A-4

STATE OF NEW JERSEY

In the Matter of Keisha N. Singletary
Judiciary, Essex County Vicinage

CSC DKT. NO. 2013-3053
OAL DKT. NO. CSV 07364-13

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: NOVEMBER 19, 2014 BW

The appeal of Keisha N. Singletary, Judiciary Clerk 3, Essex County Vicinage, Judiciary, removal effective October 22, 2012, on charges, was heard by Administrative Law Judge Irene Jones, who rendered her initial decision on October 15, 2014. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on November 19, 2014, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. However, in light of the appellant's medical condition, the disciplinary penalty of removal is unduly harsh. Therefore, the foregoing circumstances provide a sufficient basis to modify the removal to a resignation in good standing. *See N.J.A.C.* 4A:2-2.9(d). *See Eugene Verdell v. New Jersey State Department of Military and Veterans' Affairs,* Docket No. A-0497-04T5 (App. Div. February 16, 2006).

Re: Keisha N. Singletary.

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
NOVEMBER 19, 2014

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals and Regulatory Affairs
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P. O. Box 312
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attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 07364-13
AGENCY DKT. NO. 2013-3053

KEISHA SINGLETARY,
Petitioner,
v.
SUPERIOR COURT OF NEW JERSEY,
ESSEX VINCINAGE,
Respondent.

Keisha Singletary, petitioner, pro se

Thomas Russo, Esq., Staff Attorney, for respondent (Administrative Office of the Courts)

Record Closed: January 23, 2014 Decided: October 15, 2014

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Keisha Singletary (petitioner or Singletary) was employed by the Superior Court of New Jersey, Essex Vicinage (respondent or Vicinage) as a Judiciary Clerk 3 (JC 3) and assigned to the Vicinage's Criminal Division. On December 6, 2012, she was issued a Preliminary Notice of Disciplinary Action

(PNDA) that charged her with insubordination, chronic or excessive absenteeism or lateness, "other sufficient cause" consisting of an unauthorized leave of absence, and job abandonment (resignation not in good standing). (R-24.) The PNDA set forth the bases for the charges and also sought petitioner's removal. A departmental hearing on the charges was held on January 30, 2013, wherein all charges, save the insubordination charge, were sustained. (P-5.) On April 25, 2013, a Final Notice of Disciplinary Action (FNDA) was issued wherein petitioner was removed from her position, effective October 22, 2012. Petitioner filed an appeal with the Civil Service Commission and the matter was transmitted to the Office of Administrative Law for hearing as a contested case. The matter was then assigned to the undersigned and a prehearing conference was held on September 19, 2013.

Hearings were held on October 24 and November 22, 2013. In support of its case, the Vicinage presented the testimony of Human Resources Division Manager Oretha Oniyama, Assistant Trial Court Administrator Sheila Deveraux, Supervisor I Arnette Jones, Team Leader John Merkt, and Criminal Division Manager Dorothy Howell. The petitioner testified on her own behalf. The parties submitted post-hearing briefs on January 9 and 23, 2014, at which time the record closed. At the request of the undersigned the time for the issuance of this Initial Decision was extended until October 23, 2014.

TESTIMONY

The testimony in this matter will not be fully repeated herein, but the relevant facts will be summarized.

FACTS

Petitioner commenced working for the Essex Vicinage in 2000 as a Judicial Clerk (JC 2). At the time of her termination, petitioner was working as a JC 3 in the Vicinage's Criminal Division. On September 10, 2012, when she was

assigned to the Division's Office where her principle job duties included processing expungement applications and servicing as courtroom clerk "floater" on an as-needed basis. (R-21.) As a court room floating clerk, petitioner was required to work in that capacity at least four hours per month, so as to maintain her certification to operate the courtroom audio equipment.

As a JC 3, petitioner was required to process expungement applications. The expungment process is labor intensive, time consuming, and time-sensitive. Petitioner was one of two employees in the Vicinage who knew how to process expungement applications. Indeed, the second employee was trained by petitioner. Likewise, petitioner was also one of several employees credentialed to serve as a floater because the job required a JC 3 job title or higher. The floaters are required to prepare the court calendar, check in litigants, process the issuances of bench warrants, operate courtroom audio equipment, and generally assist the trial judge. Petitioner also answered telephones and staffed the customer service window. (R-21.)

