

Commission, charges were sustained, and major discipline was imposed. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12, counsel fees must be denied.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was justified. However, it modifies the suspension to a 26 working day suspension. The Commission further orders that the appellant be granted four working days of back pay, benefits, and seniority. The amount of back pay awarded is to be reduced as provided for in *N.J.A.C.* 4A:2-2.10(d)3. 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.

Counsel fees are denied.

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 28TH DAY OF FEBRUARY, 2024



Allison Chris Myers
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
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 01358-23

AGENCY DKT. NO. 2023-1655

**IN THE MATTER OF JASON SABOL,
MERCER COUNTY CORRECTIONS
CENTER.**

Michael P. DeRose, Esq., for appellant, Jason Sabol (Crivelli, Barbati, & DeRose, LLC, attorneys)

Michael A. Amantia, Assistant County Counsel, for respondent (Paul R. Adezio, Mercer County Counsel, attorney)

Record Closed: December 8, 2023

Decided: January 22, 2024

BEFORE **MICHAEL R. STANZIONE, ALJ:**

STATEMENT OF THE CASE

Respondent, Mercer County Corrections Center (MCCC or Appointing Authority), suspended appellant, Jason Sabol, for thirty working days. The suspension was based on the charges of chronic or excessive absenteeism, conduct unbecoming a public employee, and other sufficient cause. The appellant appealed these charges and the suspension.

PROCEDURAL HISTORY

The first Preliminary Notice of Disciplinary Action (PNDA) is dated January 19, 2022 ("PNDA 1"). (R-1.) A second PNDA ("PNDA 2") was issued on January 20, 2022. (R-9.) The third PNDA ("PNDA 3") is dated May 24, 2022. (R-13.) A fourth PNDA ("PNDA 4") is dated August 12, 2022. (R-15.)

After a departmental hearing in which the charges were sustained, a Final Notice of Disciplinary Action (FNDA) encompassing all the disciplinary actions was issued. (R-20.) The FNDA charged appellant with violating N.J.A.C. 4A:2-2.3(a)(4), chronic or excessive absenteeism or lateness, and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause: Mercer County Correction Center Table of Offenses and Penalties, Section A-4, chronic or excessive absenteeism from work without pay. The FNDA imposed a penalty of a thirty-working-day suspension without pay, which appellant has since served, in accordance with the applicable civil service statutes and regulations. The appellant filed a timely appeal, and the matter was transmitted to the Office of Administrative Law on February 15, 2023, for hearing as a contested case. The case was heard on October 18, 2023. The record remained open for the receipt of written summations by the parties. Both summations were received by December 8, 2023, and the record closed that day.

FACTUAL DISCUSSION AND FINDINGS

The following is undisputed, and I, therefore, **FIND** the following as **FACT**:

1. Appellant called out sick on December 21, 2021. (R-2.) On the appellant's late slip, the reason noted for the call out was "F/S," meaning "family sick." (R-3.) On that date, the appellant had no sick time remaining. This absence was identified in PNDA 1. (R-1.)
2. Appellant had applied for and received intermittent-use Family and Medical Leave Act (FMLA) time. The approval allowed him to use the time periodically, no more than two times per week, or for follow-up treatments and appointments

when requested in advance. The approval was for the period of June 21, 2021, until December 21, 2021. (A-1.)

3. On December 22, 2021, the appellant called out sick to care for a family member. (R-5.) On the late slip, the appellant claimed FMLA as the reason for his call out. (R-6.) The appellant's approved FMLA time expired on December 21, 2021, and he had none remaining. This absence was identified in PNDA 1. (R-1.)
4. On December 24, 2021, the appellant called out sick. (R-10.) On the late slip, the reason noted was "family sick/FMLA." (R-11.) The appellant had no sick time to use, nor did he have any approved FMLA time. This absence was identified in PNDA 2. (R-9.)
5. On May 24, 2022, the appellant called out sick. (R-14.) The appellant had no sick time, nor did he have any approved FMLA time. This absence was identified in PNDA 3. (R-13.)
6. On July 5, 2022, the appellant called out sick. (R-16.) The appellant had no sick time, nor did he have any approved FMLA time. This absence was identified in PNDA 4. (R-15.)
7. The appellant's disciplinary history is recorded in a July 29, 2022, computer printout. (R-17.)
8. Based on the appellant having called out sick when he did not have sufficient sick hours or available FMLA time, the Appointing Authority charged the appellant with committing the following infractions, which were sustained after a hearing: chronic or excessive absenteeism or lateness, conduct unbecoming a public employee, and other sufficient cause. (R-20.)

