M.D. That document constituted appellant's excuse from duty commencing July 5, 2013 with an estimated return to work date of January 20, 2014. The document notes: "patient having surgery on 10/5/13 at SMC."

Culleny identified Dr. Delasotta's statement of January 20, 2014. In that document, he authorized appellant's return to work, but limited her activity due to "sedentary duty, lifting up to ten pounds and sitting not more than thirty minute internals at a time, some walking/standing, no pushing or pulling, bending, stooping or squatting, no repetitive work." (R-12). This document also recommended continuation of continued physical therapy.

Culleny identified Dr. Delasotta's statement of February 25, 2014 (R-13). That document continued appellant on sedentary duty until her next appointment with Dr. Delasotta on April 2, 2014. Dr. Delasotta's next letter was dated April 17, 2014 and

continued the appellant on sedentary duty until her next appointment with him on May 21, 2014 (R-14).

Dr. Delasotta's next letter was dated June 15, 2014 (R-15) and authorized appellant to commence "light duty", which consisted of: maximum lifting and carrying of twenty-five pounds, occasionally, some walking/standing, occasional sitting, pushing or pulling, bending, stooping or squatting. The document states that any further appointment with Dr. Delasotta was "pending testing".

The next document came from Maurica B. Scibilia, MSN, RN, APN-C, and is dated September 8, 2014. That document continued appellant on light duty but stated that her estimated return date to full duty was October 16, 2014 (A-20). That letter was followed by a letter from Dr. Delasotta dated October 15, 29014 (A-22). That document stated appellant could return to full duty on October 16, 2014.

On cross examination, Culleny offered the following testimony.

Culleny acknowledged that other firefighters work in non firefighting capacities, including himself. He denied that any of those persons worked light duty.

Culleny acknowledged that the fire department never sent the appellant for a fitness for duty examination. He admitted he could offer no evidence that appellant could not presently perform her duties as a firefighter.

Culleny reviewed the specifications supporting the charges against the appellant. He began by noting that appellant used all of her sick leave during 2009 and 2010. However, he admitted that appellant was never disciplined for improper usage of sick leave during those years. He conceded that she never violated any policy regarding sick leave during those years. He conceded that she complied with all of the requirements for use of sick leave. He acknowledged that appellant was granted extended sick leave with pay by the City administration from May 5, 2011 through October 22, 2011. He conceded that she was not AWOL during that time. He noted

that appellant utilized all of her sick leave during the remainder of 2011, but admitted that in so doing, appellant violated no policy or regulation.

Culleny stated that in 2012, appellant used all of her sick leave, vacation leave and extended lave. However, he admitted that all such leave was approved by the City and conceded that appellant has not violated any City policy, rule of regulation in taking that leave.

Culleny stated that appellant used all of her sick leave and extended sick leave in 2013. But he conceded that all of her time off was approved by the City and that appellant had not violated City policy, rule or regulation by taking that leave.

Finally, Culleny admitted that all leave taken by appellant during 2014 was approved by the City and that she violated no policy, no rule of regulation by taking that leave.

Culleny conceded that appellant was never given notice that if she did not return to full duty by a specific date, her job would be in jeopardy. He acknowledged that appellant took all leave in full accordance with City policy, rule and regulation. He agreed that at no time during her tenure with the City was appellant absent without leave (AWOL). Culleny denied knowledge of the reasons why appellant was provided with extended sick leave.

Both parties stipulated that appellant had no prior disciplinary history.

Appellant testified on her own behalf. Appellant served in the US Army both on active duty and in the Reserves from 2001 through 2009. During the active duty portion of her service, she saw combat in Iraq. She was honorably discharged from the Reserves in 2009.

In 2004 appellant was initially employed as a docket clerk in the Atlantic City Municipal Court. In 2008 she transferred to the Fire Department as a firefighter. In

2010 she was laid off with approximately thirty other firefighters, but was rehired along with the other firefighters in 2011.

Appellant did not return to work in May of 2011. She had been pregnant with twins and shortly before May of 2011 had mis-carried the babies. As a result of her physical condition following the miscarriage, she received six months approved leave by the City Administration. That leave accounts for the extended leave of absence reflected in appellant's 2011 attendance record (R-6).

Appellant returned to work in October of 2011. However, in March of 2012, she learned she was once again pregnant. Pursuant to fire department policy, a pregnant woman cannot work in fire suppression. As a result, appellant was placed on extended sick leave commencing March 5, 2012 and ending March 14, 2013.