On September 10, 2012, petitioner was re-assigned to the Criminal Division's Special Remand Court, where her duties largely involved data entry and answering telephones. Petitioner had just returned from a leave of absence. Denise Howell, criminal division manager, reassigned the petitioner to this post because petitioner related that she could not stand for long periods of time or lift anything heavy. Oretha Oniyama, human resource division manager and the Vicinage's Title I ADA coordinator recalled that on September 18, 2012, petitioner submitted a physician's note to the Vicinage that listed her limitations. (R-26.) The physician's note was considered as a formal request for a workplace accommodation. The Vicinage attempted to meet with petitioner to ascertain the details of her limitations and their impact on her ability to perform the essential functions of her job. However, petitioner was granted another leave before the meeting could be held. Petitioner never returned to work from that leave.

Petitioner was granted several leaves of absence in 2012 that exceeded her earned administrative, vacation, and sick leave days. Kim Tuttle, then the administrative specialist 2/leave specialist in the human resource division, testified that in the beginning of 2012, petitioner received 56.7 hours of sick leave, 56.7 hours of vacation leave, and 21 hours of administrative leave. (R-4.) Petitioner was entitled to receive 105 hours each of sick and vacation leave; however, she received reduced amounts because she exceeded her leave time in 2011. (R-4.) Indeed, Tuttle noted that petitioner exceeded her sick and vacation leave time in every year since 2007, thus reducing her leave time allotment for each succeeding year. However, from 2007, petitioner continued to be absent even after she had exhausted her paid leave days, which caused her to fall into "no pay" or docked status for the additional absences in 2012—petitioner had exhausted all of her administrative, vacation, and sick days by the end of March of 2012. (R-4.) Because she failed to return to work in 2012 following a sick leave, petitioner owes the Vicinage $1,586.89 for that time. (R-7, R-8, R-9.)

Tuttle further stated that the leaves granted to petitioner in 2012 included her administrative, sick, and vacation and family leave, commenced on March 26, 2012 through June 15, 2012. (R-10.) Originally, petitioner only requested family leave from March 26 through April 23. (R-10.) The Vicinage granted her additional leave based upon her subsequent submission of a physician's note, which asked that she be excused from work until May 21, 2012. (R-11.) However, she did not return to work on May 21. Rather, she submitted another physician's note on May 22, 2012, which stated that she was unable to work until approximately August 1, 2012. (R-12.) Upon receiving this note, the Vicinage reviewed petitioner's entitlement to additional family leave. It determined that her entitlement would end on June 15, 2012. (R-2, R-4.) Accordingly, the Vicinage granted Ms. Singletary's request to stay out longer in view of the exhaustion of family leave, and she was granted a discretionary unpaid leave of absence for June 16 to August 1, 2012. However, she did not return to work on August 1, 2012. Instead, she submitted another physician's note, which provided that she was unable to work until October 1, 2012. (R-13.) Based upon this note, the Vicinage granted additional unpaid discretionary leave until September 10, 2010.

Witness Tuttle and Sheila Devereaux testified to the criminal division's operational needs and the hardships caused to the office by petitioner's prolonged absences. (R-2.). Specifically, petitioner's absences required her work to be distributed to other staff, which in turn, adversely impacted their own workload and lowered morale. The absences also reduced the number of "floater clerks" available for coverage in the courtrooms.

Petitioner's attendance history reveals that she returned to work on September 10, 2012. (R-3.). However, she left early that day and was absent for the next three days. (See R-22 and R-23.). The following week, she reported for work on Monday, September 17, but again left work early and was out the next day. She reported for work on Wednesday, September 19, but she did not come in the following day or any day since.

On September 26, 2012, petitioner submitted yet another doctor's note which stated that she was unable to work on September 20. The note provided the "possible" return date of January 15, 2013. (R-14.) The Vicinage granted petitioner another discretionary leave. However, the leave was only granted through Friday, October 19, 2012. (R-3.) Sheila Devereaux sent petitioner a letter granting the additional leave but directing her to report for work on Monday, October 22, 2012. The letter also advised her that her failure to report would be deemed a job abandonment, or resignation not in good standing, and it could also result in disciplinary action, up to and including termination. Witness Tuttle testified that on October 17, 2012, she and Oniyama had a telephone conversation with petitioner regarding her impending return to work. During that conversation, they reiterated to the petitioner that she was due back on October 22, which she acknowledged. (R-15.) Tuttle further noted that petitioner failed to mention any upcoming medical procedures on that day.

