

**NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0327-21**

**IN THE MATTER OF SHERMAN  
ABRAMS, NORTHERN STATE  
PRISON, DEPARTMENT  
OF CORRECTIONS.**

---

Argued January 19, 2023 – Decided April 13, 2023

Before Judges Sumners and Susswein.

On appeal from the New Jersey Civil Service Commission, Docket No. 2021-1989.

Arnold S. Cohen argued the cause for appellant Sherman Abrams (Oxford Cohen, PC, attorneys; Arnold S. Cohen, of counsel and on the briefs).

Elizabeth A. Davies, Deputy Attorney General, argued the cause for respondent New Jersey Department of Corrections (Matthew J. Platkin, Attorney General, attorney; Sookie Bae-Park, Assistant Attorney General, of counsel; Elizabeth A. Davies, of counsel and on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent New Jersey Civil Service Commission (Pamela N. Ullman, Deputy Attorney General, on statement in lieu of brief).

## PER CURIAM

Petitioner Sherman Abrams appeals from the September 7, 2021 final administrative determination of the Civil Service Commission (Commission) denying his motion for reconsideration and affirming his fifteen-working-day suspension from employment for failing to follow call-out procedures. In his motion for reconsideration, Abrams argued that the Commission committed a clear, material error when it rejected the findings of fact and recommendation of the administrative law judge (ALJ) who convened the evidentiary hearing. Because petitioner has failed to demonstrate the Commission's final decision was arbitrary, capricious, or unreasonable, we affirm.

### I.

Abrams works as an Operating Engineer Repairer at Northern State Prison (NSP) within the Department of Corrections (DOC). On October 31, 2017, November 1, 2017, and November 2, 2017, Abrams did not report to work. The DOC recorded these as unauthorized absences.

A preliminary notice of disciplinary action was issued on November 21, 2017. On December 19, 2017, Abrams was served with a final notice of disciplinary action (FNDA), sustaining charges of chronic or excessive

absenteeism or lateness, citing N.J.A.C. 4A:2-2.3(a)(4) and Human Resources Bulletin (HRB) 84-17(A-1). The FNDA detailed:

Based on the Time and Leave Reporting System provided by Human Resources, you called off on 10/31/2017, 11/1/2017, and 11/2/2017. You did not have approved leave on file or sufficient leave balance to cover these dates. These dates are unauthorized absence[s]. Your actions violated the Sick Call Policy and the Employee Attendance Policy.

As a result, the DOC terminated Abrams's employment, effective December 19, 2017. Abrams appealed his termination to the Commission, which referred the matter to the Office of Administrative Law (OAL). An evidentiary hearing was held on April 8, 2019.

The DOC presented testimony from Anthony DelValle, a Chief Operating Engineer and Abrams's supervisor. DelValle testified that Abrams was an essential worker because powerhouse facilities need to be monitored constantly by an engineer on site. At any given time, only one engineer is on duty. DelValle testified that if an engineer calls out unauthorized, the on-shift engineer cannot leave until relief is found. DelValle testified that Abrams was not present at work on the dates in question and his absences were unauthorized.

Abrams testified he "took off" because his father was sick, and he could not leave his father unattended due to his Alzheimer's disease. Abrams testified

that he called DelValle on those dates before the start of the shift. He stated that on October 31, 2017, "I told [DelValle] I need some emergency time off, vacation time or comp time<sup>[1]</sup> or whatever was . . . available." Abrams testified that on November 1 and 2, he also called DelValle and told him that he needed to use emergency time and that DelValle said "he would take care of it." Abrams explained he was not aware that he was marked as taking unauthorized days off.

During cross-examination, Abrams again asserted that he spoke to DelValle on October 31, November 1, and November 2 and asked for emergency vacation time or emergency compensatory time. Abrams admitted that he "[did not] know what policy it's [based] on" but that he "would ask [for time-off] and then [DelValle] would authorize it."

DelValle was called in rebuttal and testified that he did not speak with Abrams on October 31, November 1, or November 2. DelValle stated that an employee is not permitted to call out with vacation time, even in an emergency; it needs to be approved in advance. DelValle further testified that, in an emergency, only sick or administrative leave time can be used to call out. He also stated that an employee could not call out using compensatory time.

