

*IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION*

DOCKET NO. A-003814-22

JAMES BARTOS,
Appellant below/Appellant

v.

NEW JERSEY DEPARTMENT OF
TRANSPORTATION,
Respondent below/Respondent

CIVIL ACTION

ON APPEAL FROM FINAL
ADMINISTRATIVE ACTION OF
THE CIVIL SERVICE COMMISSION

CSC DOCKET NO.: 2021-177

OAL DOCKET NO.: CSV08374-20

**BRIEF AND APPENDIX OF APPELLANT BELOW,
APPELLANT JAMES BARTOS**

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STATEMENT OF FACTS

As stated in the Opinion of ALJ Morejon, James Bartos was employed by the New Jersey Department of Transportation (NJDOT) as a Highway Technician assigned to the NJDOT Ramsey maintenance yard. In March 2020, As the Covid-19 pandemic was beginning, the Ramsey yard closed after an employee tested positive for Covid-19 (**EXHIBIT 4** at P. 4; P. 13a of Appendix).

For the next two weeks all of its employees, including James Bartos, were in required quarantine. Bartos was granted a paid leave of absences due to Covid-19 from March 20, 2020, to April 3, 2020 (**EXHIBIT 4** at P. 4; P. 13a of Appendix).

During this time when Bartos was out on quarantine, the Ramsey yard went into “Reactionary Mode”.

“Reactionary Mode” meant that Bartos and his co-workers at the Ramsey yard were not to report to work, unless instructed to do so (**EXHIBIT 4** at P. 4; P. 13a of Appendix).

Bartos was to remain at home and only come to the Ramsey yard if called by their supervisor for an emergency (**EXHIBIT 4** at P. 4; P. 13a of Appendix).

Bartos was considered an essential employee for weather related emergencies and business continuity (**EXHIBIT 4** at P. 4 & 5, P. 13a - 14a of Appendix).

The “Reactionary Mode” policy required Bartos to be on standby at his Home (**EXHIBIT 4** at P. 5; P. 14a of Appendix).

Bartos was to be called by his supervisor three (3) times daily to confirm his work ready status (**EXHIBIT 4** at P. 5; P. 14a of Appendix).

On Friday, April 3, 2020, the quarantine at the Ramsey yard expired (**EXHIBIT 4** at P. 5; P. 14a of Appendix).

Therefore, on April 6, 2020, Bartos was required to be available for duty at the Ramsey yard under the “Reactionary Mode”, meaning Bartos was not to report

to work unless instructed by a supervisor to do so (**EXHIBIT 4** at P. 5; P. 14a of Appendix).

Bartos was never instructed by a supervisor to report to work. Bartos admits he told a supervisor he did not intend to report to work because of fear of Covid-19, but Bartos was never instructed to return, and he never said he was quitting or abandoning his job (T. P. 215, L11 - 15).

On June 10, 2020, the NJDOT issued a Preliminary Notice of Disciplinary Action (**EXHIBIT 1**, P. 1a of Appendix).

Bartos was subsequently fired by NJDOT because it was determined Bartos abandoned his job not in good standing and there was a resignation not in good standing effective April 13, 2020 (**EXHIBIT 2**, P. 3a of Appendix).

PROCEDURAL HISTORY

A Final Notice of Disciplinary Action dated July 2, 2020 charges

Bartos resigned not in good standing (**EXHIBIT 2**).

Bartos appealed the Final Notice of Disciplinary Action dated July 2, 2020 (**EXHIBIT 3**, P. 3a and 4a).

A Zoom hearing was held before ALJ Julio C. Morejon on August 25, 2021.

The record was closed on August 17, 2023.

ALJ Morejon issued his decision dated May 22, 2023 (**EXHIBIT 4**, P. 10a – 29a).

ALJ Morejon reversed the Final Notice of Disciplinary Action and Ordered the penalty against Bartos removed and that Bartos be awarded back pay, benefits and seniority.

The Acting Chairperson of the Civil Service reversed the ALJ Decision by a

decision dated July 19, 2023 (**EXHIBIT 5**, P. 30a – 33a).

Bartos appeals the decision of the Acting Chairperson of the Civil Services
Commission.

POINT I

**THE DECISION OF THE ACTING CHAIRPERSON OF THE CIVIL
SERVICE COMMISSION WAS ARBITRARY CAPRICIOUS AND
UNREASONABLE.**

NJDOT contends that James Bartos had until April 13, 2020 to submit medical documentation to extend his leave of absence beyond April 13, 2020, and therefore Mr. Bartos abandoned his job and resigned not in good standing.

N.J.A.C. 4A: 2-6.2(b) states:

“Any employee who is absent from duty for five or more consecutive business days without the approval of his or her supervisor shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing. Approval of the absence shall not be unreasonably denied.”

James Bartos contends he had the approval of Diane Gutierrez-Scaccetti, Commissioner of NJDOT to decide to report to work until April 16, 2020 by her

letter dated April 14, 2020 (**EXHIBIT 6**).

Mr. Bartos contends that the Commissioner of NJDOT is clearly a supervisor under **N.J.A.C. 4A:2-6.2(b)**.