Testimony

For the Appointing Authority:

Captain Michael Kownacki was employed by the Appointing Authority. As captain, he was responsible for assisting the warden and deputy administrator with the management of the MCCC facility. His duties included overseeing employee discipline.

The written policy that addresses sick leave requires employees to call out at least two hours before their assigned shift. (R-8.)

As noted on the FMLA approval memorandum, A-1, an employee calling out sick “must identify” his absence as “FMLA.” Employees are required to follow established call-in procedures. Failure to properly notify employers may cause a denial of FMLA protections. Regarding PNDAs 2, 3, and 4, one for each unauthorized absence, the appellant called out sick and had no sick time to use or any FMLA approved time.

If the Appointing Authority had adhered to the Mercer County Public Safety Table of Offenses and Penalties, the appellant would have been facing a sixty-five-working-day suspension. (R-18.) The Table of Offenses and Penalties considers the employee’s disciplinary history, and number and nature of infractions. However, after the disciplinary hearing, an FNDA dated January 25, 2023, suspended the appellant for thirty working days.

On cross-examination, Captain Kownacki acknowledged that the appellant’s wife and mother were simultaneously dealing with life-threatening illnesses; however, the respondent’s evidence of the sick-time call-offs and the lack of sick or FMLA time was not controverted. Captain Kownacki did testify that he agreed that on the call-out date of December 21, 2021, the appellant did have FMLA time available.

For the appellant:

Jason Sabol, the appellant, has worked for the Appointing Authority as a correction officer for twenty-three years and has not worked anywhere else.

He called out sick for the December 21, 2021, workday because he had a sick family member. His wife was seriously ill and he had to take care of her. At the time, he used the term "family sick" because his family member was sick, and he knew he had available FMLA time. On December 22, 2021, he called out sick, believing he had FMLA time, but it had expired the day before.

On December 24, 2021, he again called out and requested to use his FMLA time. Although his last day of approved FMLA time was December 21, 2021, he believed he still had available days. On this date, his wife was sick, and the kids were home, so he had to be there to take care of them. No other family members were available to care for the kids or his ill wife and ill mother.

On May 24, 2022, he called out "personal sick" because he believed he had sick time available, when he did not. He did not realize that the FMLA usage in 2021 altered the sick time that was available to him in 2022.

On July 5, 2022, he again called out "personal sick" to take care of his mother, whose health had been deteriorating ever since having a stroke. Again, he had no sick time available.

During cross-examination, Sabol stated that he believed he was following the rules and responsibilities of the FMLA approval. (A-1.) It was his belief that since he was calling out "family sick," it would pertain to FMLA. To him, "FMLA was the same as family sick." Also, following the expiration of his FMLA time on December 21, 2021, he believed that it was still available at the time he tried to use it on December 22, 2021, and December 24, 2021. Sabol believed that he still had the coverage, as he continuously renews the FMLA coverage every six months.

Additional Findings

It is the obligation of the fact finder to weigh the credibility of the witnesses before making a decision. Credibility is the value that a fact finder gives to a witness' testimony. Credibility is best described as that quality of testimony or evidence that makes it worthy of belief. "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Estate of Perrone, 5 N.J. 514, 522 (1950). To assess credibility, the fact finder should consider the witness' interest in the outcome, motive, or bias. A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

As the fact finder, I had the ability to observe the demeanor, tone, and physical actions of Captain Kownacki during his testimony concerning his understanding of the Appointing Authority's relevant policies. He has been employed by the Appointing Authority for over twenty-three years. Most recently, he has been responsible for assisting with the management of the facility. He testified professionally and without equivocation concerning the sick-time and FMLA-usage policy. I find his testimony to be credible.

As the fact finder, I had the ability to observe the demeanor, tone, and physical actions of the appellant during his testimony. The appellant comported himself in a manner that suggested he was credible. However, he did not offer documentary or other evidence to support an assertion that he had available sick or FMLA time for all his call-outs. Furthermore, he testified that he believed he called out correctly when he did have FMLA time available to him on December 21, 2021. Given the absence of evidence supporting the appellant's assertion, I cannot accord his testimony equal weight to that of respondent's witness.