However, on October 22, 2012 petitioner submitted yet another doctor's note that provided that she would not be back at work because she was scheduled to have a medical procedure on October 22, her return to work date.

Later that day, a second doctor's note was submitted by another doctor stating that petitioner was being treated for depression and would return to work on November 1, 2012.

Respondent did not grant petitioner any further leave time. In spite of this, petitioner submitted additional medical notes, the first of which requested additional leave time until January 15, 2013. (R-13.) On January 15, 2013, a second doctor's note said she was unable to work until April 15, 2013. (R-19.) On March 13th a third note extended her return date to April 2014. (R-20.) Oniyama testified that none of the leave requests were granted.

Petitioner did not return to work. However, in November 2012, she applied for a disability retirement pension. (R-27.) Oniyama noted that due to the application, the Vicinage concluded that petitioner could no longer perform her duties. (R-35.) As her doctor stated that she was totally and permanently disabled.

Petitioner does not dispute that she was absent for most of the days cited by the respondent. She does note that there are discrepancies with the time matrix (R-4) and Leave Report System (R-8) and the Electronic Cost Accounting and Timesheet System (eCATS) (R-7). Specifically, she notes that the time matrix (R-4) for 2007 fails to show Family Medical Leave time whereas the TALRS (R-6a) show intermittent FMLA. (R-6(a); P-4(a), (b).). Further, before her March 26, 2012, sick leave TALRS provides that she used a total of 29 sick hours, 19 administrative hours, and 14 vacation hours of leave. (See R-6(f) totaling almost 9 days of paid leave.) However, eCATS, (R-7) reflects a different amount of hours used. Petitioner asserts that it is unfair for respondent to use FMLA leave time as a basis to establish poor and excessive absenteeism.

Petitioner asserts that her absences were due to injuries that she suffered on March 26, 2012, when the car that she was riding in was broadsided on the side where she sat. The car was pushed on the sidewalk and was so impacted that she had to be cut out of the vehicle. She was severely traumatized and in

severe pains for month. She was out of work for six months when she received a letter telling her that she had to return to work on September 10, 2012. (R-2.) She did so despite her doctor's orders and her excruciating pain. After a few days, she was unable to stay because she could not physically handle her job. She had severe whiplash, a bulging neck disc, severe back muscle sprain, and torn ligaments. The injury to her neck resulted in her having severe migraines and work exacerbated the pain. She recalls the American Disabilities Act (ADA) hearing with Oretha Oniyama and Dawna Scott. At the hearing, she requested shorter hours. Oniyama told her that shorter work hours were not an available accommodation; however, she would speak to Annette Jones her immediate supervisor to ascertain what accommodation could be had. Before anything was arranged, her doctor took her out of work because her symptoms increased.

Petitioner further noted that the excruciating daily pain along with the stress of financial consequences not being able to work triggered an episode of severe depression, which necessitated her hospitalization on October 4, 2012. On October 22, 2012, a few days after her release from the hospital, she received a letter from Sheila Deveraux ordering her return to work. (R-3.) On October 17, 2012, she called Tuttle and related that she was scheduled to undergo a series of medical procedures for her pain and thus she would be unable to return to work on October 22, 2012. It was projected that the procedure would be completed over a period of three months. The procedures required that she not move for days at a time. The procedure would be completed over a period of three months. Tuttle advised her to speak with Oniyama. She did speak with Oniyama and requested more time off. Oniyama told her that she would have to speak with Dorothy Howell, the criminal division manager and get back to her. After speaking with Howell, Oniyama advised her that they could not grant her request. Her primary doctor (Dr. Joseph Salese) and pain-management doctor (Dr. Todd Koppel) faxed supporting documentation to Tuttle on October 19, 2012. (R-16, R-17.)

While she did not return to work on October 22, 2012, she did speak to Tuttle on October 23, 2012, and told her that she was faxing further

documentation from her orthopedic doctor, Dr. Alan Schultz, about her inability to return to work on October 23, 2012.

Petitioner concedes that she filed for retirement disability on October 20, 2012, with a retirement date of November 1, 2012. She acknowledges receipt of PDNA and FNDA and a departmental hearing thereon.