The Acting Chairperson of Civil Service found that the five consecutive business days ended on April 14, 2020, (**EXHIBIT 5**, P. 31a of Appendix). This date is the date of the letter by Commissioner Gutierrez- Scaccetti, which gave Mr. Bartos until April 16, 2020 (**EXHIBIT 6**, P. 34a).

By ignoring the letter of the Commissioner of NJDOT the Acting Chairperson of the Civil Service Commission abused her authority.

Mr. Bartos acknowledges the Appellate Court review of an agency's decision is limited and a presumption of reasonableness attaches. *In re Stallworth* 208N.J.182, 194(2011)

However, the Court can reverse an Agency's decision when there is clear

error by the agency. *In re Carter* 191 N.J.474, 482-83 (2007).

The clear error alleged by Mr. Bartos is that the agency ignored the letter dated April 14, 2020 from Commissioner Diane Gutierrez-Scaccetti.

James Bartos asks this Appellate Court to reverse the Decision of the Commission dated July 19, 2023 (**EXHIBIT 5**, P. 30a to 33a of Appendix), and to uphold the Decision of ALJ Morejon dated May 22, 2023 (**EXHIBIT 4**, P. 10a to 29a of Appendix).

POINT II

**THE NJDOT DID NOT PRODUCE ANY PROOF THAT JAMES
BARTOS ABANDONED HIS JOB.**

Blacks Law Dictionary defines abandonment as the voluntary relinquishment of all rights, title or claim to property to property that rightfully belongs to the owner.

In this case, Mr. Bartos is claiming his property rights are his rights to keep his job. Mr. Bartos contends that he had a right to his job because he never did a single act to show he was relinquishing his job. Mr. Bartos should not lose his job based solely on his words.

Mr. Bartos does admit that he told more than one person that he was not going to report to work due to Covid-19, but he never carried through with those words.

Mr. Bartos testified that he spoke with Patrick Vannozzi, a manager in Human Resources.

He told Mr. Vannozzi:

“I said if it was blizzard I’d be there till the cows come home. I said a nature thing I’d be there 24/7, but this pandemic with the viruses, I didn’t know how to - you know try to help with this” (T. P. 231, L19 to P. 232, L1).

Mr. Bartos contends these words clearly show he did not intend to abandon his job.

Also, Mr. Bartos paid for his medical insurance company through May 20, 2020. See Leave of Absence - Prepay Schedule (**EXHIBIT 7**, P. 35a).

If Mr. Bartos intended to abandon his job, he would not have paid for his medical insurance to May 22, 2020, more than five (5) weeks after the NJDOT claims he abandoned his job. Mr. Vannozzi testified that one must be an employee of the State to be eligible for State leave (T. P. 45, L13 to L24).

Mr. Vannozzi also testified that he did not know of any instance where Mr. Bartos was called by his supervisor and told there is an emergency, and he must report to work (T. P. 49, L17).

If, Mr. Bartos continued to qualify for benefits, his health insurance, after April 13, 2020, then he was still employed.

No witness for the NJDOT testified that he or she called Mr. Bartos three times a day during the “Reactionary Mode.”

In fact, Mr. Bartos received one (1) phone call from Patrick Vannozzi on April 17, 2020, which is after the relevant dates pertaining to the reason to fire Mr. Bartos (T. P. 18, L7-18).

Mr. Vannozzi confirmed what Mr. Bartos said about being at work in an emergency “till the cows come home.” Mr. Vannozzi had the voice mail from Mr. Bartos (T. P. 41, L3-22).

NJDOT called Alan Tanny as a witness. He was Crew Supervisor, but he was on childcare leave during reactionary mode.

He testified he never called Mr. Bartos (T. P. 124, L1-15).

Janice Nelson testified for NJDOT. She stated she did not know of any instance where Mr. Bartos was called and asked to come in to work under Reactionary Mode (T. P. 73, L4-8).

Kujtim Ismailovski testified for the NJDOT. He was assistant crew foreman (T. P. 80, L10-18). During Reactionary Mode one of his jobs was to call the guys three times a day to make sure they were home and if there was an emergency, to have the workers respond (T. P. 80, L16 to P. 81, L3). Mr. Ismailovski testified he only called Mr. Bartos once (T. P. 101, L22 to P. 102, L5).

Christopher Feintheil testified for NJDOT. He was Senior Director of Operations (T. P. 130, L1 to L2). He wrote the Reactionary Mode policy

(T. P. 130, L22 to P. 131, L2).

He never communicated with Mr. Bartos. He was not aware of any instance where Mr. Bartos was called and told he must appear at an emergency (T. P. 140, L4-19).

Michele Shapiro testified for NJDOT. She was the former Director of Human Resources for NJDOT (T. P. 147, L8-15).

She signed the Final Notice of Disciplinary Hearing finalizing the resignation not in good standing for Mr. Bartos (T. P. 170, L9-19).

She testified that she reported the matter of Mr. Bartos up to the Commissioner and she knew that the Commissioner sent an Email and a letter to Mr. Bartos (T. P. 158, L21 to P. 159, L13).

She testified that she wrote and signed the document stating Mr. Bartos resigned not in good standing effective April 13, 2020 (T. P. 181, L5-8). She then

testified she would not terminate someone on a date before the Commissioner wrote them a letter (T. P. 183, L17 to P. 185, L10).

