STATE OF NEW JERSEY

In the Matter of Malcolm Poulard
Hudson County,
Department of Family Services

CSC DKT. NO. 2018-2240
OAL DKT. NO. CSV 02417-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: AUGUST 3, 2018 BW

The appeal of Malcolm Poulard, Human Services Specialist 3, Hudson County, Department of Family Services, 15 working day suspension, on charges, was heard by Administrative Law Judge Ernest M. Bongiovanni, who rendered his initial decision on June 26, 2018. No exceptions were filed.

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 August 1, 2018, 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 suspending the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Malcolm Poulard.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 1ST DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT NO. CSV 02417-18
AGENCY REF. NO. CSC 2018-2240

MALCOLM POULARD,
Appellant,
v.
HUDSON COUNTY, DEPARTMENT OF FAMILY SERVICES,
Respondent.

Seth Gollin, (Field Representative, AFSCME) appearing pursuant to N.J.A.C. 1:1-5.4(A)6 for appellant

John J. Collins, Esq., (Assistant County Counsel for Hudson County) for respondent

Record Closed: June 6, 2018 Decided: June 26, 2018

BEFORE **ERNEST M. BONGIOVANNI**, ALJ:

STATEMENT OF THE CASE

Malcolm Poulard challenges the Final Notice of Disciplinary Action (FNDA) dated January 8, 2018, imposing a fifteen-day working suspension for chronic or excessive lateness, in violation of Civil Service Rule 4A:2-2.3(a)(2) neglect of duty, and other sufficient cause, in violation of Civil Service Rule 4A:2-2.3(a)(7).

The Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13 to the Office of Administrative Law, where it was filed on January 16, 2018.

The hearing was held on June 6, 2018 at which time the record was closed.

ISSUES

The issues in this case are whether there is sufficient credible evidence to sustain the charges of neglect of duty, chronic or excessive lateness, or other sufficient cause, and if sustained, whether a penalty of a fifteen-day working suspension is warranted.

UNDISPUTED FACTS

Malcolm Poulard is employed as a Hudson County Department of Family Services, as a Human Services Specialist #3. He was the subject of two prior disciplinary actions for lateness, one resulting in a one-day suspension, the other in a five-day suspension.

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SUMMARY OF TESTIMONY

Respondent's Case

Roger Quinata, personnel officer for the Hudson County Department of Family Services, was the only witness for respondent. He has held the same title for ten years. He supervises staff in all matters of personnel, including issues concerning human resources, medical benefits and disciplinary matters. Part of his duties concern employee attendance, although support staff oversee and maintain these records. He is familiar with the appellant, his attendance and disciplinary history.

Mr. Quinata explained that Article XLI, entitled "Lateness," (R-2) of the local 2036 collective bargaining agreement governs the employees' duty to arrive to work on time. Under the policy, there is a five-minute grace period, so that an employee who arrives 5 minutes late or less is not marked as late. For a first infraction, an employee who is late nine or more times in a calendar quarter of a year (January-March, April-June, July-September, October-December) shall be subject to a one-day suspension. Subsequent infractions are based on "rolling quarters," that is 90 days commencing after the last instance of lateness for which the suspension was imposed. A second infraction occurs where the employee was late 9 times or more times in a quarter, subjecting the employee to a five-day suspension. A third infraction occurs where the employee is late seven or more times in a quarter, subjecting him to a fifteen-day suspension.

Mr. Quintana produced attendance records compiled for the hearing (R-3). This attendance record was based on the Department's "Kronos" system of maintaining attendance which designates the attendance by the employer issuing codes assigned to a given day, including such designations as, among others, MED/L for medical leave of absence and FAM/L for family leave, S, for sick, and AWOL for absent without leave. (R-4). Employees have access to this system and can track how their attendance is being kept by the employer. According to the attendance records, Poulard was late for work eight times between September 7, 2017 and November 15, 2017. Also, the exact amount of lateness for each instance was recorded, which ranged from the least being 9 minutes and the most being two hours.

All the instances of lateness on the Kronos record were designated by the numbers of minutes Poulard was late (as fractions of an hour or hours) and all were followed with the designation "WO" (the designations such as AWOL are abbreviated for space). Mr. Quintana explained the procedure by which the employee would call in to explain why he was late and the process of excusing lateness. In some instances, even where the employee doesn't call in, for instance when he is too sick to do so, an instance of lateness can be excused. In Mr. Poulard's case, there was no record of any request to excuse any lateness. None of the instances of lateness were excused. This was Mr. Poulard's third infraction for excessive lateness (R-6) and (R-7).