She further admits that she has exhausted all leave time, including two discretionary leave of absences, sick and vacation time. She denies being told about the Donated Leave Program under N.J.A.C. 4A:6-1.22. If so advised, she would have participated in same and avoided the instant charges.

DISCUSSION

The issue herein is whether petitioner is guilty of chronic and excessive absenteeism.

In 2012, petitioner used 19 days of paid leave by the end of March followed by 12 weeks of family leave and then approximately 12 weeks of discretionary leave. Following her return to work on September 10, 2012, she left work early that day and she was out the next three days. On September 17, she returned but again she left work early that day and was out the next day. Although she reported for work on September 19, she was absent on Thursday, September 20, 2012, which started a month-long discretionary leave. This was the third discretionary leave which she never returned. Respondent contends that petitioner's failure to return to work constitutes "other sufficient cause" consisting of an unauthorized leave of absence (N.J.A.C. 4A:2-2.3(a)(1)) and job abandonment or resignation not in good standing (N.J.A.C. 4A:2-6.2(b)).

Respondent asserts that 2012 was not the only or the first year of poor attendance. Rather, petitioner had a pattern or poor attendance having exhausted all of her allowable leave time from 2007 to 2012. She was docked or in a no-pay status for 2010-2011. In 2010, petitioner took a voluntary furlough. (R-4.)

Petitioner contends that all absences were medically based and they were justified as they were accompanied by appropriate paperwork. She disputes that her absences were "chronic" which in her view implies a pattern of not returning to work on time. Furthermore, she contends that her absenteeism should not be characterized as "excessive" as that word is open to interpretation. In her view, an absence becomes excessive when it negatively impacts the work environment. While she concedes that her absence from work did put a strain on her department, she asserts that she was not responsible for staffing, the delegation of tasks, or the training of her colleagues. Therefore, she should not be held solely responsible for the strain her absences placed on the department.

Respondent contends that it is well established that a public employer has the right to expect consistent and timely attendance by its employees. In Rios v. Patterson Housing Authority, CSV 3009-02, Initial Decision (Aug. 1, 2005), http://njlaw.rutgers.edu/collections/oal, it was held that an employer has a legitimate right to expect that its employees will attend work as scheduled. Likewise, In re Marty Dias, CSV 05323-06, Initial Decision (July 7, 2008), http://njlaw.rutgers.edu/collections/oal, it was held:

> Appellant's employer had a right to expect that he would be present at work, willing and able to perform his duties. Certainly, [an employer] is not obligated to continue to employ a person who either cannot, or will not, perform his job duties on a regular basis. Frequent absences cause disruption in the workplace and create a hardship . . . for the remaining employees, who must absorb the job duties of a person who cannot or will not perform them.

Further, respondent argues notes that discipline for chronic or excessive absenteeism or lateness is not limited to instances of bad faith, or lack of justification, on the part of the employee. March v. City of Newark, CSV 7277-02, Initial Decision (Oct. 29, 2004), http://njlaw.rutgers.edu/collections/oal (citing Terrell v. Newark Housing Auth., 92 N.J.A.R.2d (CSV) 750; accord Rios, supra, CSV 3009-02; Nieves v. Essex County Prosecutor's Office, CSV 7710-02, Initial

Decision (March 28, 2006), adopted, MSB (May 12, 2006), http://njlaw.rutgers.edu/collections/oal ("A charge of chronic or excessive absenteeism or lateness addresses 'frequent and repeated attendance infractions, without consideration of the reasons.'"). Discipline may be warranted even in these circumstances because attendance is deemed an essential function of most jobs and employers are not legally obligated to accommodate excessive absenteeism or lateness. Rios, supra, CSV 3009-02 (citing Muller v. Exxon Research and Eng'g Co., 345 N.J. Super. 595, 605-06 (App. Div. 2001) (which held that under the Law Against Discrimination, excessive absenteeism need not be accommodated even if it is caused by a disability otherwise protected by the Act) and Svarnas v. AT&T Commc'ns, 326 N.J. Super. 59, 78 (App. Div. 1999) ("reasonably regular, reliable, and predictable attendance is a necessary element of most jobs" and "an employee who does not come to work cannot perform any of his or her job functions, essential or otherwise"). In the Terrell, supra, 92 N.J.A.R.2d 750, there was good cause for the absences, however, the ALJ noted that:

> After reasonable consideration is given to an employee . . . the employer is left with a serious personnel problem and a point is reached where the absenteeism must be weighed against the public right to efficient and economic service. An employer is entitled to be free of excessive disruption and inefficiency due to an inordinate amount of employee absence.