---

<sup>1</sup> Compensatory or "comp" time is accrued through overtime work. Employees have the option to accrue this in lieu of being paid for overtime work.

DelValle then explained that in the event of a call-out using sick or administrative leave time, the policy and procedure is to call Center Control. He explained that Abrams would sometimes call him in addition to Center Control, as a courtesy so that DelValle could get coverage for the shift. When asked how he knew Abrams would be out, DelValle responded, "I did not know he was gonna be out unless he calls out [to] [C]enter. Center's the one that received the calls. What I do know is that . . . I didn't speak to him directly."

Following the OAL hearing, the parties attempted to resolve the matter as part of a global resolution of other matters concerning Abrams. On September 8, 2020, the parties informed the ALJ they were unable to reach a global resolution of Abrams's cases.

On April 13, 2021, the ALJ rendered her initial decision, concluding that that the charges against Abrams were not sustained and reversed his removal from employment. The ALJ found the FNDA did not specify a violation of its call-out policy and was limited to having insufficient leave time to cover his absence.<sup>2</sup> Because Abrams did in fact have sufficient accrued compensatory

---

<sup>2</sup> After the hearing, the DOC identified an error in the leave-time calculation and notified the ALJ that it would no longer be pursuing the charge based on lack of sufficient leave time.

time to cover his absences, even though it was not approved in advance, the ALJ reasoned the DOC did not meet its burden of proving the existing charges.

The ALJ made findings of fact but did not make credibility findings with respect to the conflicting testimony offered at the hearing. The findings of fact noted the material difference between Abrams and DelValle's testimonies, but did not attempt to resolve it, or credit one version over the other. Instead, regarding the call-out charge, the ALJ focused on the language of the FDNA. She reasoned:

[T]he FDNA specifically states that Abrams did call off on the days in question. It does not state that he violated the call out procedure. The conduct that is the subject of the FDNA is calling out without approved leave or sufficient leave to cover the days. . . . Abrams was not charged with the Internal Management Provision NSP.PSM 3.005, no show, no call unexcused absence.

After reviewing the ALJ's initial decision and conducting an independent evaluation of the record, on May 19, 2021, the Commission rejected the ALJ's recommendation and imposed a fifteen-working-day suspension. The Commission disagreed with the ALJ's reading of the FNDA and her conclusion that Abrams had not been charged with violating NPS.PSM 3.005. The Commission reasoned:

Based on the specifications in the [FNDA] as well as the testimony at the hearing, it is clear that the appellant was on notice that one of the allegations against him was that he failed to follow the call-in procedure. Further, the ALJ did not explicitly indicate that the appellant's supervisor's testimony was not credible. Rather, she found that he did not "deny that Abrams called in but denied that Abrams called him." However, the appellant did not indicate speaking with anyone but his supervisor. The ALJ also substantially relied on the fact that the appellant did, indeed, have sufficient leave time to cover his absences. However, absent other evidence, it cannot be concluded that the appellant properly called in. Accordingly, he would be considered in violation of NSP.PSM 3.005.

NSP.PSM 3.005 requires that an employee who calls out sick must notify the shift commander at least one hour prior to their scheduled time on duty. In a memorandum from DelValle dated September 26, 2016, powerhouse employees were directed to call the Center Keeper an hour prior to the start of a scheduled shift to call off using sick time.

Abrams moved for reconsideration of the Commission's decision, which was denied. Abrams argued the Commission committed a "clear material error" in "reject[ing] the credibility findings of the [ALJ]."

Regarding the Commission's earlier finding that Abrams was charged with NSP.PSM 3.005, the final decision explained:

In this matter, the record indicates that the petitioner was served a FDNA which indicated that "[y]our

actions violated the [S]ick [Call] [P]olicy and [E]mployee [A]ttendance [P]olicy." Further, a review of the ALJ's [i]nitial [d]ecision indicates that the DOC submitted a September 9, 2020[] letter acknowledging a previous error was discovered and the petitioner did have leave time available. However, the letter stated that the DOC was moving forward concerning the petitioner's failure to follow call-out procedures. Additionally, the record indicates that the DOC testified during the hearing that the petitioner violated internal policy 3.005, which required the petitioner to call the [C]enter [K]eeper for his call-outs on the days in question. Therefore, although the ALJ concluded that the petitioner was not charged with violating policy 3.005, the record indicates that based on the FNDA, the DOC's September 9, 2020 [letter], and testimony during the hearing, the petitioner had sufficient notice that he was charged with violating this policy.

