A-4

STATE OF NEW JERSEY

In the Matter of Michael Pribramsky
Borough of Clementon,
Department of Roads

CSC DKT. NO. 2015-681
OAL DKT. NO. CSV 11877-14

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 2, 2015 BW

The appeal of Michael Pribramsky, Laborer, Grounds, Borough of Clementon, Department of Roads, removal effective July 17, 2014, on charges, was heard by Administrative Law Judge Joseph A. Ascione, who rendered his initial decision on July 23, 2015. Exceptions were filed on behalf of the appellant and a reply to exceptions were filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on September 2, 2015, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Michael Pribramsky.

Re: Michael Pribramsky

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
SEPTEMBER 2, 2015

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
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attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 11877-14
AGENCY DKT. NO. 2015-681

IN THE MATTER OF MICHAEL PRIBRAMSKY,
BOROUGH OF CLEMENTON,
DEPARTMENT OF ROADS.

Joseph Waite, Staff Representative, American Federation of State, County and Municipal Employees, District Council 71, for appellant Michael Pribramsky pursuant to N.J.A.C. 1:1-5.4(a)(6))

Joseph G. Antinori, Esq., for respondent Borough of Clementon, Department of Roads (Brown & Connery, attorneys)

Record Closed: March 23, 2015 Decided: July 23, 2015

BEFORE **JOSEPH A. ASCIONE**, ALJ:

STATEMENT OF THE CASE

Appellant, Michael Pribramsky (Pribramsky), appeals his July 16, 2014, removal as a laborer by the Borough of Clementon (Clementon), Department of Roads, on charges of failing to report to work during regularly scheduled working hours, failure to report absences in accordance with the procedures established in Clementon's policies and procedures/collective bargaining agreement, and excessive absenteeism.

Appellant argues improprieties in handling the discipline, violations of due-process requirements, including depriving appellant of appropriate hearings, and failure to apply progressive discipline. Appellant further argues that Clementon regularly allowed him to make up hours during lunch or by working late. Appellant further argues that the charges only identify one date of absence, which is not a reasonable basis for removal for excessive absenteeism.

PROCEDURAL HISTORY

On July 16, 2014, Clementon issued a Preliminary Notice of Disciplinary Action (PNDA) against Pribramsky. (R-10.) Pribramsky requested a departmental hearing, which was held on August 19, 2014, and on August 20, 2014, a Final Notice of Disciplinary Action (FNDA) was issued sustaining the charges and notifying appellant of his removal (R-12). Pribramsky appealed, and the matter was transmitted by the Civil Service Commission to the Office of Administrative Law, where on September 17, 2014, it was filed for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A hearing was held on February 19, 2015. At that time, the parties requested the opportunity to submit written closing statements and legal memoranda. The record closed on March 23, 2015, upon the receipt of the post-hearing submissions. The time for issuance of the initial decision was extended on May 7, and June 23, 2015.

UNDISPUTED FACTS

On February 19, 2015, the parties stipulated on the record the following facts. Accordingly, I **FIND** the following undisputed **FACTS**:

1. Appellant Michael Pribramsky commenced work as a laborer with respondent Clementon, in the Department of Public Works (DPW), on May 13, 2009.

2. Appellant is a member of the American Federation of State, County and Municipal Employees, District Council 71, (hereinafter, "Union") and is covered under the terms of a Collective Negotiations Agreement entered into between the Union and the Borough.

3. Appellant acknowledges receipt of the Clementon Personnel Policies and Procedures Manuals for 2010 and 2013.

4. Appellant is entitled to fifteen paid sick days per year.

5. According to the Clementon Policies and Procedures, an employee's request for an unexpected sick day is to be made by telephone no less than thirty minutes prior to the employee's start time.

6. Appellant's supervisor during the time at issue was Melvin Applegate.

7. Clementon terminated appellant's employment effective July 17, 2014.

TESTIMONY

Melvin Applegate

Applegate testified that he has been employed with the Clementon DPW as acting director for the last five to six years. He supervises nine employees. He testified that he is familiar with Pribramsky. He experienced Pribramsky's lateness and attendance issues over the years, and his poor skills in dealing with the public. As a result of these issues, on April 8, 2013, he held a counseling session with Pribramsky that was attended by Jenai Johnson, the Clementon administrator/clerk. Johnson and Applegate advised Pribramsky of Clementon's concerns regarding his absenteeism and lateness and unacceptable conduct with the public, and notified him that failure to report to work as scheduled and to conduct himself in an appropriate fashion could lead to further disciplinary action. (R-5.)