Respondent contends that removal is appropriate penalty for the proven charge of chronic or excessive absenteeism. In determining the appropriateness of a penalty in civil service appeals, the courts consider several factors, including the nature of the underlying offense, the concept of progressive discipline and the employee's prior discipline record. See In re Bell, CSV 10243-99, Initial Decision (October 14, 2004), modified, MSB (December 3, 2004), http://njlaw.rutgers.edu/collections/oal. It notes that petitioner's duties included processing expungement, serving as a floater clerk, answering the telephone, and staffing the customer service window in the criminal division, one of the Vicinage's busiest offices. It is important that all of these tasks and, in particular, the

expungement and floater duties, be performed in a timely and efficient manner. This could only be done if petitioner is at work on a regular basis. See Rios, supra, CSV 3009-02 (quoting Bellamy v. Twp. of Aberdeen, 96 N.J.A.R.2d (CSV) 770 ("The work of [government] is carried on by the people in its employ. If they are not present, even if the absence is for good cause, the work is impeded or may not be done at all.")). Petitioner's chronic and excessive absenteeism means that she was not performing her duties in a timely and efficient manner and other employees had to be called upon the perform tasks that should have been performed by her. This resulted in the office's reduced operational efficiency; it also lowered office morale.

Moreover, respondent asserts that petitioner's poor attendance history warrants her removal. In 2004, she was counseled about her poor attendance and referred to the EAP Officer. (R-29, R-30.) She was issued a written warning and a written reprimand (R-30, R-31, R-32), all were remedial actions because under the collective negotiations agreement counseling, oral warnings and written warnings do not constitute discipline are considered "pre-disciplinary actions." (R-1 at 27.) In 2006, petitioner's poor attendance were settled and "downgraded" from a reprimand to an oral warning and a written warning. (R-31, R-32, R-33.)

Oniyama testified that petitioner's discipline record includes a 2008 reprimand for an infraction unrelated to time and attendance. (R-34.) The Vicinage submits that removal is appropriate in this matter because petitioner has not proffered any evidence to show that her attendance is expected to improve in the future. Indeed, the evidence in the record, including physician's notes submitted by Ms. Singletary, indicates that the pattern of poor attendance will continue at least into the foreseeable future.

Respondent further contends that petitioner's failure to return from the third discretionary leaved of absence granted to her in 2012 is the basis for the "other sufficient cause" charge as it was an unauthorized leave of absence in violation of N.J.A.C. 4A:2-2.3(a)(11) and job abandonment or resignation not in good standing N.J.A.C. 4A:2-6.2(b). The Vicinage did not grant petitioner permission to be out

beyond Friday, October 19, 2012. Yet, she failed to return to work on October 22, 2012, as directed, or since then. Accordingly, this absence constitutes an unauthorized leave of absence.

Job abandonment, or resignation not in good standing, is defined in N.J.A.C. 4A:2-6.2 as occurring when:

> (b) Any employee who is absent from duty for five or more consecutive business days without the approval of his or her superior 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.
>
> (c) An 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. A request for extension of leave shall not be unreasonably denied.

Petitioner was charged with violating N.J.A.C. 4A:2-6.2(b), however, the Vicinage contends that whether this matter is analyzed under section (b) or (c) of the resignation, the result is the same, namely, that petitioner abandoned her job, as she was absent for more than five consecutive work days – without Vicinage approval. The Vicinage did not grant petitioner further leave because of the need for her services and the serious deleterious effects that her absences were having on the criminal division's operations. See, e.g., Jones v. Ocean County, Dep't of Solid Waste Mgt., CSV 9158-11, Initial Decision (July 16, 2012), adopted, CSC (Aug. 5, 2012), http://njlaw.rutgers.edu/collections/oal ("A chronic medical condition does not require that an employee be continued in a position by extended leaves of absences until the employee is able to return to work. Further, the Court recognized that in determining whether to grant or deny a leave of absence request, the employer may reasonably consider the need for the employee's services and the impact of the employee's absence on operations.") (citations omitted); Baldwin v. Dep't of Human Servs., 2002 WL 1359348, OAL Dkt. Nos. CSV 10934-98, 2689-99, and 8244-00 (May 14, 2002), adopted, MSB

(October 1, 2002) (State hospital properly denied leave extension to social worker based on operational needs).