The Commission concluded:

Therefore, the Commission's finding that the petitioner was charged with violating policy 3.005 was not the Commission substitution its own credibility finding for those made by the ALJ as petitioner argues, as this determination was not based on the credibility of the witnesses, but based on the notice as provided in the record. Further, the record indicates that the petitioner did not indicate that he spoke with anyone but his supervisor. However, the record indicates that the call-out procedures required the petitioner to call the [C]enter [K]eeper. Therefore, as there is nothing in the record that indicates that the petitioner called the [C]enter [K]eeper for the days in question, as indicated in the prior decision, "absent other evidence, it cannot be concluded that the petitioner properly called in."

Abrams raises the following contention for our consideration:



THE CIVIL SERVICE COMMISSION IMPROPERLY OVERTURNED A CREDIBILITY FINDING AND FACTUAL FINDINGS BY AN ADMINISTRATIVE LAW JUDGE WITHOUT EXPLANATION AND IMPROPERLY EXPANDED THE DISCIPLINARY CHARGES AGAINST THE APPELLANT.

Abrams also raises the following contention in his reply brief:

THE CIVIL SERVICE COMMISSION IMPROPERLY ADDED CHARGES TO THE APPELLANT'S FINAL NOTICE OF DISCIPLINARY ACTION.

## II.

Judicial review of agency determinations is limited. Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011); In re Herrmann, 192 N.J. 19, 27 (2007). A "strong presumption of reasonableness attaches" to an agency's decision. In re Carroll, 339 N.J. Super. 429, 437 (App. Div. 2001) (quoting In re Vey, 272 N.J. Super. 199, 205 (App. Div. 1993)). However, we are not "relegated to a mere rubber-stamp of agency action." Williams v. Dep't of Corr., 330 N.J. Super. 197, 204 (App. Div. 2000).

"An administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." Allstars Auto Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) (quoting Russo, 206 N.J. at 27). In Allstars, our Supreme Court outlined that.

[o]n appellate review, the court examines:

(1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law;

(2) whether the record contains substantial evidence to support the findings on which the agency based its action; and

(3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

[Ibid. (quoting In re Stallworth, 208 N.J. 182, 194 (2011)).]

"A reviewing court 'must be mindful of, and deferential to, the agency's expertise and superior knowledge of a particular field.'" Id. at 158 (internal quotation marks omitted) (quoting Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 10 (2009)). "Moreover, '[a] reviewing court may not substitute its own judgment for the agency's, even though the court might have reached a different result.'" Ibid. (internal quotation marks omitted) (quoting Stallworth, 208 N.J. at 194). "However, a reviewing court is 'in no way bound by [an] agency's interpretation of a statute or its determination of a strictly legal issue.'" Ibid. (alteration in original) (quoting N.J. Div. of Youth & Fam. Servs. v. T.B., 207 N.J. 294, 302 (2011)).

### III.

We first address Abrams's due process contention that the Commission improperly "enlarged" the charges to include a violation of NSP.PSM 3.005, depriving him of adequate notice. The Commission's determination that the charges against Abrams included NSP.PSM 3.005, and thus he was afforded proper notice, is a legal determination we review de novo.

A preliminary notice of disciplinary action must "set[] forth the charges and statement of facts supporting the charges (specifications)." N.J.A.C. 4A:2-2.5(a). "Properly stated charges are a [s]ine qua non of a valid disciplinary proceeding." Town of W. New York v. Bock, 38 N.J. 500, 522 (1962). "'Plain notice' is the standard to be applied when considering the adequacy of disciplinary charges filed against public employees. . . . These principles emanate from the concept of affording due process and fairness to proceedings which impact so significantly on an employee." Pepe v. Twp. of Springfield, 337 N.J. Super. 94, 97 (App. Div. 2001). "It is elementary that an employee cannot legally be tried or found guilty on charges of which he has not been given plain notice by the appointing authority." Ibid. (quoting Bock, 38 N.J. at 522).