Ms. Shapiro, when asked by the Judge, agreed that it was fair to say that Mr. Bartos believed he had until April 16, 2020, to report his intentions about returning to work (T. P. 187, L1 to 12).

But despite this, Ms. Shapiro decided Mr. Bartos had resigned not in good standing effective April 13, 2020.

In DeLorenzo v. Board of Review, Division of Employment Sec 54 N.J. 361, (1969) the Superior Court of New Jersey held that a failure to report for work because of illness not attributable to work was not in itself a voluntary quit.

The Board of Review then stated that there must be a finding that the employee, in fact, decided to terminate the employment.

Bartos contends that his fear of Covid-19 in early 2020 should be considered

as similar to an illness. Covid-19 was a pandemic. There is no proof in the record that Mr. Bartos decided to terminate his employment.

In Savastano v. State Board of Review, 99 N.J. Super 397, (APP. DIV. 1968)

it was held that there must be a finding of an intent by the employee to leave employment. Again, there is no proof of intent in this case.

Garcia v. Board of Review, 191 N.J. Super 602, (APP. DIV 1983) held there must be proof that the employee intended to quit his job.

In a Civil Service disciplinary case, the employer bears the burden of sufficient, competent, and credible evidence of facts essential to the charge.

Atkinson v. Parsekian 37. N.J. 143 (1917); In re Polk 90 N.J. 550 (1982).

In an administrative proceeding, concerning a major disciplinary action, the employer must prove its case by a fair preponderance of the believable evidence, citing both the Polk and Atkinson cases.

The Appellate Court may look as to whether the record contains substantial evidence to support the findings on which the agency based its action.

See *In re Carter*.

Mr. Bartos contends based on the above there is no evidence that he abandoned his job. Therefore, Mr. Bartos asks this Court to reverse the agency decision.

POINT III

THE NJDOT UNREASONABLY DENIED JAMES BARTOS HIS LEAVE OF ABSENCE.

Mr. Bartos contends that lost in all this discussion over his words that he would not report to work and his termination is the issue of reasonableness, in denying his leave.

N.J.A.C. 4A:2-6.2(b) provides “...Approval of the absence shall not be unreasonably denied.”

N.J.A.C 4A:2-6.2(c) provides “...A request for extension of leave shall not be unreasonable denied.”

Due to the Covid-19 pandemic Mr. Bartos’ yard in Ramsey was under quarantine. The State Government and Courts were closed. Ironically some of the very people involved in the fate of Mr. Bartos were working remotely at this time.

ALJ Morejon found that Mr. Bartos was very concerned about being infected with the Covid-19 virus in March and April 2020 and that it was the primary reason he did not want to return to work at the Ramsey yard (**EXHIBIT 4**, P. 11, last paragraph).

All this could have been avoided but for the fact that Mr. Bartos' first authorized appointment with the State's Workers' Compensation doctor, Michael Benke, M.D. was on March 23, 2020, as per the letter from the State of New Jersey dated March 19, 2020, which shows the appointment (**EXHIBIT 8**, P. 36a).

Dr. Benke cancelled this March 23, 2020 appointment ironically, due to Covid-19 and it was rescheduled for April 15, 2020 (T. P. 218, L14 to P. 219, L15).

Mr. Bartos contends he would have been removed from work on March 23, 2020 by Dr. Benke if he was able to see Dr. Benke on March 23, 2020. But again, Covid-19, because the problem it presented for everyone, was the reason

the appointment of March 23, 2020 was cancelled.

Mr. Bartos saw Dr. Benke on April 15, 2020, and Dr. Benke placed Mr. Bartos out of work for his Workers' Compensation injury (**EXHIBIT 1ac**, P. 1ac of Confidential Appendix).

Then we have the Email dated April 17, 2020, by Michele Shapiro to many of the witnesses who testified for the NJDOT: (**EXHIBIT 9**, P. 37a)

“Hi, again all,
I regret to have to inform you (emphasis added) that we received medical documentation this afternoon, which placed Mr. Bartos on Temporary Workers' Compensation effective April 15, 2020.”

The Email goes on to say that:

...” I am going to place everything on hold until I have had an opportunity to review the facts. I'll let you know how we will proceed at some point next week.”

So, from her testimony we know that Michele Shapiro knew that Covid-19 was definitely a factor in this case and she knew Mr. Bartos feared Covid-19.

She knew that as of April 15, 2020, Mr. Bartos could not return to work due to his work-related injury. She knew the Commissioner of NJDOT gave Mr. Bartos until April 16, 2020.

She had not yet made a decision to terminate Mr. Bartos as of April 17, 2020.

But then Ms. Shapiro decides to bring the charges to terminate Mr. Bartos, saying he abandoned his job on April 13, 2020. Most telling in her Email is how she begins it, “I regret to have to inform you ...”

It is clear Michele Shapiro wanted to terminate James Bartos, and that these words show her decision to deny the leave of absence was “unreasonable”.

Mr. Bartos contends that these facts show his approval of a leave of absence or an extension was unreasonably denied.

CONCLUSION

For all the reasons stated herein James Bartos asks this Appellate Court to reverse the Decision of the Acting Chairperson of the Civil Service Commission dated July 19, 2023, and to reinstate and uphold the Decision of ALJ Morejon dated May 22, 2023.