Applegate testified that Pribramsky's absenteeism continued, and he did not meet minimum attendance standards. By PNDA dated June 4, 2014, Clementon proposed a ten-day suspension for not calling or showing up for duty on June 2 and June 3, and failure to report for additional scheduled hours on May 31. Appellant did not request a departmental hearing in connection with that disciplinary action, and served a ten-day suspension from June 18 through July 1, 2014. After appellant served the ten-day suspension, he again failed to show up for regular work on July 16. Appellant's notice of his intended absence came to Applegate by text message after the work day started. The following day, July 17, appellant advised Applegate by text message shortly before the work day started that he would be two hours late for work. The following day he advised Applegate that he would be out because he had to see a doctor about his medications. Applegate never submitted a doctor's note to Clementon. Applegate advised Johnson of Pribramsky's absences.

Applegate saw the July 16, 2014, PNDA issued by Johnson. He was present at appellant's requested departmental hearing on August 19 before Personnel Committee chair Tom Weaver, which was attended by two union representatives, one of whom he recalls was Colin Tucker.

Applegate testified that he never had a no-call, no-show employee. He knew of the Family and Medical Leave Act (FMLA), but never received any request from appellant for accommodations due to medical circumstances, or a request for a leave of absence. Appellant never requested a work-hour change. Applegate testified that he did not know who determines the disciplinary penalties.

Jenai Johnson

Johnson testified that she is the administrator/clerk of Clementon. She has been with Clementon since 2005, and previously served as an assistant administrator. She testified that she is familiar with Pribramsky.

Johnson testified that there existed an attendance problem with Pribramsky from at least April 2013, when it was noted in appellant's review (R-6). As a result of that review, Johnson and Applegate had a counseling conference with appellant to discuss the issue of attendance.

Johnson recalled some medical issues with appellant in 2012 involving an emergency-room visit, but those issues did not lead to a request for an accommodation. No medical issues were raised in 2013 or 2014. R-3 and R-4 were identified as appellant's attendance records for 2013 and 2014.

Johnson testified that she supervised all municipal employees except the police. Appellant could have come directly to her to ask for an accommodation due to medical issues. This did not occur prior to the disciplinary action seeking his termination. The termination followed civil-service guidelines regarding progressive-discipline obligations. A counseling session was held in 2013 regarding attendance and conduct; a ten-day suspension was imposed in 2014 for failure to report to work as scheduled and failure to report absences in accordance with the procedures established; and appellant's removal was proposed shortly thereafter on charges of failure to report to work as scheduled, failure to report absences in accordance with the procedures established, and excessive absenteeism. A departmental hearing on the removal action was held before the Personnel Committee chair, Thomas Weaver, after which the charges were sustained and the termination was affirmed.

Michael Pribramsky

Pribramsky testified to his five years of employment with Clementon as a laborer. Pribramsky acknowledged that on July 16, the date identified in the July 16, 2014, PNDA, he overslept and reported his absence late. He disputed that he did not timely advise his supervisor of his lateness on July 17 and absence on July 18, and he relies on the text messages to his supervisor, Applegate (R-9). Pribramsky disputed that he did not have leave time available to use. He claimed that leave-time numbers were

always miscalculated. Further, he testified that the office practice allowed a worker to work through lunch or work after hours to make up time.

Pribramsky testified that while his job position was laborer, he actually did repaving, roofing, and air-conditioner repair, saving the municipality a tremendous amount of money.

Pribramsky testified that he knew of the FMLA, but never talked to anyone about it. He did supply a doctor's note regarding the 2012 emergency-room visit, and his employer knew that he had been prescribed medication.

Appellant complained that he did not get two hearings pursuant to civil-service rules and the collective-bargaining-agreement guidelines. He acknowledged the departmental hearing before Personnel Committee chair Thomas Weaver prior to the FNDA of August 20, 2014. Pribramsky said that he would like to return to his employment at Clementon.

Appellant did not dispute his timesheets for 2013 and 2014. (R-3; R-4.) He acknowledged signing the Receipt for Personnel Policies and Procedures Manual (R-2), but testified that he did not read the manual. He acknowledged the 2013 absenteeism counseling session, but did not recall Johnson being there. He did recognize that absenteeism and lateness could result in additional disciplinary charges. He signed the second page of his April 2013 performance review (R-6), and understood that he did not meet the minimum standards. When he received the June 4, 2014, PNDA proposing the ten-day suspension for failure to report to work as scheduled and failure to report absences in accordance with the procedures established (R-7), he chose not to request a hearing.