Having considered the testimony and documentary evidence, and the credibility of the witnesses, I **FIND as FACT** that the appellant had no available sick time or FMLA

leave when he called out sick for the December 24, 2021, May 24, 2022, and July 5, 2022, workdays, and he, therefore, did not have enough sick time remaining to cover his absences on those days. I also **FIND as FACT** that the appellant had available FMLA leave when he called out sick for the December 21, 2021, workday, and he, therefore, had the available sick time to cover his absence that day.

LEGAL ANALYSIS AND CONCLUSIONS

The appellant's rights and duties are governed by laws including the Civil Service Act and the regulations promulgated thereunder. A civil service employee who commits a wrongful act related to his or her employment, or provides other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6, -20; N.J.A.C. 4A2-2.2, -2.3. Major discipline includes removal, fine, or suspension for more than five working days. N.J.A.C. 4A:2-2.2. Employees may be disciplined for insubordination, neglect of duty, conduct unbecoming a public employee, failure or inability to perform duties, chronic or excessive absenteeism or lateness, and other sufficient cause, among other things. N.J.A.C. 4A:2-2.3. An employee may be removed for egregious conduct without regard to progressive discipline. In re Carter, 191 N.J. 474 (2007). Otherwise, progressive discipline would be applied. West New York v. Bock, 38 N.J. 500 (1962).

The Appointing Authority has the burden of establishing the truth of the allegations by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). 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); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

As a law-enforcement officer, appellant is held to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). Maintenance of strict discipline is important in military-like settings such as police departments, prisons, and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.),

certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997). Adherence to this high standard of conduct is an obligation that a law enforcement officer voluntarily assumes when he or she enters public service. In re Emmons, 63 N.J. Super. 136, 142 (App. Div. 1960).

Appellant was charged with "chronic or excessive absenteeism or lateness." N.J.A.C. 4A:2-2.3(a)(4). Conduct that occurs over a period of time, or frequently recurs, is considered "chronic" and may be the basis of discipline or dismissal. N.J.A.C. 4A:2-2.3(a)(4). "Just cause for dismissal can be found in habitual tardiness or similar chronic conduct." West New York v. Bock, 38 N.J. at 522. While a single instance may not be sufficient, "numerous occurrences over a reasonably short space of time, even though sporadic, may evidence an attitude of indifference amounting to neglect of duty. Such conduct is particularly serious on the part of employees whose job is to protect the public safety and where the [employees] serve precise shifts to afford continuous protection." Ibid.

The Appellate Division further discussed the need for civil service employees to comply with attendance rules:

A work force cannot be effective unless it responds to direction. This observation has particular efficacy in the context of providing security services. Defiance in the face of reasonable orders may result in calamity.

We do not expect heroics, but "being there," i.e., appearing for work on a regular and timely basis, is not asking too much.

[State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 333 (App. Div. 1998).]

Here, the appellant violated the Appointing Authority's policy concerning the use of sick time on PNDA 2, PNDA 3, and PNDA 4. However, he had FMLA available on December 21, 2021, which directly contradicts the specifications and basis for half of

PNDA 1. The record contains no evidence that would permit an alternative finding. Accordingly, I **CONCLUDE** that the appellant's conduct constituted chronic or excessive absenteeism in violation of N.J.A.C. 4A:2-2.3(a)(4) for PNDA 2, PNDA 3, and PNDA 4. There is no basis for chronic or excessive absenteeism or violation of N.J.A.C. 4A:2-2.3(a)(4) as it pertains to the December 21, 2021, portion of PNDA 1.

The appellant was also charged with "conduct unbecoming a public employee" in violation of N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. at 140. It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't. of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't. of Civil Serv., 17 N.J. 419, 429 (1955)).

Here, the appellant failed to comply with the Appointing Authority's policy concerning attendance. As discussed above, the public reasonably expects civil service employees to appear for work as required. Given correction officers' particularly important role, which includes the need to ensure safety within correction facilities, this expectation is heightened. The appellant provided no evidence other than his explanation that he believed he had FMLA and sick time available when he called out. Accordingly, I **CONCLUDE** that the appellant's conduct constituted conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6) for PNDA 2, PNDA 3, and PNDA 4. I **CONCLUDE** that the appellant's conduct did not constitute conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6) for the December 21, 2021, portion of PNDA 1 because he should have been credited with FMLA time for that day.