Date: 05/14/2024

Respectfully Submitted,

/s/ HERBERT L. McCARTER, ESQ.
HERBERT L. McCARTER, ESQ.
Appellant, James Bartos

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-3814-22

IN THE MATTER OF
JAMES BARTOS,
DEPARTMENT OF
TRANSPORTATION

:
: CIVIL ACTION
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: ON APPEAL FROM
: A FINAL DECISION OF THE CIVIL
: SERVICE COMMISSION
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**BRIEF ON BEHALF OF RESPONDENT NEW JERSEY
DEPARTMENT OF TRANSPORTATION**

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PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS¹

Appellant, James Bartos, was employed by the NJDOT as a Highway Operations Technician 1 (“HOT-1”) assigned to the Ramsey maintenance yard. (Aa13).² In March 2020, during the COVID-19 pandemic, the Ramsey yard was temporarily closed after an employee tested positive for the virus. (Ibid.). The Ramsey yard employees were required to quarantine for two weeks and Bartos was therefore placed on an approved paid leave of absence from March 20, 2020, until April 3, 2020. (Ibid.).

Concurrent with the Ramsey yard’s employee quarantine, the NJDOT implemented extensive precautions to protect its essential employees from exposure to COVID-19 via a policy known as “Reactionary Mode.” (Ra1-3). These covered multiple types of essential employees at the NJDOT, including (1) those categorized as weather-related, who are “required to report to work when State offices are closed due to inclement weather and/or adverse conditions,” and (2) those essential to business continuity, who “are required to

¹ Because they are closely related, these sections are combined for efficiency and the court’s convenience.

² “1T” refers to the first hearing transcript document; “2T” refers to the second; “Ra” refers to the NJDOT’s appendix; “Aa” refers to Bartos’s appendix; “Ab” refers to his brief.

report to work to maintain operations necessary for public health, safety or welfare during a business interruption.” (Ra28).

Under Reactionary Mode, essential employees were on standby at their homes and called to confirm their work-ready status at three pre-determined intervals during the day: 7:30 AM, 11:30 AM, and 3:30 PM. (Ra2). If an essential employee was required to work under Reactionary Mode, precautionary steps were taken to safeguard against exposure to COVID-19. (Ibid.). For example, employees were not required to physically report to the yard or work together in confined spaces, facemasks and social distancing were required, and only one employee would be in a truck at a time as a means of ensuring social distance was maintained. (Aa14).

As previously noted, Bartos was an essential employee. (Aa13-14; Ra30). He was actually categorized as a “WB” employee, which meant he was considered essential for *both* weather-related emergencies and business continuity. (Ra28-30). As such, when his quarantine period expired, Bartos was required to return to work under the precautions of Reactionary Mode. (Ra028-Ra30). Per the NJDOT’s Reactionary Mode protocol, the Ramsey yard’s assistant crew supervisor Kujtim “Tim” Ismailovski attempted to contact Bartos on April 6, 2020 via telephone to confirm work availability but received no response. (Ra9). Later that day, Bartos finally returned the missed telephone

call. (Ibid.). At that time, he informed Ismailovski he did not intend to report to work because he did not want to contract the COVID-19 virus. (Ibid.).

On April 6, 2020, Bartos also advised Patrick Vannozzi, a manager in the NJDOT's Human Resources Department, that although he tested negative for COVID-19 but he did not intend to return to work because he was concerned about contracting the virus. (Ra4). Vannozzi explained to Bartos he could not use vacation time or sick time to avoid returning to work under Reactionary Mode. (Ibid.).

Shortly after they spoke, Bartos left Vannozzi a voicemail stating he would report to work if there was a weather-related emergency like snow, but that he did not consider himself an essential employee, stating: "I am not a healthcare worker. If it was weather-wise related or had something to do with some accident, no problem, I'm there 'till the cows come home. But I can't help you with this, man. Alright guys? So, whatever happens, I will take it on the chin." (Aa15).

On April 7, 2020, Bartos again spoke with Vannozzi via telephone. (Ra10). This time, they were joined on the call by NJDOT Human Resources employee Janice Nelson. (Ibid.). Vannozzi and Nelson explained to Bartos that he could not remain out of work indefinitely due to his fear of contracting the

COVID-19 virus, and that any future absences would require medical documentation. (Ibid.).

The Commissioner of the NJDOT learned that Bartos was refusing to return to work and personally reached out to him via email on April 9, 2020, and by certified letter on April 14, 2020, to explain the seriousness of the situation he was placing himself in by failing to return to work despite being categorized as an essential employee. (Ra15-17). The email noted assured him: “In your voicemail message you indicated that you are not a healthcare worker. You would not be instructed to act in that capacity, only in your capacity as a highway operations technician.” (Ibid.). It also warned Bartos that failure to abide by Reactionary Mode constituted job abandonment and requested confirmation of whether he intended to return to work as required. (Ibid.). In closing, the email read: “We need your decision by close of business today. If we do not hear from you by the end of the day, we will take as your decision to no longer be employed by NJDOT.” (Ibid.). Bartos did not respond to the Commissioner’s e-mail. (Ibid.).