During the quarter under consideration, Mr. Poulard was covered by a leave of absence, for a six-month period, under the Family and Medical Leave Act, (FMLA) for having a serious health condition, evidenced by a statement signed by his treating doctor, allowing him to be absent, without pay, for 8 hours a day, twice a month. According to Mr. Poulard's chiropractor, his "flare ups" (the diagnosis or symptoms were not otherwise described) "can occur one time every two weeks" resulting in an "incapacity to work" for a period lasting up to two days (R-7, page 3, Addendum).

Under cross examination, Mr. Quintana was repeatedly asked if he was aware of instances where Mr. Poulard's supervisor (s) were made aware of, and/or approved of Mr. Poulard's use of his FMLA time during days when he was marked late. Mr. Quintana was unaware of any such instance. Moreover, he said, such instances could not be approved because the leave of absence permitted was for periods of eight hours a day, once every two weeks, not for the periods of work for which Mr. Poulard arrived late.

Moreover, according to Mr. Quintana, Mr. Poulard was given time between notification of a pending disciplinary charge to submit reasons for his lateness, and Mr. Poulard never explained during that period that he meant to use his FMLA time off to excuse his lateness.

Appellant's Case

Malcolm Poulard testified as follows. He has worked for the Hudson County Department of Family Services for seven years and is now a Human Services Specialist #3. He was never made aware of the lateness problem until he received the Preliminary Notice of Disciplinary Action (PNDA) (R-1).[1] He was aware that his doctor had prescribed the use of intermittent or periodic leave of absence, of 8 hours a day, every two weeks, but said he "could not afford to use" the leave in that manner as it

[1] Article XLI, paragraph 4 provides that "no disciplinary warnings will be issued for lateness."

would compel him to give up 8 hours of salary earned for those days, as FMLA is leave without pay.[2]

He said that when his FMLA began he was told by a Supervisor, Lucy Diaz, that although his doctor had authorized absences of 8 hours a day once every two weeks, he could exercise the leave for lesser periods, such as hours or minutes in a given day. He also called every time he was late or going to be late to advise, either Ms. Diaz, Susan Egbert, "Janet" or "Debbie" of the reason for lateness being attributable to his FMLA.

Under cross examination, he said that after the PNDA was taken it was "too late" for him to explain his belief that the instances of lateness were instead instances where he was using FMLA time. He said that although all the calls he made to his office during these lateness episodes to explain his reasons for being late were on his cellphone, he was not going to "go back a year" to search for records of calls. Asked if he recalled the December 2017 hearing, he stated that at the time "there was a lot going on in my life." Although he called in each time he was late owing to the use of FMLA, he believed that once the initial FMLA six-month period was approved he could "use it at my discretion" as to specific hours and dates. During the period in which the appellant is charged with excessive lateness, he took no paid sick time, vacation or personal time, as he had used all the accumulated or annual time for that period.

CREDIBILITY

When witnesses present conflicting testimony, it is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. Credibility is the value that a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story considering its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2D 718 (9TH Cir. 1963); see In Re Polk, 90 N.J. 550 (1982). Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human

[2] He stated: "I do it in a way that allows me to...recuperate and make it to work in a timely manner."

experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 474 (1999). A fact finder is expected to base decisions on credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 847, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973).

The finder of fact is not bound to believe the testimony of any witnesses, and credibility does not automatically rest on the party with more witnesses. In Re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved, but may not be disregarded at an administrative proceeding. Middleton Twp. V. Murdoch, 73 N.J. Super 511 (App. Div. 1962). Credible testimony must not only proceed from the mouth of a credible witness, but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 554-555 (1954).

Mr. Quintana was forthright in his testimony. He was straightforward and direct in his answers. When he did not know an answer, such as in one case not knowing why on a specific date medical leave was granted, he said so. He was credible and believable. His testimony likewise was credible.

