

CSC DKT. NO. 2018-2492  
OAL DKT. NO. CSV 03437-18

ISSUED: APRIL 24, 2019 BW

DPF-439 \* Revised 7/95

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 24<sup>TH</sup> DAY OF APRIL, 2019



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 03437-18

AGENCY DKT. NO. 2018-2492

**IN THE MATTER OF MARKIDAH GIBSON,  
MERCER COUNTY CORRECTIONS  
CENTER.**

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**Stuart J. Alterman, Esq.,** for appellant, Markidah Gibson (Alterman and Associates, LLC, attorneys)

**Stephanie Ruggieri D'Amico,** Assistant County Counsel, for respondent, Mercer County Corrections Center (Paul R. Adezio, County Counsel)

Record Closed: February 25, 2019

Decided: March 21, 2019

**BEFORE JUDITH LIEBERMAN, ALJ:**

**STATEMENT OF THE CASE**

The respondent, Mercer County Corrections Center (MCCC or Appointing Authority), suspended the appellant, Markidah Gibson, for twenty-five working days. The suspension was based on the charges of chronic and excessive absenteeism, conduct unbecoming a public employee, and other sufficient cause. The appellant appealed these charges and the suspension.

### **PROCEDURAL HISTORY**

On June 20, 2017, the Appointing Authority issued a Preliminary Notice of Disciplinary Action (PNDA) setting forth the charges and specifications made against the appellant. After a departmental hearing, which was held on January 25, 2018, the Appointing Authority issued a Final Notice of Disciplinary Action (FNDA) on February 21, 2018, sustaining the charges in the PNDA and suspending the appellant from employment for twenty-five working days, effective March 2, 2018, and ending April 6, 2018. The appellant filed a timely appeal and the matter was transmitted to the Office of Administrative Law on March 6, 2018, for hearing as a contested case. The case was heard on January 24, 2019. The record remained open for the receipt of written summations by the parties. Both summations were received by February 25, 2019, and the record closed that day.

### **FACTUAL DISCUSSION AND FINDINGS**

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

1. The Appointing Authority recorded the appellant's attendance and absences on a "Time and Attendance" form ("TA form"). (R-2.)
2. The appellant's TA form recorded that she had a balance of 115 available sick hours at the beginning of 2017. Ibid.
3. On June 13, 2017, the appellant called out sick for the shift that was to begin at 11:00 p.m. on June 13, 2017, and end at 7:00 a.m. on June 14, 2017.<sup>1</sup> (R-4.)
4. At the start of the June 14, 2017, work day, the appellant had used all but three hours of her sick time. (R-3.)

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<sup>1</sup> Hereinafter referred to as the "June 14, 2017, work day."

5. The appellant used the three remaining sick hours during the June 14, 2017, work day. Ibid.
6. The appellant did not have enough sick hours to cover the remainder of the June 14, 2017, work day.
7. The appellant was “docked” five hours for the June 14, 2017, absence because she did not have sick hours to cover that time. Ibid.
8. The appellant’s past disciplinary history is recorded in a September 11, 2017, computer printout. (R-6.)
9. Based on the appellant having called out sick when she did not have sufficient sick hours, 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-1.)

### 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 Warden with the management of the MCCC facility. Before he became Captain, he served the Appointing Authority as a lieutenant for six years, a sergeant for five years and an officer for seven years.

In June 2017, the appellant was assigned an eight-hour work shift that began 11:00 p.m. and ended 7:00 a.m. Because she called out sick for the June 14, 2017, work day, she used her last three sick hours that day and had no more sick hours to cover the five remaining hours of that work day. She was charged with a “chronic or excessive absenteeism from work without pay”, step five, because she was previously disciplined

for the same offense. (R-7.) The Appointing Authority imposed a twenty-five working day suspension, although the Mercer County Public Safety Table of Offenses and Penalties recommended a thirty working day suspension. Ibid.

On cross-examination, Captain Kownacki testified that the Appointing Authority did not previously refrain from disciplining staff who had partial sick time available to cover a sick day. When asked, he testified that a twenty working day suspension is the recommended discipline for a fourth offense of excessive absenteeism.

For the appellant:

**Markidah Gibson**, the appellant, has a bachelor's and master's degree in criminal justice. She started working for the Appointing Authority as a corrections officer on June 12, 2006. She previously worked as a 911 operator for the Trenton Police Department and for the New Jersey Division of Taxation. Her assignment in June 2017, was as an intake relief officer. She was responsible for processing new commitments to the facility.

She called out sick for the June 14, 2017, work day because she was ill. She suffered from anemia, which caused shortness of breath, dizziness and headaches. These conditions made it difficult for her to drive, work and perform daily functions. She was first diagnosed with anemia on June 4, 2017. She experienced symptoms for approximately six months prior to then. The condition is caused by hereditary factors and her fibroid tumors. She had surgery to remove the tumors after she was diagnosed with anemia; seventy-one fibroid tumors were removed from her uterus. Anemia can be controlled by medication.

She applied for leave pursuant to the Family Medical Leave Act (FMLA) over eight times. She had not been approved for FMLA leave prior to June 14, 2017, because she had not exhausted her sick time. She applied for FMLA leave after she exhausted her sick time, in June 2017.<sup>2</sup>

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<sup>2</sup> The appellant produced a January 30, 2018, letter from her counsel in which counsel asserted that her absences from work in June 2017, including on June 14, 2017, were caused by her illness. He referred to a letter from Dr. David Schaebler, of Mercer Bucks Hematology Oncology. The doctor's letter was not attached or otherwise provided.