When Bartos did not respond, the Commissioner extended an additional opportunity to him and sent a follow up letter via overnight mail. (Ra18, Ra22-23). The letter clearly stated: “We need your decision by close of business, Thursday, April 16, 2020. If we do not hear from you by that time, we will take

as your decision to no longer be employed by NJDOT.” (Ibid.). Bartos again failed to contact the Commissioner. (2T53:1-12).

On April 17, 2020, the NJDOT learned that Bartos had re-opened an existing Workers’ Compensation claim he had submitted in 2014.³ (Aa36-37). Additionally, the NJDOT was informed that a physician had placed him on Temporary Workers’ Compensation Leave effective two days prior.⁴ (Aa32; Ra19-21). That Worker’s Compensation claim was six years old and arose from work related injury. (Aa36). Because the Workers’ Compensation claim predated and was unrelated to the disciplinary matter, the NJDOT concluded that the Worker’s Compensation matter was not relevant to whether there was a basis to issue him a PNDA. (Aa17). Bartos also prepaid his insurance benefits for three pay periods. (Aa35).

The NJDOT issued Bartos a Preliminary Notice of Disciplinary Action (“PNDA”) on June 10, 2020 charging him under N.J.A.C. 4A:2-6.2(b) for Resignation Not in Good Standing and NJDOT Guidelines for Employees

³ Bartos continued working after he submitted that claim. His claim was based on a medical condition that was unrelated to the circumstances surrounding his failure to return to work.

⁴ This leave was inconsistent with Bartos’s statement on April 6, 2020 that he was ready to work if that work “was weather-wise related or had something to do with some accident.” (Aa14).

Conduct and Discipline, Section 1, B, Resignation Not in Good Standing. (Aa1-2). The PNDA advised Bartos:

[O]n approved paid leave for 3/20/2020 through 4/3/2020. On 4/7/2020 you were mailed a correspondence from the Office of Human Resources (HR) advising that your medical documentation had expired. You were directed to return to work for duty immediately, to submit medical documentation to extend your absences by 4/14/2020, or to alternatively resign in good standing from your position. You failed to avail yourself of these options and refused to return to work.

[Aa2.]

Bartos did not challenge the PNDA, and the Final Notice of Disciplinary Action (“FNDA”) was issued on July 2, 2020. (Aa11). The effective date in the FNDA was April 13, 2020. (Aa3). Although five business days from April 3 would normally be April 10, State offices were closed on that date in 2020 in observance of the Good Friday holiday. Thus, the next business day was the following Monday, April 13, 2020, the effective date contained in the FNDA. (Ibid.).

Bartos challenged the FNDA and the case was transmitted to the Office of Administrative Law (the “OAL”). (Aa12). On May 22, 2023, the Administrative Law Judge (“ALJ”) found that the disciplinary charges were not sustained, reversed the removal, and awarded Bartos “back pay, benefits, and seniority.” (Aa10-26). The ALJ concluded the NJDOT’s decision to keep the

disciplinary issue separate from the Worker's Compensation issue was "nothing more than an attempt to remove Bartos because of his stated intention not to report to duty," and that the April 13, 2020, effective date was selected because April 16, 2020 "would have resulted [NJDOT's] inability to charge him with N.J.A.C. 4A:2-6.2(b)." (Aa24).

On July 19, 2023, the Civil Service Commission ("CSC") rejected the ALJ's Initial Decision and determined "the action of the appointing authority in resigning [Bartos] not in good standing was justified." (Aa32). Specifically, the CSC recognized N.J.A.C. 4A:2-6.2(c)'s five-day threshold begins when "the employee is advised of being absent without authorization." (*Ibid.*). It acknowledged Bartos knew "his continued absence was unauthorized without medical documentation" and that "none of the other communications from any of the appointing authority representatives . . . indicated that any of his absences . . . were approved, **unless** he produced appropriate medical documentation covering those absences." (*Ibid.*). (Emphasis in original).

Bartos never provided any such medical documentation, and as the CSC concluded, "the medical documentation provided would only be considered valid beginning on April 15, 2020, the date he began receiving Workers' Compensation benefits **for a medical condition unrelated to the reasons for his failure to return on April 6, 2020.**" (*Ibid.*). (Emphasis in original). Thus,

Bartos abandoned his position, and because the NJDOT gave him multiple opportunities to provide medical documentation justifying those absences between April 7 and 14, it acted reasonably in “not authorizing the absences and resigning him not in good standing.” (Ibid.).

This appeal timely followed.

ARGUMENTS

POINT I

BECAUSE BARTOS FAILED TO RETURN TO WORK FOR FIVE CONSECUTIVE DAYS WITHOUT APPROVAL FROM HIS SUPERVISOR AND THEREBY ABANDONED HIS JOB WITH THE NJDOT, THE RESIGNATION NOT IN GOOD STANDING IS REASONABLE AND SHOULD BE AFFIRMED.

An agency decision will only be reversed if it is arbitrary, capricious, or unreasonable, does not adhere to the law, or was not supported by the evidence in the record. Zimmerman v. Sussex Cnty. Educ. Servs. Comm’n, 237 N.J. 465, 475 (2019). As the challenging party, Bartos had the burden to make that showing; he has failed to establish a basis to disturb the CSC’s decision. In re J.S., 431 N.J. Super. 321, 329 (App. Div. 2013).