Appellant returned to work on March 15, 2013. But on July 13, 2013, Dr. Delasotta placed her on sick leave because of a back problem (R-11). Appellant then underwent spinal surgery performed by Dr. Delasotta. Because of her spinal surgery, she was again placed on extended medical lave through January 20, 2014. At that time, she returned to work, but was limited to light duty. On October 16, 2014 Dr. Delasotta advised the City that appellant could return to full time duty (A-22). At present, appellant stands ready willing and able to assume her duties as a firefighter.

Appellant was never told she was in violation of City policy or fire department rules and regulations. She never was out of work on unauthorized leave. She also testified that the City never sent her for a fitness for duty evaluation. No City official ever told her that if she did not return to work by a specific date, she would be terminated. Nor was she told that if she did not return to full duty by a specific date she would be terminated.

## LEGAL DISCUSSION

Appellant faces three charges: inability to perform duties, chronic or excessive absenteeism, and other sufficient cause. Counsel for the City admitted candidly that the charge of other sufficient cause was "catch all" and was in reality subsumed by the other two charges.

In order to prove the charge of inability to perform duties, the City must present medical evidence showing that the appellant in incapable of performing her job. In this case, the City presented no such evidence. Indeed, the City did not even send appellant for a fitness for duty evaluation.

In the specifications attached to the Final Notice of Disciplinary action, the City stated: From May 5, 2011 through January 20, 2014 the City has compensated Nicola Knox in the amount of $243,822.28. Over that time period, appellant worked on 50 shifts out of a possible 358 shifts, exclusive of vacation time. In other words, she was on either sick leave or extended sick leave for 308 shifts. The City's position appears to be that her lengthy absences during that time period must necessarily mean she is unable to perform her duties. In short, the City seeks to establish inability to perform duties through extrapolation. The City may not do so. Inability to perform duties can only be established at a minimum through a fitness for duty evaluation.

No competent testimony was adduced at trial and no evidence was offered at trial proving that appellant was physically or mentally unable to perform the duty as a firefighter. To the contrary, Dr. Delasotta's memorandum of October 5, 2014 (A-22) establishes that appellant is able to return to full duty. Appellant herself offered uncontroverted testimony that she is now physically able to perform the duties of a firefighter.

The City failed to offer any proof to the contrary. Nothing in the record demonstrates that appellant is unable to perform her duties. Accordingly, the charge of inability to perform duties must be **DISMISSED**.

The City employed the same theory to prove chronic or excessive absenteeism. The heart of its case lies in the fact that between May 5, 2011 and January 14, 2014 appellant was on either sick leave or extended sick leave for 308 out of a possible 358 shifts. The City would appear to argue that because appellant did not come to work, she was chronically and/or excessively absent. The City's position ignores the fact that each of the shifts for which appellant was absent was excused. Indeed, the bulk of those shifts were excused by express action by the City administration in granting the appellant extended sick leave. Unlike the Fire Department, the City administration recognized that a miscarriage, a pregnancy, and back surgery constitute valid reasons not to come to work. It should be noted that a substantial portion of the shifts that appellant missed, namely those from March 5, 2012 through March 14, 2013 were the direct result of the Fire Department Policy that prohibits a pregnant woman from serving as a firefighter.

The proper proof to establish chronic or excessive absenteeism would entail demonstrating that appellant used sick leave when she was not in fact sick or that she called out sick when she had no sick leave available. In this case, no such proof exists. The uncontroverted proof before this tribunal is that appellant has suffered a series of major physical issues that have rendered her unable to work. Under the law, it is not a violation of any statues, regulation, or local policy to utilize sick leave when legitimately ill or infirm.

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

The City cites a series of cases in support of its position. None of those cases is directly on point. In Michael Gugliotta v. City of Newark Police Department, 93 N.J. A.R. 2$^{d}$ (CSV) 667 (N.J. Adm.), 1993 WL 470764, the appellant received a thirty-day suspension for excessive absenteeism. The excessive absenteeism consisted of two hundred fourteen separate days over a seven year period. The days were interspersed, and no specific reason for the absences was given; apparently some of

the absences were the result of work related injury, but many were not. Further, Newark had an "unlimited sick leave policy".

In the present case, appellant's absences were attributed to three specific maladies: a miscarriage of twins, a pregnancy, and back surgery. All three of those maladies were finite; none of them presently affects appellant's ability to work. All absences attributable to those three maladies were expressly approved by the City, either by contract or by formal action.

In In Matter of Phillip Smith and City of Newark, OAL Docket No. CSV 11064-06, 2007 WL2247548 (N.J. Adm.), the appellant was terminated for incompetency or inefficiency. Once again, this case dealt with Newark's unlimited sick leave policy with police officers. Like the Gugliotta case, the appellant in Smith took off sick leave in small to moderate increments. He justified his absence as a resulting from of a variety of ailments including flu, lower back pain, and pain in hip, food poisoning, viral gastroenteritis, sore throat, stomach virus, trouble breathing, possible food poisoning, food poisoning, stomach problem, and blood pressure. Smith was disciplined fourteen times before he was ultimately removed.