The question before us is whether the FNDA, as written, encompassed the charge of NSP.PSM 3.005. The FNDA notified Abrams that he was charged with chronic or excessive absenteeism, in violation of HRB

84-17(A-1) and N.J.A.C. 4A:2-2.3(a)(4). It further explained that Abrams "did not have approved leave on file or sufficient leave balance to cover" his "unauthorized absence[s]." It notified him that his "actions violated the Sick Call Policy and the Employee Attendance Policy."

Contrary to the ALJ's determination, the unauthorized absence charge is explicitly referenced in the FNDA, not by number but instead by name. NSP.PSM 3.005 is entitled "Sick Leave/Attendance Policy" and contains the "Sick Call Policy" referenced in the charge explanation. Moreover, the precise nature of the charges against Abrams were emphasized by the DOC's letter notifying the ALJ that it would no longer be pursuing the discipline charge based on lack of sufficient leave time but would "still move forward concerning . . . Abrams[']s alleged failure to follow call-out procedures." This occurred well before the parties submitted their closing briefs on April 1, 2021, at which time the ALJ closed the record.

Accordingly, there was no improper "enlargement" of the charges as Abrams claims. The FNDA's statement that Abrams's actions "violated the Sick Call Policy" provided sufficient notice that NSP.PSM 3.005 was at issue in the disciplinary action.

#### IV.

We turn next to Abrams's contention that the Commission improperly denied his motion for reconsideration. N.J.A.C. 4A:2-1.6(b) provides that a petition for reconsideration must show either: "(1) new evidence or additional information not presented at the original proceeding, which would change the outcome and the reasons that such evidence was not presented at the original proceeding" or (2) "[t]hat a clear material error . . . occurred."

Abrams contends the Commission committed a "clear material error" in rejecting the ALJ's "credibility findings." N.J.S.A. 52:14B-10(c) requires that credibility findings from an ALJ cannot be rejected or modified without the Commission "first determin[ing] from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record." Abrams argues that the Commission improperly overturned the ALJ's credibility findings without such a review.

The Commission, however, did not reject or modify witness credibility findings for the simple reason that the ALJ made no such findings. As we have noted, although there was diametrically conflicting testimony presented by Abrams and his supervisor as to what transpired, the ALJ did not make findings

accrediting one version over the other. Therefore, the Commission was not obliged to determine the ALJ's findings were arbitrary, capricious, or unreasonable before modifying or rejecting them. In the absence of credibility findings, an agency head may reject or modify findings of fact, provided the agency's decision to do so is supported by sufficient credible evidence on the record and the reasons for the change are specifically explained. N.J.S.A. 52:14B-10(c).

The Commission satisfied the requirement to specifically explain its reasons for rejecting the ALJ's factual findings and recommendation. It detailed that Abrams received notice of violating NSP.PSM 3.005, citing the FDNA's language that Abrams's "actions violated the [S]ick [Call] [P]olicy and [E]mployee [A]ttendance [P]olicy." In addition to the FDNA, the Commission pointed to the DOC's September 9, 2020 letter to the ALJ that the Department was moving forward with charges concerning Abrams's failure to follow call-out procedures and testimony that Abrams was required and failed to call the Center Keeper for his call outs on the days in question. The Commission specified that its decision was based on a review of the record and not through substitution of credibility findings.

The record is also clear that when powerhouse employees wish to call out sick, they must do so by calling the Center Keeper, not their supervisor. Abrams testified that he only spoke to his supervisor on the days in question. Therefore, by his own admission, he did not follow the call-out procedure.

Applying, as we must, a deferential standard of review, we are satisfied the record contains sufficient evidence to support the Commission's conclusion that Abrams was charged with and violated the call-out procedure. Abrams is thus unable to demonstrate the final agency decision was "arbitrary, capricious, or unreasonable, or . . . lacks fair support in the record." Allstars, 234 N.J. at 157 (quoting Russo, 206 N.J. at 27).

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.



CLERK OF THE APPELLATE DIVISION