

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Dwayne Austin. The Commission further orders that appellant be granted 30 days back pay, benefits, and seniority. 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.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C. 4A:2-2.12*. An affidavit of services in support of reasonable counsel fees 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* and *N.J.A.C. 4A:2.12*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay or counsel fees.

The parties must inform the Commission, in writing, if there is any dispute as to back pay or counsel fees within 60 days of 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 shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 5TH DAY OF DECEMBER, 2018



Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
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attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 00726-18

AGENCY DKT. NO. 2018-1881

**IN THE MATTER OF DWAYNE AUSTIN,
HUDSON COUNTY SHERIFF'S
DEPARTMENT.**

Samuel B. Wenocur, Esq., for appellant Dwayne Austin (Oxford Cohen,
attorneys)

John A. Smith III, Assistant County Counsel, for respondent Hudson County
(Donato J. Battista, County Counsel)

Record Closed: October 25, 2018

Decided: October 26, 2018

BEFORE MARGARET M. MONACO, ALJ:

STATEMENT OF THE CASE

This matter involves disciplinary charges against appellant Dwayne Austin, who is employed as a 911 operator with the Hudson County Sheriff's Department (the Department). Appellant appeals from a thirty-day suspension stemming from his use of sick time.

PROCEDURAL HISTORY

The Department issued a Preliminary Notice of Disciplinary Action dated September 20, 2017, informing appellant of the charges of inability to perform duties; chronic or excessive absenteeism; conduct unbecoming a public employee; and other sufficient cause issued against him. Specifically, the PNDA states:

You have surpassed the allotted usage of sick days for calender [sic] year 2017. As of 9-20-17 you have logged 17 sick days. You have also demonstrated a pattern of absences on 4 separate occasions as indicated on the departmental reports and sign-in sheets therefore causing an inability and inefficiency to your performance by not be[ing] at your position during the directed hours of operation. Your lack of action for not following the Rules and Regulations of the Hudson County Sheriff's Office is conduct unbecoming a public employee.

After a departmental hearing, the Department issued a Final Notice of Disciplinary Action dated December 18, 2017, sustaining the charges and providing for appellant's suspension for thirty days. Appellant filed an appeal, and the Civil Service Commission transmitted the matter to the Office of Administrative Law, where it was filed for determination as a contested case. The hearing was held on June 7, 2018. After the conclusion of the testimony, the record remained open for the receipt of post-hearing submissions. The parties filed briefs in support of their respective positions, and the record closed upon receipt of the last submission.

FACTUAL DISCUSSION

At the hearing, the Department presented testimony by principal personnel technician Richard Sires and 911 coordinator Elba D'Aiuto, and appellant testified on his own behalf. Based upon a review of the testimony and the documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, I **FIND** the following undisputed **FACTS**.

Appellant has been employed as a full-time 911 operator with the Department since June 20, 2014. (R-3.) Elba D'Aiuto, who holds the position of 911 coordinator, supervised 911 employees, including appellant, during the pertinent period.

Pursuant to the applicable collective-bargaining agreement, after an employee's first calendar year of service, the County provides the employee with 15 days of sick leave at the beginning of each calendar year, and unused sick leave is accumulated from year to year without limit. (R-2.) At the beginning of 2017, appellant had 19.5 accrued sick days and, after receiving 15 days for calendar year 2017, he had a total of 34.5 days of sick leave. (R-3.)

Appellant's normal shift was 4:00 p.m. to 12:00 a.m. Appellant's schedule rotated so that he had one out of every three weekends off and he was never regularly scheduled to work more than three or four days in a row. As of September 20, 2017, appellant had used 17 of his 34.5 sick days. (J-1.) He used sick days on April 6, 8, 9 and 10, 2017; June 21, 22, 23, 26, 27 and 28, 2017; July 30 and 31, 2017; August 2, 3, 4 and 31, 2017; and September 2, 2017. (See J-1; R-3.) The 17 days resulted from four sick-leave occurrences that were at least 2 days long. In April, appellant was out sick for 4 work days; he was out sick on April 6, he had a day off on April 7, and he was out sick on April 8, 9 and 10, 2017. In June, appellant was out sick for 6 work days; he was out sick on June 21, 22 and 23, he had days off on June 24 and 25, and he was out sick on June 26, 27 and 28, 2017. In July/August, appellant was out sick for 5 work days; he was out sick on July 30 and 31, he was off on August 1, he was out sick on August 2, 3 and 4, 2017, and he was off on August 5, 2017. In August/September, appellant was out sick for 2 work days; he was out sick on August 31, he was off on September 1, and he was out sick on September 2, 2017.