Pribramsky identified R.J. as his son. He testified that his son did not have a medical condition on July 17, 2014. Appellant did not submit any medical evidence relating to either himself or his son at the departmental hearing or at the OAL hearing.

Appellant testified that the Clementon Personnel Policies and Procedures Manual is not binding on the union contract or on the Civil Service Commission. Applegate could have charged his time against pay, or his supervisor could have allowed him to make up time during his lunch hour.

DISCUSSION

This matter involves appellant's proposed removal based on a continuing course of absenteeism, not absence on one day. The time records reflect that appellant used every hour of sick, vacation, personal-leave and compensatory time available to him in 2013, and in fact owed the Township time at the end of 2013. (R-3.) By July 2014 he had used all of the leave time allotted for that year. (R-4.) This may have been due to medical circumstances; however, appellant has failed to provide any medical records that would support findings of fact by this tribunal regarding medical circumstances. Appellant did not testify that he requested any FMLA non-compensatory time, or an unpaid leave of absence, or an accommodation for medical reasons. Though, it appears from the testimony that Applegate tolerated excessive lateness and absenteeism from appellant and attempted to accommodate the appellant without a formal accommodation request.

Appellant disputed Clementon's assertion that he had used all of the leave time allotted to him, but he did not provide documentation showing totals different from those calculated by Clementon. He also disputed Clementon's assertion that proper hearing and notice procedures were followed, but did not submit a collective-bargaining agreement that supports his position.

Respondent's witnesses were credible, and appellant offered no testimony disputing the credibility of their testimony, nor any evidence that the testimony was biased against the appellant. Accordingly, I find the respondent's witnesses credible. Appellant's testimony was also credible, but very limited, and did not offer sufficient support to challenge the presentations of respondent's witnesses. If appellant sought no accommodation from his employer for medical issues during the time period in

question, and did not afford his employer an opportunity to address any needs resulting from medical issues, he cannot now raise medical issues in support of his position that his absences should have been excused.

ADDITIONAL FINDINGS OF FACT

Based on the witnesses' credible testimony and the documentary evidence, I **FIND** the following additional **FACTS**:

8. Clementon has shown that all of appellant's allotted leave time for calendar year 2013 was used. (R-3.)

9. Clementon has shown that all of appellant's allotted leave time for calendar year 2014 was used as of mid-July 2014. (R-4.)

10. Pribramsky acknowledged the counseling regarding absenteeism on April 8, 2013.

11. Pribramsky did not request a departmental hearing on the ten-day suspension imposed by the June 4, 2014, PNDA, and he served the suspension.

12. Pribramsky failed to timely report his lateness and eventual absence from work on July 16, 2014.

13. Pribramsky requested a departmental hearing on the removal proposed by the July 16, 2014, PNDA. The departmental hearing was held on August 19, 2014, before Personnel Committee chair Thomas Weaver. That hearing resulted in the charges against appellant being sustained and the appellant's termination from his employment with Clementon.

LEGAL ANALYSIS AND CONCLUSION

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil-service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her duties. N.J.S.A. 11A:1-2(a). Such an employee may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a).

An appeal to the Civil Service Commission requires the OAL to conduct a de novo hearing to determine the employee's guilt or innocence, as well as the appropriate penalty if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). De novo means to consider anew, or afresh, for a second time. Houman v. Pompton Lakes, 155 N.J. Super. 129 (Law Div. 1977). It is as if there had been no prior hearing and as if no decision had been previously rendered. Housing Auth. of Newark v. Norfolk Realty Co., 71 N.J. 314, 326 (1976).

The burden of persuasion falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The appointing authority must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson v. Parsekian, 37 N.J. 143 (1962). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

In this case, the issue is whether Clementon's action of removing Pribramsky from his position for his failure to timely advise of his lateness and eventual absence from work and excessive absenteeism was reasonably justified.

In 2013, the amount of sick, personal, vacation and compensatory time used by appellant exceeded the annual amount allowed to an employee. By mid-July 2014, the amount of sick, personal, vacation and compensatory time used by appellant had exceeded the annual amount allowed to an employee. There is no evidence that appellant requested an accommodation for medical reasons.

Appellant argues that respondent violated his rights regarding the timeliness of the departmental hearing afforded, under Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). Clementon provided appellant with a departmental hearing within thirty-five days of the termination, and not the thirty days required by statute.