There is a “strong presumption of reasonableness” attached to the actions of the administrative agencies. In re Carroll, 339 N.J. Super. 429, 437 (App. Div. 2001). Therefore, the CSC’s decision in this case is owed substantial

deference “even if the court would have reached a different result in the first instance.” In re Herrmann, 192 N.J. 19, 21 (2007).

In cases involving major discipline such as a removal, the appointing authority need “establish the truth of the charges by a preponderance of the believable evidence and not to prove guilt beyond a reasonable doubt.” Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). This means “a desired inference is more probable than not,” Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 169 (2006), “such as to lead a reasonably cautious mind to the given conclusion.” Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958).

N.J.A.C. 4A:2-6.2(c) provides that “[a]n employee who has not returned to duty for five or more consecutive business days following an approved leave of absence **shall** be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing.” Ibid. (emphasis added). That regulation permits requests for extensions of leave which “shall not be unreasonably denied.” Generally, for the purposes of N.J.A.C. 4A:2-6.2(b) “the five-day threshold *begins* once the employee is advised of being absent without authorization.” (Aa32).

Here, ample evidence in the record shows Bartos failed to return to work from his approved leave and was absent for five consecutive business days without supervisory approval. Bartos was due to return to work from quarantine

on April 3, 2020. At the very latest, Bartos knew his absence was unapproved as of April 7, 2020, based on the multiple phone discussions he had with his superiors. Therefore, as the CSC recognized Bartos's resignation not in good standing "should have been considered effective, **at the absolute latest**, on April 14, 2020." (Aa30-32) (emphasis in original). Whether the five-day window began on April 3, 2020 or April 7, 2020, because he was absent from work without supervisory approval for five business days, Bartos abandoned his job.

Bartos claims the Commissioner, whom he inaccurately characterized as his supervisor on two occasions, sent him two correspondences granted him until April 16, 2024, to decide whether to return to work. (Ab7). That is inaccurate. The Commissioner requested a response to both correspondences and set a deadline of the close of business on April 9, 2020 in the first communication and April 16, 2020 in the second. However, this was merely an effort to communicate with an essential worker during the COVID-19 pandemic, not an extension of the five-day window under N.J.A.C. 4A:2-6.2(b).

As a matter of fact, even if viewed under the most liberal interpretation, the April 16 deadline to respond to the Commissioner's letter was outside N.J.A.C. 4A:2-6.2(b)'s five-day window. The CSC recognized this by noting the "usage of the word 'shall'" in N.J.A.C. 4A:2-6.2(b), which is compulsory.

(Aa31). Here, that five day window could also only be potentially be altered via medical documentation that authorized the absences, as the regulation makes clear “[a]pproval of the absence shall not be unreasonably denied.” *Ibid.* The CSC even noted the PNDA “indicated that [Bartos] could have extended his leave to April 14, 2020, if he provided medical documentation to cover the days he was out from April 6, 2020, to that date.” (Emphasis in original). (Aa32). However, Bartos did not respond to either the Commissioner’s email or her letter, nor did he ever provide any medical documentation to justify these unauthorized absences. Thus, this court should reject Bartos’ argument that the CSC “ignored” the Commissioner’s letter. (Ab8).

POINT II

BARTOS WAS NOT UNREASONABLY DENIED A LEAVE OF ABSENCE BECAUSE HE FAILED TO PROVIDE MEDICAL DOCUMENTATION.

In what appears to be an effort to justify his refusal to return to work, he claims his employer unreasonably denied him a leave of absence. (Ab20). The record contradicts that claim.

N.J.A.C. 4A:2-6.2(c) provides that any request for an extension of leave by “[a]n employee who has not returned to duty for five or more consecutive business days following an approved leave of absence,” who would otherwise “be considered to have abandoned his or her position and” resigned “not in good

standing,” “shall not be unreasonably denied.” Ibid. An appointing authority has discretion to deny requests for leave, provided discretion is exercised reasonably. Cumberland Cty. Welfare Bd. v. Jordan, 81 N.J. Super. 406, 412, 414 (App. Div. 1963).

Here, Bartos was not unreasonably denied a leave of absence because he never provided medical documentation to justify his absences from work despite having been told to do so on multiple occasions. The Director of the NJDOT’s Division of Human Resources even sent Bartos a letter that unambiguously warned failure to return to work constituted job abandonment, but advised that if “there is a medical reason for your need for continued absence, medical documentation must be submitted . . . no later than Tuesday, April 14, 2020.” (Ra13). Likewise, even the PNDA recounted that Bartos “was directed to return to work for duty immediately, to submit medical documentation to extend [his] absences by 4/14/2020, or to alternatively resign in good standing from [his] position.” (Aa2).

As the CSC recognized, despite being made aware the absences from April 7 onwards were not approved “**unless** he produced appropriate medical documentation covering **those** absences,” Bartos never did so. (Aa32) (emphasis in original). What he did eventually provide was medical documentation that re-opened an existing Workers’ Compensation claim that

originated in 2014. As NJDOT witness testimony established, that Workers' Compensation matter was an entirely separate issue that should not be conflated or confused with the unauthorized absences nor the resultant discipline. (Aa32). It is not disputed Bartos provided documentation that re-opened the Workers' Compensation claim, but by that point he had already missed five consecutive days of work and resigned not in good standing.