The County Employee Handbook, which appellant received, addresses "Sick Leave Abuse" and states:

Abuse of sick leave or chronic or excessive absenteeism will result in discipline up to and including discharge. Abuse includes using sick leave when you are not ill. Examples of chronic or excessive absenteeism include situations where

employees routinely use more than the amount of sick leave earned in a calendar year or where a pattern of absences is established.

[J-3; emphasis added.]

A substantially similar provision is set forth in the collective-bargaining agreement. (See R-2.)

The Department Rules and Regulations, which appellant received, also addresses "Abuse of Sick Leave." (R-1.) Specifically, Section 2.1 of the Rules and Regulations states:

An employee who has been absent on sick leave for periods totaling more than fifteen (15) days in one calendar year consisting of periods of less than five (5) days may be required to submit acceptable medical evidence for any additional sick leave in that year and may be the subject of disciplinary action.

An employee whose absence on sick leave indicates a pattern; i.e., adjacent to days off, holidays or vacation or compensation days, which occurs more than five (5) times in one calendar year will be required to submit acceptable medical evidence for any additional sick leave in that year and may be the subject of disciplinary action.

[Emphasis added.]

When an employee with the 911 call center is absent from work, another employee must cover the shift, which may result in mandatory overtime.

The submitted disciplinary record for appellant does not include prior discipline related to appellant's use of sick time. Appellant's prior disciplinary record consists of the following: a five-day suspension, via Notice of Minor Disciplinary Action dated January 23, 2015, for sleeping on duty and conduct unbecoming (R-5); a twenty-day suspension, with an additional ten days held in abeyance, for sleeping on duty (R-4); a two-day suspension, via Notice of Disciplinary Action dated May 9, 2016, for reporting late for duty and failing to call during the period of January to May 2016 (R-6); a five-day

suspension, via Notice of Disciplinary Action dated October 31, 2016, for reporting late for duty and failing to call during the period of January to October 2016 (R-7); a written/verbal warning on June 15, 2017, for reporting late for duty and failing to call during the period of December 15, 2016, to June 15, 2017 (R-8); and a written/verbal warning on July 3, 2017, for failing to call the 911 center while using sick time in June 2017 to update his status. (R-9).

In addition to the evidence that forms the foundation of the above findings of facts, a summary of other pertinent testimony follows.

The Testimony

Richard Sires

Sires addressed the absenteeism provisions set forth in the County Employee Handbook, the collective-bargaining agreement, and the Department Rules and Regulations. He agreed that the Department Rules and Regulations were more narrowly tailored to appellant's department than the County Employee Handbook, which applies to all County employees. Sires also agreed that the County Employee Handbook and the collective-bargaining agreement contain substantially similar language and refer to "situations where employees routinely use more than the amount of sick leave earned in a calendar year." Sires articulated his belief that exceeding fifteen sick days in a year for the first time would probably support a warning or something else. He did not know whether appellant had used more than fifteen sick days in any prior year. Sires acknowledged that the Department Rules and Regulations require more than five instances in one calendar year of alleged sick days adjacent to a scheduled day off, a holiday, a vacation day, or a compensation day for an employee to be disciplined. Although the Preliminary Notice of Disciplinary Action charges appellant with a pattern of absences on four separate occasions, Sires testified as to five occasions¹ and could not clearly explain the basis for some of appellant's absences

¹ These occasions included the following: appellant was out sick on April 6, 2017, and had a day off on April 7, 2017; appellant was out sick on June 23, 2017, in conjunction with the weekend off on June 24 and 25, 2017; appellant was out sick on August 2, 2017, in conjunction with time off on August 1, 2017;

being considered an "in conjunction" sick day. He further admitted that since the Department had identified only five instances, appellant did not violate Section 2.1 of the Department Rules and Regulations as it relates to a pattern of absences.