In Ealy v. Department of Law and Public Safety, CSV 2206-02, Initial Decision (February 26, 2003), adopted Comm'r (April 11, 2003), <http://njlaw.rutgers.edu/collections/oal/>, the administrative law judge determined that the de novo hearing held before the OAL cured any procedural deficiency. "We must bear in mind that the primary object and the purpose of the civil service law is to secure for government, state, county and municipal entities, efficient public service in all its many functions. The welfare of the people as a whole, and not specifically or exclusively the welfare of the civil servant, is the basic policy underlying the law." Borough of Park Ridge v. Salimone, 21 N.J. 28, 44 (1956). Granting appellant's requested dismissal of the disciplinary charges would chip away at, if not undermine, that very policy.

I **CONCLUDE** that respondent violated appellant's rights regarding the timeliness of the departmental hearing afforded; however, I further **CONCLUDE** that the violation

has been remedied by the hearing provided within thirty-five days of the termination, as well as this de novo hearing.

Appellant also argues that the one day of absence identified in the July 16, 2014, PNDA specifications does not constitute excessive absenteeism upon which a removal action may be based. However, ample information had been provided to appellant regarding the reasons for the charges against him. Appellant had been given notice with the April 2013 counseling and the June 2014 ten-day suspension that continued failure to abide by the Clementon absence/lateness policies could result in further disciplinary action, up to and including termination. His failure to report to work as scheduled on July 16, 2014, was the infraction that led to further disciplinary action. Appellant had an opportunity at this administrative hearing to address the charges and correct any information presented by Clementon that he believed was inaccurate. The submissions from appellant at this hearing have not been adequate to dispute the reasonable disciplinary action taken by Clementon.

"Just cause for dismissal can be found in habitual tardiness or similar chronic conduct." See W. New York v. Bock, 38 N.J. 500, 522 (1962). In judging whether an employee's absenteeism is chronic or excessive, relevant factors include, among others, the number of absences and the time span between the absences. See Harris v. Woodbine Developmental Ctr., CSV-4885-02, Initial Decision (March 27, 2003), <http://njlaw.rutgers.edu/collections/oal/>. Appellant's absence on July 16, 2014, constitutes chronic or excessive absenteeism because his allotted leave time for the year had been exhausted, which had also been the case in the prior year. (R-3 and R-4.)

I **CONCLUDE** that Clementon has met its burden to prove by a preponderance of the evidence that on July 16, 2014, appellant failed to provide timely notice of his intended absence in accordance with Clementon's policies and procedures, and that his absence on that date supports the charge of excessive absenteeism.

PENALTY

When dealing with the question of penalty in a de novo review of a disciplinary action against a civil-service employee, the proofs and penalty on appeal based on the charges presented must be evaluated. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962). Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. West New York v. Bock, supra, 38 N.J. at 522–24. Major discipline may include removal, disciplinary demotion, and suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number and proximity of prior disciplinary infractions evaluated by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

Here, appellant used all of his allotted sick, vacation, personal-leave and compensatory time for the years 2013 and 2014 within an eighteen-month period. This is excessive absenteeism, and appellant has not shown that medical reasons were the cause of the absences. Since April 2013 he has been counseled regarding absenteeism, and in 2014 he served a ten-day suspension for absenteeism.

Accordingly, I **CONCLUDE** that termination is appropriate.

ORDER

I **ORDER** that Pribramsky's appeal is **DENIED** in all respects.

I further **ORDER** that the termination of Pribramsky is **AFFIRMED**.

I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

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

Within thirteen days from the date on which this 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, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 23, 2015
DATE

JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 7/23/15

Date Mailed to Parties: 7/23/15

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APPENDIX

LIST OF WITNESSES

For Appellant:

Michael Pribramsky

For Respondent:

Jenai Johnson, Clerk

Melvin Applegate, Acting Director of Public Works

LIST OF EXHIBITS

For Appellant:

None

Respondent:

R-1 Borough of Clementon Personnel Policies and Procedures Manual

R-2 Receipt for Policy, December 10, 2013

R-3 Available Time 2013

R-4 Available Time 2014

R-5 Counseling Action Plan (admissibility limited to penalty)

R-6 Performance Review (admissibility limited to penalty)

R-7 Preliminary Notice of Disciplinary Action, dated June 4, 2014

R-8 Final Notice of Disciplinary Action, dated June 19, 2014

R-9 Text communications

R-10 Preliminary Notice of Disciplinary Action, dated July 16, 2014

R-11 Departmental Hearing Determination Letter, August 19, 2014

R-12 Final Notice of Disciplinary Action, dated August 20, 2014

R-13 Not admitted