Bartos's argument that he would have been placed on Workers' Compensation leave earlier had he managed to be seen by a physician sooner, see Ab18-19, ignores the stated reason for his absence which he admits was unrelated to the Workers' Compensation issue. (Aa14). Indeed, he expressly stated he would have had "no problem" reporting to work if the situation under which he was called to do so "was weather-wise related or had something to do with some accident," (Aa14), thus undermining his own hypothetical.

Even so, the courts have recognized a "later awarded workers' compensation benefit" does not "reinstate a validly terminated, or voluntarily resigned, former employee to active employee status." James v. Bd. of Trs. of Pub. Emples. Ret. Sys., 164 N.J. 396, 412 (2000). Indeed, as the CSC noted, the only medical documentation Bartos ever provided would "only be considered valid beginning on April 15, 2020, the date he began receiving Workers' Compensation Benefits **for a medical condition unrelated to the**

reasons for his failure to return on April 6, 2020.” (Aa32) (emphasis in original).

The CSC rightly concluded: “as the [NJDOT] gave [Bartos] multiple opportunities to present valid documentation for his absences from April 7, 2020 to April 14, 2020, which he did not do, it cannot be concluded that it acted unreasonably in not authorizing the absences and resigning him not in good standing pursuant to N.J.A.C 4A:2-6.2(b).” (Aa32). There was nothing arbitrary or capricious about this: the NJDOT did not grant Bartos leave because he never provided the required medical documentation, as any employee must do.

POINT III

BARTOS’S ARGUMENTS REGARDING HIS LACK OF INTENT TO RESIGN ARE NOT SUPPORTED BY THE RECORD.

Bartos argues he should not “lose his job based solely on his words.” (Ab9). In his view, State employees must “intend” to resign not in good standing. (Ab15).

That position is contrary to common sense because employees are held to verbal resignations all the time (including when permanent employees choose to voluntarily resign from their positions in good standing via “verbal notice”). N.J.A.C. 4A:2-6.1(a). Moreover, Bartos was not terminated “solely on his

words” but also because of his actions: specifically, despite being an essential employee, he failed to report to work under the precautions of Reactionary Mode for five consecutive business days without supervisory approval. These actions belie Bartos’s claim that “he never carried through with [his] words” not to report to work. (Ab9). In fact, he never reported to work.

The cases upon which he relies to support his reasoning are irrelevant because they pertain to interpreting what constitutes leaving work “voluntarily” for the limited purpose of unemployment benefits. See De Lorenzo v. Board of Review, 54 N.J. 361, 364 (1969) (considering “voluntary leaving of work” for disqualification of unemployment benefits under N.J.S.A. 43:21-5(a) “when an employee becomes ill and does those things reasonably calculated to protect the employment.”); Savastano v. Board of Review, 99 N.J. Super. 397 (App. Div. 1968) (remanding to determine whether an employee “voluntarily left” his position or was discharged).

The only case Bartos cites even involving a resignation not in good standing due to unauthorized absences or failure to return from leave is Garcia v. Board of Review, 191 N.J. Super. 602 (App. Div. 1983). See Ab15. It acknowledged termination for absences without notice “projects a disciplinary standard, for breach of which the employee may perhaps be discharged and possibly suffer the six-week disqualification for unemployment compensation

benefits provided by N.J.S.A. 43:21-5(b).” But it still drew a clear distinction between discipline for failure to return to work, as was the case here, and a “voluntary quit” for the purposes of unemployment benefits. 191 N.J. Super. at 608. Still, even if N.J.S.A. 43:21-5(a) were applicable here (which it is not), Bartos neither was ill nor took steps “reasonably calculated to protect the employment,” as in De Lorenzo. 54 N.J. at 364. The fact remains he confirmed he had no intention of returning to work, disregarded multiple attempts by several different parties to persuade him to return, and failed to respond to two correspondences from the Commissioner. These are hardly the actions of an employee making a “reasonably calculated” attempt to safeguard his position. Rather, they show Bartos abandoned his job at the very time the State most needed him as an essential employee. Though he prepaid for three pay periods worth of insurance benefits, this was related to the Workers’ Compensation matter, and because they were for the pay periods between April 11 and May 22, 2020, actually pre-dated the Preliminary Notice of Disciplinary Action. (Aa35, 2T57:13-25).

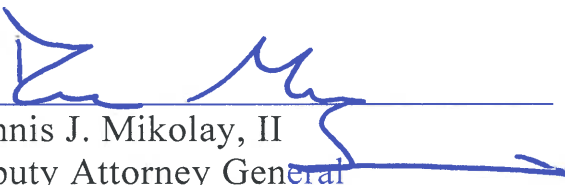
The Final Administrative Action was not arbitrary, capricious, or unreasonable. It is supported by the record and wholly consistent with legal precedent. Thus, the CSC correctly upheld the NJDOT’s major discipline against Bartos in the form of a resignation not in good standing.

CONCLUSION

For these reasons, the Final Administrative Action should be affirmed.