Elba D'Aiuto

D'Aiuto testified that she had spoken to appellant about his attendance around June 2017 and that this discussion occurred before her written/verbal warnings to appellant on June 15 and July 3, 2017. D'Aiuto acknowledged that this discussion was not memorialized in a document and that the warnings she issued do not reference the number of appellant's absences or a warning that he was approaching fifteen sick days. According to D'Aiuto, she previously counseled appellant several times about his tardiness and absences, but could not identify when this occurred, except as documented in the notice she issued in November 2016, which refers to appellant's pattern of absences. (R-7.) She acknowledged that this referenced pattern of absence was not the subject of disciplinary action. Although D'Aiuto opined that appellant had previously used more than fifteen sick days in a calendar year, she did not provide detail as to the year this occurred or documents to support her testimony, which is not reflected in any disciplinary action against him. Although D'Aiuto also testified about seeing appellant at the mall on one of the days that he had called out sick, I give no weight to this uncorroborated testimony, which appellant denied, in that it goes beyond the scope of the charges against him.

Dwayne Austin

Appellant described that he had an underlying medical condition (i.e., diabetes) that affected his ability to work. Appellant disputed D'Aiuto's assertion that he had previously used more than fifteen sick days in a calendar year. Appellant acknowledged that he had discussions with D'Aiuto regarding his attendance, but described that most of these discussions involved his lateness. He testified that, prior to

appellant was out sick on August 4, 2017, in conjunction with the weekend off on August 5 and 6, 2017; and appellant was out sick on August 31, 2017, in conjunction with a day off on September 1, 2017. (See J-2.)

the disciplinary action in 2017, D'Aiuto did not discuss with him the number of sick days he used, and appellant brought in doctor's notes for all of his seventeen absences. Appellant described that he distinguished sick days from absences; he understood absences to be when a person chose not to go to work, and he was not aware that he could not use sick time if he was sick.

Based upon a review of the testimony and documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses, I **FIND** the following additional **FACTS**:

Appellant suffered from a medical condition in 2017 and brought in doctor's notes for all of his seventeen absences. Although D'Aiuto had a discussion with appellant regarding his attendance in 2017, I am not persuaded that this discussion concerned the number of sick days that appellant had used, which topic is not documented in the warnings D'Aiuto later issued to appellant. The credible, competent evidence also fails to demonstrate that appellant had previously used more than fifteen days in a calendar year. Although D'Aiuto articulated a belief that appellant had previously used more than fifteen days, the Department did not introduce documentation regarding appellant's attendance prior to 2017, and appellant's prior disciplinary actions and written warnings do not involve his use of sick time. That appellant had previously exceeded his allotted sick days is further undermined by the fact that appellant has only been employed by the Department since June 2014 and had 19.5 accrued sick days at the beginning of 2017.

LEGAL DISCUSSION AND CONCLUSIONS

The Civil Service Act and the regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1, et seq. A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. See N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the employee is guilty of the charges brought against him

and, if so, the appropriate penalty, if any, that should be imposed. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

The Department bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, and according to a reasonable probability of truth. Jackson v. Del., Lackawanna & W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). 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, 275 (1958). Precisely what is needed to satisfy this burden necessarily must be judged on a case-by-case basis.

An appointing authority may discipline an employee for, among other causes, an inability to perform duties, chronic or excessive absenteeism, conduct unbecoming a public employee, and other sufficient cause. N.J.A.C. 4A:2-2.3(a). Conduct unbecoming a public employee has been described as an "elastic" phrase that includes "conduct which adversely affects the morale or efficiency" of the public entity or "which has a tendency to destroy public respect for [public] employees and confidence in the operation of [public] services." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (citation omitted); see Karins v. City of Atl. City, 152 N.J. 532 (1998). Although the regulation does not define 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 frequently, Good v. N. State Prison, 97 N.J.A.R.2d (CSV) 529, 531, and "excessive" is defined as "exceeding a normal, usual, reasonable, or proper limit." American Heritage Dictionary 638 (3rd ed. 1992); see Rios v. Paterson Hous. Auth., CSV 3009-02, Initial Decision (August 1, 2005), adopted, MSB (September 13, 2005), <http://njlaw.rutgers.edu/collections/oal/>.