Mr. Poulard was not direct in his answers. He was at times vague and evasive. He appeared incapable of giving simple answers when called for, such as if he agreed he was late (whether excused or not) for the specific times that were recorded on the time sheets. At first, he said he didn't dispute the timesheets, then said he did dispute them. When asked if he was changing his testimony he asked to speak to his attorney before giving another answer. He also claimed he wasn't aware of the "idiosyncrasy" of having to call in to advise that he was using his FMLA time once he had an approved FMLA, yet he also said he always called in to advise when he would be late owing to the FMLA. Appellant also sidestepped the question of why he never noticed that none of his FMLA time ever appeared in the Kronos timekeeping system even though he had everyday access to these records. Specific statements he made simply defied credulity. To name a few, he claimed not to have heard anything about the charges in the Preliminary Notice of Disciplinary Action until the date of the Departmental hearing. Although he posited it that he called one of four named supervisors from his cellphone whenever he would be late because of his exercise of FMLA, regarding proof of same,

he said he would not check his cell records from "over a year ago", although the departmental hearing was only two months after the last lateness incident and the Administrative Appeal less than seven months after it. Finally, he claimed that when his FMLA was approved he was told by a supervisor, Ms. Diaz that he could use FMLA for minutes or hours over several days rather than 8 hours a day, once every two weeks. He said he had no reason to believe Ms. Diaz could not testify at the departmental or administrative hearings. He also had been through two prior disciplinary proceedings and regarding this current infraction, had representation at the departmental hearing and up to and including the administrative proceeding. Despite that background, in explaining why Ms. Diaz was not asked to be a witness, he claimed "I didn't know I could bring any witnesses."

FINDINGS OF FACTS

Based on the evidence presented at the hearing, as well as on the opportunity to observe the witnesses and assess their credibility, I **FIND** the following **FACTS**.

1. As a supervisor in the Hudson County Department of Family Services, Mr. Poulard is a full-time employee working eight hours daily beginning 8:30 A.M., Mondays through Fridays.

2. Poulard was late for work eight times in a measured "rolling quarter" or 90 days, between August 29, 2017 and November 15, 2017 as follows:

    1. September 7, 2017 - 52 minutes
    2. September 12, 2017 - 12 minutes
    3. September 14, 2017 – 9 minutes
    4. September 25, 2017 - 1 hour, 9 minutes
    5. October 2, 2017 - 11 minutes
    6. October 4, 2017 - 24 minutes
    7. November 14, 2017 – 2 hours
    8. November 15, 2017 – 21 minutes

3. Appellant has an approved leave of absence, under the Family and Medical Leave Act, for six months, which period included the rolling quarter in question, which permitted him to take off, without pay, 8 hours a day, once every two weeks.

4. During the quarter, in addition to the eight times Poulard was late, he had six additional days (August 30, September 21, September 27, October 17, October 30, November 3,) where he took approved medical leave for the entire day, and several other occasions with approved medical leave for part of the day.

5. During the quarter, the attendance records show no evidence that Mr. Poulard intended to exercise or did exercise his FMLA unpaid time.

LEGAL ANALYSIS AND CONCLUSIONS

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6 governs a civil service employee's rights and duties. The act is an important inducement to attract qualified personnel to public service. It is to be liberally constructed toward attainment of merit appointments and broad tenure protection. See Essex Council No. 1 N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super 583 (App. Div. 1972) Mastrobattista v. Essex County Park Comm'n., 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of New Jersey is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A1-2 (b). To carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

The public employee who is protected by the provisions of the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2 2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant

and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); Polk, 90 N.J. 550. The evidence must ne such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro Bottling Co., 26 N.J. 263 (1958). Therefore, the judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del Lackawanna and W.R.R., 111 N.J.L. 487, 490 (E. & A. 1933). Preponderance may 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).

This appeal to the Merit System Board requires that the Office of Administrative law conduct a de novo hearing and determine the appellant's guilt or innocence as well as the appropriate penalty. In the Matter of Morrison, 216 N.J. Super 143 (App. Div. 1987).

Charge 1 of the FNDA charges Poulard with "Chronic or excessive absenteeism or lateness." Courts have held that excessive absenteeism need not be accommodated and that attendance is an essential function of most jobs. Mueller v Exxon Research and Engineering Co., 345 N.J. Super 595, 605-606 (App. Div. 2001). Although Muller refers to absenteeism, logic dictates that it also applies to excessive lateness, for the impact of such conduct on the work environment is the same.