Respectfully submitted,

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This Statement in Lieu of Brief is filed on behalf of the Civil Service Commission pursuant to Rule 2:6-4(c). James Bartos appeals the Commission’s July 19, 2023, final administrative determination upholding his resignation not in good standing as a Highway Operations Technician 1 from the New Jersey Department of Transportation (“NJDOT”) Ramsey maintenance yard. (Aa13).¹

At the beginning of the COVID-19 pandemic, employees in the Ramsey maintenance yard were placed on quarantine from March 20, 2020, until April 3, 2020. (Aa13-14; Ra1-3). Following this quarantine, Bartos was labeled an essential employee and placed on standby at home subject to check-ins at pre-determined hours to provide his work-ready status. (Aa28-30). On April 6, 2020, Bartos’s supervisor called Bartos to confirm his availability but received no response. (Aa9). When Bartos finally returned the missed call, he informed his supervisor that he did not intend to report to work because he did not want to contract COVID-19. Ibid. That same day, NJDOT's Human Resources Manager informed Bartos he could not use his leave-time to avoid returning to work under the standby policy. (Aa4). Despite further outreach from NJDOT’s

¹ “Aa” refers to Appellant’s appendix. “Ra” refers to NJDOT’s appendix.

Human Resources and Commissioner, Bartos failed to return to work. (Aa10; Aa15-17). On April 17, 2020, NJDOT learned that Bartos had re-opened an unrelated and pre-existing Workers' Compensation claim and had been placed on Temporary Workers' Compensation Leave effective April 15, 2020. (Aa19-21; Aa36-37).

On June 10, 2020, NJDOT issued Bartos a Preliminary Notice of Disciplinary Action (“PNDA”) charging him under N.J.A.C. 4A:2-2.b and Department Guidelines for a Resignation Not in Good Standing. (Aa1-2). On July 2, 2020, the NJDOT issued a Final Notice of Disciplinary Action (“FNDA”) charging Bartos for a Resignation Not in Good Standing, effective April 13, 2020. (Aa3). Bartos filed an administrative appeal with the Civil Service Commission on July 22, 2020. (Aa5-6).

After a hearing, the Administrative Law Judge (ALJ) found that NJDOT failed to sustain the charges against Bartos. (Aa24). The ALJ found that Bartos believed he was not an essential worker during the pandemic and that NJDOT sent Bartos a second letter, giving him until April 16, 2020, to respond. (Aa14-16). The ALJ concluded that while Bartos had no intention of returning to work after lifting the April 3, 2020 quarantine, NJDOT had not conclusively

established the effective date of Bartos' separation. (Aa23). Further, the ALJ concluded that before receiving the worker's compensation claim, NJDOT had already determined that Bartos had abandoned his work duties and failed to consider his claim properly. (Aa24). The ALJ concluded that because NJDOT used an incorrect effective date and improperly disregarded Bartos's worker's compensation claim, the FNDA should be reversed. (Aa24-25).

Upon review, on October 12, 2022, the Commission declined to adopt the ALJ's initial decision, sustained the charges, and upheld the resignation not in good standing. Ibid. The Commission noted several errors in the ALJ's findings. (Aa31). First, the ALJ determined that the effective date of the resignation not in good standing was April 16, 2023, which was incorrect. Ibid. Instead, the Commission found that the effective date was April 14, 2020, at the latest. Ibid. The Commission concluded that under the April 14 effective date, "there would be no meritorious reason to find that the appellant had not abandoned his position under N.J.A.C. 4A:2-6.2(b)." Ibid. Further, the ALJ ignored N.J.A.C.4A:2-6.2(b), which states that the five-day threshold to declare that an employee has abandoned their position begins once the employee is advised of being absent without authorization, which the Commission found to

be April 7, 2023 at the latest. (Aa31-32). Finally, Bartos started receiving benefits for Workers' Compensation on April 15, after the date the Commission determined he had already effectively resigned, and for a condition unrelated to his failure to return to work on April 6. (Aa32).

Having reviewed the merits briefs filed by the primary parties, the Commission has determined that the factual and legal issues involved in this appeal do not warrant filing a separate brief. The primary issue raised in this appeal is whether the Commission's decision upholding Bartos' removal was arbitrary, capricious, or unreasonable. Because this matter does not involve a challenge to the validity of the Civil Service statutes or the rules promulgated thereunder, a separate brief on the merits is unnecessary. The primary parties to this appeal have adequately addressed the relevant issues, and the public interest does not require the Commission's participation.

Nevertheless, the Commission's decision should be affirmed. It is well-established that an agency's determination will not be upset unless it is affirmatively shown that it is arbitrary, capricious, or unreasonable or that it lacks fair support in the record as a whole. Karins v. City of Atl. City, 152 N.J. 532, 540 (1998). A strong presumption of reasonableness attaches to the

Commission's decision. In re Carroll, 339 N.J. Super. 429, 437 (App. Div. 2001). Thus, a court must affirm the decision if the evidence supports it, even if the court may question its wisdom or would have reached a different result. Campbell v. N.J. Racing Comm'n, 169 N.J. 579, 587 (2001).

The Commission reasonably relied upon the testimony and other evidence in the record to conclude that Bartos abandoned his position and that Bartos's removal was proper. (Aa30-33).

For these reasons, the Commission's decision should be affirmed.

Respectfully submitted,

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