In the within matter, the County Employee Handbook, collective-bargaining agreement, and Department Rules and Regulations specifically define when an

employee's absence will be deemed to rise to the level of sick-leave abuse warranting disciplinary action. The County Employee Handbook and collective-bargaining agreement explicitly state that "chronic or excessive absenteeism include[s] situations where employees routinely use more than the amount of sick leave earned in a calendar year." (Emphasis added.) Clearly, an event must occur more than once before it can be considered routine. See Cambridge English Dictionary (defining routinely "as part of the usual way of doing things"), <https://dictionary.cambridge.org/us/dictionary/english/routinely>; Merriam-Webster (defining routine as "of a commonplace or repetitious character"), <https://www.merriam-webster.com/dictionary/routine>; English by Oxford Dictionaries (defining routinely as "part of a regular procedure" and "[f]requently and without proper consideration of the consequences"), <https://en.oxforddictionaries.com/definition/us/routinely>. Accordingly, by their terms, the County Employee Handbook and the collective-bargaining agreement require evidence that the employee has previously used more than the allotted amount of sick days in a given year before an employee can be subject to disciplinary action. In short, the Department failed to demonstrate that appellant had exceeded fifteen sick days prior to 2017.

The Department Rules and Regulations also do not support grounds for disciplining appellant because of his seventeen sick days. Rather, the Rules and Regulations state that an employee may be subject to disciplinary action when the employee "has been absent on sick leave for periods totaling more than fifteen (15) sick days in one calendar year consisting of periods of less than five (5) days." (Emphasis added.) The plain reading of this provision does not purport to capture situations when an employee exceeds fifteen sick days in a calendar year due to an extended sick leave consisting of periods of five or more sick days. In the within matter, appellant had four sick-leave occurrences, two of which totaled eleven days and were for periods of five and six days in length. It was only because of those extended absences that appellant used more than fifteen sick days in 2017.

The Department also failed to demonstrate a pattern of absences by appellant warranting disciplinary action. Initially, all of the identified pattern-of-absence days were part of longer sick leaves, and the Department failed to demonstrate the basis for

designating certain days as patterns-of-absence days. For example, some of the asserted patterned days were in the middle of extended sick leaves, while other sick days adjacent to scheduled days off were not considered pattern. More significantly, the Department Rules and Regulations define a pattern of absences that may subject an employee to discipline as when an employee uses sick days "adjacent to days off, holidays or vacation or compensation days, which occurs more than five (5) times in one calendar year." (R-1; emphasis added.) Simply put, the Preliminary Notice of Disciplinary Action charges appellant with a pattern of absences on only four occasions. Although Sires testified as to five occasions, this testimony also falls short of the more-than-five-times requirement set forth in the Rules and Regulations. Indeed, Sires candidly acknowledged that since there were only five alleged instances in 2017, appellant's absences did not violate this provision of the Department Rules and Regulations.

Based upon a review of the totality of the evidence, I **CONCLUDE** that the Department has failed to shoulder its burden of proving, by a preponderance of the credible evidence, that appellant's use of seventeen sick days constitutes an inability to perform duties, chronic or excessive absenteeism, conduct unbecoming a public employee, or other sufficient cause that provides grounds for disciplinary action against him.

ORDER

I **ORDER** that the charges set forth in the Final Notice of Disciplinary Action dated December 18, 2017, be and hereby are **DISMISSED**. I further **ORDER** that back pay and other benefits be issued to appellant as may be dictated by N.J.A.C. 4A:2-2.10.

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.

October 26, 2018 Margaret M. Monaco
DATE MARGARET M. MONACO, ALJ

Date Received at Agency:

October 26, 2018

Date Mailed to Parties:

October 26, 2018

jb

APPENDIX

List of Witnesses

For Appellant:

Dwayne Austin

For Respondent:

Richard Sires

Elba D'Aiuto

List of Exhibits in Evidence

Joint:

J-1 Stipulation dated June 7, 2018

J-2 Summary of Absences

J-3 Excerpt from the County of Hudson Employee Handbook and acknowledgment of receipt

J-4 Preliminary Notice of Disciplinary Action dated September 20, 2017

J-5 Final Notice of Disciplinary Action dated December 18, 2017

For Appellant:

None

For Respondent:

R-1 Excerpt from the Hudson County Sheriff's Office Rules and Regulations

R-2 Excerpt from the Collective Bargaining Agreement

R-3 Annual Attendance Record

R-4 Final Notice of Disciplinary Action dated July 14, 2016, with attachments

R-5 Notice of Minor Disciplinary Action dated January 23, 2015

R-6 Notice of Disciplinary Action dated May 9, 2016, with attachments

R-7 Notice of Disciplinary Action dated October 31, 2016, with attachments

R-8 Written/Verbal Warning dated June 15, 2017

R-9 Written/Verbal Warning dated July 3, 2017