The collective bargaining agreement between the employees and employer contains a policy on lateness for employees with two prior infractions as having seven unexcused instances of lateness in a 90-day measured "rolling quarter." An instance of lateness is being late more than five minutes after reporting time. No cautionary warnings are needed before an employee can be disciplined for lateness. Here the evidence is irrefutable that the appellant was late eight times in said quarter. Although appellant had trouble admitting it, his case was not that he wasn't late but that his lateness was excused because he was exercising his FMLA leave of absence each time he was late. However, in his only instance of candor appellant stated that he couldn't "afford" to exercise his FMLA time with the prescribed 8 hours a day once

every two weeks, so that he chose to "do it in a way that allows me to... recuperate and make it to work in a timely manner." He believed he could exercise his FMLA time "at [his] discretion."

In fact, however, his approved FMLA gave him no such discretion. It was uncontested that all employees are required to call in sick when sick or as soon as they are physically able to do so, that all instances of lateness must be excused, and that employees that don't want to incur a disciplinary infraction only have a five-minute grace period from the reporting time or have an excused lateness before they are considered late. Poulard obviously was reluctant to use his FMLA time. If exercised six times in a quarter, as permitted, he would have lost 48 hours of pay, whereas he only lost approximately six hours of pay for lateness.

However, if an employee under FMLA doesn't exercise his excused leave time in accordance with the approved plan that his own doctor prescribed, he also can't expect to live by unwritten rules about FMLA substituting as lateness because a supervisor allegedly told him it was alright to do so. It flies in the face of the literal words of the approved FMLA, and it contradicts the uncontested attendance records. It strains all reason to believe his employer would reward the employee by letting him save money by being late to work. The respondent more than carried its burden of proving chronic or excessive lateness by preponderance of the credible evidence.

As to the second charge and third charges neglect of duty, and other sufficient cause, neither party presented evidence distinct from the lateness, nor made any arguments that those charges should be sustained. Accordingly, those two charges are dismissed.

There remains the issue of the imposition of a fifteen-day suspension for this infraction. In deciding which penalty is appropriate, the courts have looked toward the concept of progressive discipline. W. New York v. Bock, 38 NJ at 523-524. The New Jersey Supreme Court held that evidence of a past disciplinary record, including the nature number and proximity to prior instances of misconduct can be considered in

determining the appropriate penalty. The penalty imposed must not be so disproportionate to the offense and the mitigating circumstances that the decision is arbitrary and unreasonable.

In this matter, Poulard has a moderate disciplinary history, having been disciplined twice before, also for lateness. For the first infraction he received the one-day penalty prescribed in the collective bargaining agreement and for the second the prescribed five-day penalty. Both infractions took place in successive quarters in late 2016. This third infraction took place almost exactly one year after the first two. Combined lateness for all three infractions show 26 instances of lateness between October 1, 2016 and November 15, 2017. During a substantial portion of that time, Appellant has had the benefit of a requested FMLA.

The Collective Bargaining agreement provides for a 15-day suspension for a third infraction for lateness. As the aim of that policy is to provide a uniform penalty focused on one particular cause for discipline, lateness, the court should be reluctant to consider, if possible, a different penalty. Further, the policy reasonably addresses the interest of providing progressive discipline. Finally, neither of the parties argued for a different penalty if the charge was sustained.

I **CONCLUDE** by the preponderance of the credible evidence that Mr. Poulard was guilty of chronic or excessive lateness, and that the Final Notice of Disciplinary Action should be upheld. I further **CONCLUDE** that the penalty of a fifteen-day working suspension is appropriate.

ORDER

It is hereby **ORDERED** that the appellant's Appeal is **DENIED.**

It is further **ORDERED** that the appellant's fifteen-day suspension is hereby **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**, who 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.

June 26, 2018

DATE

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

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APPENDIX

LIST OF WITNESSES

For Appellant

Malcolm Poulard

For Respondent

Roger Quintana

LIST OF EXHIBITS IN EVIDENCE

For Appellant

None

For Respondent

R-1 Preliminary Notice of Disciplinary Action
R-2 Article XLI – Policy on Employee Lateness
R-3 Record of Lateness from 8/31/17 to 11/15/17
R-4 Attendance Record for 2017
R-5 Record of 1st Disciplinary Action, 1-day suspension, 12/15/16
R-6 Record of 2nd Disciplinary Action, 5-day suspension 12/16/16-12/22/16
R-7 Leave History-approved FMLA, 9/7/17 to 3/7/18
R-8 Leave History-approved FMLA, 3/8/18 to 9/8/18