The Appointing Authority's policy requires correction officers to call out at least two hours prior to the start of their work shift. The appellant complied with this policy when she called out sick on June 13, 2017. Given her illness, she would not have been able to comply with her job duties or respond to an emergency, which would have required her to protect herself and other officers.

The Appointing Authority previously only "docked" officers when they did not have sufficient sick time to fully cover an absence. She believed that, under such circumstances, the officers were not disciplined. The Appointing Authority applied this policy to her in the past. She did not receive written or oral notice that the policy had changed. She acknowledged that the document marked "R-6" accurately reflected her past disciplinary history.

#### 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 observations 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 the appellant during the hearing. The appellant comported herself in a manner that suggested she was credible. However, she did not offer documentary or other evidence to support her assertions concerning the health problems that interfered with her ability to report to work. Similarly, she did not offer evidence, other than her attorney's

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Counsel argued that "this illness should have been deemed within the coverage period of the FMLA as it is related to the overall chronicity of the illness[.]" (R-8.)

correspondence, concerning her FMLA applications. She testified that she applied for FMLA more than eight times. She did not explicitly state whether her applications had been approved or, had they been approved, whether she availed herself of FMLA leave during the time at issue. Furthermore, although she testified to a routinely-applied past practice that did not involve disciplining officers who called out sick when they had insufficient sick time, and she testified that this practice had been applied to her many times, she did not cite to any specific instance in which this occurred. Rather than attempt to identify when she was the beneficiary of this practice, she merely suggested that a review of her record would show when this happened. Given the absence of evidence supporting the appellant's assertions, I cannot accord her testimony weight.

Captain Kownacki testified credibly concerning his understanding of the Appointing Authority's relevant policies. He has been employed by the Appointing Authority for over eighteen 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 usage policy. He also testified professionally and without equivocation that there had not been a past practice that involved "docking" officers when they had insufficient sick time to cover an absence and that such officers were not subject to discipline. I find his testimony to be credible.

Having considered the testimony and documentary evidence, and the credibility of the witnesses, I **FIND as FACT** the appellant had only three available sick hours when she called in sick for the June 14, 2017, work day and she, therefore, did not have enough sick time remaining to cover her absence that day. I also **FIND as FACT** that the Appointing Authority did not previously have a policy that officers who had insufficient sick time to cover an absence would not be disciplined and instead would be "docked" time.

### **LEGAL ANALYSIS AND CONCLUSION**

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. 4A:2-2.2, -2.3. Major discipline includes removal, or 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 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 a 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. 500, 522 (1962). 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 men 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 School Dist. of City of Newark v. Gaines, 309 N.J. Super. 327, 333 (App. Div. 1998).

Here, the appellant violated the Appointing Authority's policy concerning use of sick time. The record contains no evidence that would permit an alternative finding. Accordingly, I **CONCLUDE** the appellant's conduct constituted chronic or excessive absenteeism in violation of N.J.A.C. 4A:2-2.3(a)(4).

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. 136, 140 (App. Div. 1960). 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)).

The appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(11), "other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.

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 to explain why she exhausted all available sick hours by the middle of the year. Accordingly, I **CONCLUDE** the appellant's conduct constituted conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6). Furthermore, given the evidence of improper behavior by the appellant, I **CONCLUDE** the appellant's conduct constituted other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11).

### **PENALTY**

A civil service employee who commits a wrongful act related to his 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 appellant'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. 500, 523-24 (1962), 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 twenty-five working days for her actions. The appellant has been disciplined twenty times between January 2007 and May 2017. (R-6.) All but two of the twenty disciplinary actions were for "unsatisfactory attendance," "absent without proper notice," "lateness" or "chronic, excessive

absenteeism." Ibid. The remaining two disciplinary actions were for "failure to carry out orders" and "other sufficient cause." Ibid. The penalties included ten written reprimands, one one-day suspension, two three-day suspensions, two ten-day suspensions, and multiple fines ranging from one to fifteen days. 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 principal of progressive discipline, I **CONCLUDE** that appellant's violations are significant enough to warrant a penalty, which, in part, is meant to impress upon her the seriousness of the failure to comply with attendance mandates. The appellant did not conduct herself in a manner intended to ensure she would be in compliance. As the appellant has committed multiple violations of rules governing attendance, as well as other violations of administrative procedures and/or regulations, I **CONCLUDE** that the action of the Appointing Authority in suspending the appellant for twenty-five working days is reasonable and consistent with progressive discipline, and should be affirmed.

### **ORDER**

I hereby order that the charges of chronic or excessive absenteeism, conduct unbecoming a public employee and other sufficient cause are sustained. I order that the action of the Appointing Authority imposing a twenty-five working day suspension is **AFFIRMED**, and the appellant shall be suspended for twenty-five 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, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 21, 2019

DATE

  
JUDITH LIEBERMAN, ALJ

Date Received at Agency:

3/21/19

Date Mailed to Parties:

3/21/19

/vj

**APPENDIX**

**LIST OF WITNESSES**

**For appellant:**

Markidah Gibson

**For respondent:**

Captain Michael Kownacki

**LIST OF EXHIBITS**

**For appellant:**

None

**For respondent:**

- R-1 February 21, 2018 FNDA
- R-2 Appellant's Time and Attendance report
- R-3 Time record for June 13, 2017, through June 14, 2017
- R-4 Attendance and Overtime Record
- R-5 September 15, 2016, FNDA
- R-6 Disciplinary History
- R-7 Table of Offenses and Penalties
- R-8 January 30, 2018, letter to Honorable Paul Catanese, J.M.C., Ret.