In the case at bar, appellant's absences were the result of three specific maladies, all of them documented and all of them acknowledged by the City by virtue of the extended leaves afforded her. Further, prior to her termination, appellant was never disciplined for her absences. Finally, the charges in the two cases differ.

In In Matter of Sharon Kilpatrick, Greenbrook Development Center, OAL Docket No. CSV 04659-06, 2007, WL 1248340(N.J. Adm.), affirmed 2007 W.L 2429679 (N.J. Adm.), the appellant "was absent on dozens of occasion in 2005 for which she had no available time off and for which she had not even sought sick leave injured status." In the present case, all of appellant's sick and extended sick leave was expressly approved by the City.

Finally, In the Matter of Christina Sovinski and Township of South Orange, OAL Docket No. CSV 7876-03, 2004 WL 3059245 (N.J. Adm.), the charge was inability to perform the job. In that case, the appellant could not perform the job, but required accommodations that the employer was not willing to provide. In the present case, appellant has been medically cleared to return to full duty.

None of the cases cited by the City reflects a fact pattern where all of the sick time was expressly approved by the municipality. Given that approval, together with Dr. Delasotta's certification that appellant may return to full duty, the charges here have no basis and must be **DISMISSED.**

## ORDER

I **ORDER** that the charge of inability to perform duties be **DISMISSED**.

I **ORDER** that the charge of chronic or excessive absenteeism be **DISMISSED**.

I **ORDER** that the charge of other sufficient cause be **DISMISSED**.

I **ORDER** that the action of the respondent 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. 40A:14-204.

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.

2/25/15
DATE

**BRUCE M. GORMAN**, ALJ

Date Received at Agency: 2/25/15

Date Mailed to Parties: 3-3-15

/jb

## WITNESSES AND DOCUMENTS IN EVIDENCE

### WITNESSES

For Appellant:

Nicola Knox

For Respondent:

Thomas J. Culleny, Jr.

### EXHIBITS

For Appellant:

A-1 Intentionally Omitted
A-2 Intentionally Omitted
A-3 Intentionally Omitted
A-4 Intentionally Omitted
A-5 Intentionally Omitted
A-6 Intentionally Omitted
A-7 Intentionally Omitted
A-8 Intentionally Omitted
A-9 Intentionally Omitted
A-10 Intentionally Omitted
A-11 Intentionally Omitted
A-12 Intentionally Omitted
A-13 Intentionally Omitted
A-14 Intentionally Omitted

A-15 Intentionally Omitted
A-16 Intentionally Omitted
A-17 Intentionally Omitted
A-18 Intentionally Omitted
A-19 Intentionally Omitted
A-20 Doctor's Note – Anticipated Return to Full Duty, dated September 8, 2014
A-22 Doctor's Note – Return to Full Duty, dated October 15, 2014
A-23 Intentionally Omitted
A-24 Intentionally Omitted
A-25 Intentionally Omitted
A-26 Intentionally Omitted
A-27 Intentionally Omitted
A-28 Intentionally Omitted
A-29 Intentionally Omitted
A-30 Intentionally Omitted
A-31 Intentionally Omitted
A-32 Intentionally Omitted
A-33 Intentionally Omitted
A-34 Intentionally Omitted
A-35 Intentionally Omitted
A-36 Intentionally Omitted
A-37 Intentionally Omitted
A-38 Robert Wenzel Attendance Transaction

For Respondent:

R-1 Preliminary Notice of Disciplinary Action
R-2 Amended Preliminary Notice of Disciplinary Action
R-3 Final Notice of Disciplinary Action
R-4 Nicola Knox 2009 Attendance Record
R-5 Nicola Knox 2010 Attendance Record
R-6 Nicola Knox 2011 Attendance Record

R-7 Nicola Knox 2012 Attendance Record

R-8 Nicola Knox 2013 Attendance Record

R-9 Nicola Knox 2014 Attendance Record

R-10 Nicola Knox 2009 Attendance Transaction Report

R-11 Note from Dr. Delasotta, dated September 17, 2013

R-12 Note from Dr. Delasotta, dated January 20, 2014

R-13 Note from Dr. Delasotta, dated February 25, 2014

R-14 Note from Dr. Delasotta, dated April 17, 2014

R-15 Note from Dr. Delasotta, dated June 25, 2014

R-16 IAFF Local 198 Collective Bargaining Agreement Provisions