The appellant was also charged with violating N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, specifically, Mercer County Correction Center Table of Offenses and Penalties, Section A-4, chronic or excessive absenteeism from work without pay. There is no definition in the New Jersey Administrative Code for "other sufficient cause." Other sufficient cause is generally defined in the charges against the employee. For the reasons stated above with regard to the charge of "chronic or excessive absenteeism or lateness," N.J.A.C. 4A:2-2.3(a)(4), I **CONCLUDE** that respondent has met its burden of proving the charge of other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12), specifically, violation of the Mercer County Correction Center Table of Offenses and Penalties, Section A-4, chronic or excessive absenteeism from work without pay, for PNDA 2, PNDA 3, and PNDA 4. Further, for the reason stated above, I **CONCLUDE** that the appellant's conduct did not constitute other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12) for the December 21, 2021, PNDA 1.

PENALTY

A civil service employee who commits a wrongful act related to his or her duties may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). This requires a de novo review of the employee's disciplinary action. In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. at 523-24, concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). The question to be resolved is whether the discipline imposed in this case is appropriate.

The Appointing Authority seeks to suspend the appellant for thirty working days for his actions. The appellant has been disciplined forty-one times between September 2000 and February 2021. (R-17.) All but thirteen of the forty-one disciplinary actions were for "unsatisfactory attendance," "absent with notice," "absent without proper notice," "lateness" or "chronic, excessive absenteeism." Ibid. The remaining twenty-eight disciplinary actions were for "failure to carry out orders," "violating rules and regulations

policy," "conduct unbecoming a county employee," "failure to report information," "other sufficient cause," "falsification of a report," and "violating administrative procedures." Ibid. The penalties included fifteen written reprimands, two two-day suspensions, five three-day suspensions, twelve five-day suspensions, two six-day suspensions, one seventeen-day suspension, two removals, one counseling and verbal warning, and one discipline dismissed. Ibid.

After having considered the proofs offered in this matter and the impact of the appellant's behavior upon the institution, and after having given due deference to the principle of progressive discipline, I **CONCLUDE** that appellant's violations are significant enough to warrant a penalty, which, in part, is meant to impress upon him the seriousness of the failure to comply with attendance mandates. The appellant did not conduct himself in a manner intended to ensure that he would be in compliance. He committed multiple violations of rules governing attendance, as well as other violations of administrative procedures and/or regulations. However, because one of the charges in PNDA 1 was not sustained, I **CONCLUDE** that the appropriate penalty is a twenty-six-working-day suspension, as the appellant had sufficient FMLA time to use for the December 21, 2021, portion of PNDA 1.

ORDER

I hereby **ORDER** that the charges of chronic or excessive absenteeism, conduct unbecoming a public employee, and other sufficient cause are sustained as specified above. I **ORDER** that the action of the Appointing Authority imposing a thirty-day suspension is **MODIFIED**, and the appellant shall be suspended for twenty-six working days.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision

within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 22, 2024
DATE


MICHAEL R. STANZIONE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

APPENDIX

WITNESSES

For appellant:

Jason Sabol

For respondent:

Captain Michael Kownacki

EXHIBITS

For appellant:

A-1 July 16, 2021, Approval of Request for Intermittent FMLA Leave

For respondent:

- R-1 January 19, 2022, PNDA
- R-2 December 21, 2021, iSeries Timekeeper Report
- R-3 December 21, 2021, Attendance and Overtime Record
- R-4 Time Attendance Records—Jason Sabol
- R-5 December 22, 2021, iSeries Timekeeper Report
- R-6 December 22, 2021, Attendance and Overtime Record
- R-7 Time Attendance Records—Jason Sabol
- R-8 Mercer County Corrections Center, Department of Public Safety Standards and Operating Procedures 132: Sick Leave
- R-9 January 20, 2022, PNDA
- R-10 December 24, 2021, iSeries Timekeeper Report
- R-11 December 24, 2021, Attendance and Overtime Record
- R-12 Time Attendance Records—Jason Sabol
- R-13 May 24, 2022, PNDA
- R-14 May 24, 2022, Employee Time Sheet

- R-15 August 12, 2022, PNDA
- R-16 July 5, 2022, Employee Time Sheet
- R-17 Jason Sabol—Disciplinary History
- R-18 Mercer County Public Safety—Table of Offenses and Penalties
- R-19 Hearing Officer Decision dated January 13, 2023
- R-20 Final Notice of Disciplinary Action dated January 25, 2023