Respondent asserts that petitioner's state of mind, i.e., whether or not she "intended" to resign is irrelevant. In Littlejohn v. Division of Medical Assistance and Health Services, 96 N.J.A.R.2d (CSV) 471, 474, ALJ Reback recognized that the whole concept of resignation not in good standing is that a person's conduct rises to such a level that as a matter of law he or she has relinquished his or her job – voluntarily or involuntarily because of continuous absence from employment for five consecutive days." Cf. Burt v. Ancora Psychiatric Hosp., CSV 6123-98 Initial Decision (Feb. 16, 1999), modified on other grounds, MSB (April 8, 1999) (holding whether [appellant] intended to abandon her position or not, she did intend, based upon her actions and conduct, not to report to work when she was supposed to. "That she might not have intended the consequences to be what they were is wholly immaterial to these proceedings.").

Respondent contends that the doctrine of progressive discipline is not germane to a resignation not in good standing charge. Respondent cites the following cases for support. See, e.g., In re DePaul, CSV 10988-98, Initial Decision (June 21, 2002), modified, MSB (January 21, 2003), http://njlaw.rutgers.edu/collections/oal; Jones v. Newark Housing Auth., CSV 1857-01, Initial Decision (Jan. 31, 2002), adopted, MSB (March 13, 2002), http://njlaw.rutgers.edu/collections/oal; Robinson v. City of Atl. City, CSV 6149-98, Initial Decision July 31, 2000), adopted, MSB (October 23, 2000), http://njlaw.rutgers.edu/collections/oal. The facts in those cases reveal that the subject employee had never been disciplined, yet the individual was found to have resigned not in good standing. See Wolverton v. Dep't of Human Servs., CSV 10687-97, Initial Decision (Sept. 24, 1998), adopted, MSB (Nov. 9, 1998), http://njlaw.rutgers.edu/collections/oal; Frasier v. State-Operated Sch. Dist. of Newark, CSV 1542-98, Initial Decision (Jan. 19, 1999), adopted, MSB (April 13, 1999), http://njlaw.rutgers.edu/collections/oal; see also In re Jackson, CSV 10620-08, CSC (Aug. 20, 2009), http://njlaw.rutgers.edu/collections/oal (ALJ erred in

applying the tenets of progressive discipline to a matter involving the charge of resignation not in good standing).

Respondent concedes that petitioner's medical condition was genuine. However it contends that at most, the charge of resignation not in good standing should be modified to a resignation in good standing because the unauthorized absences are caused by factors beyond the employee's control. See Jackson, supra, CSV 10620-08 (". . . the [CSC] has under certain circumstances modified a removal or resignation not in good standing to a resignation in good standing. The common factor in those decisions is that the employee, through no misconduct or fault of his or her own, could not perform his or her duties. These cases most often present fact patterns indicating that the employee is unable, due to physical or psychological condition, to continue performing his or her job. Another commonality in these matters is the substantiation of the employee's disability. In such cases, the [CSC] has found good cause to modify a removal or resignation not in good standing to a resignation in good standing." (citations omitted)). Accord Miles v. Woodbridge Developmental Ctr., 97 N.J.A.R.2d (CSV) 222; DePaul, supra, CSV 10988-98; In re Shaw, CSV 410-03, Initial Decision (August 4, 2004), modified, MSB Decision (October 7, 2004), http://njlaw.rutgers.edu/collections/oal; and Sykes v. Middlesex Vicinage, CSV 4461-04, Initial Decision (July 12, 2005), modified, MSB (Sept. 7, 2005), http://njlaw.rutgers.edu/collections/oal.

FINDINGS AND CONCLUSIONS

Based on the above, I **FIND** that petitioner commenced working for respondent on July 26, 2000. In October 2004, she was issued a written reprimand for excessive use of sick time. (R-29.) In April 2005, a memorandum issued that memorialized a meeting between petitioner and Cynthia Barrett about her excessive use of sick time. (R-30.) The memo noted that she was in a no-pay status in 2004 due to excessive sick leave. And that by March 30, 2005, she had already used 8 sick days, half of her allotted annual sick leave. (R-30.) On January 31, 2006, petitioner was given a written reprimand for excessive

absenteeism during 2004 and 2005. The memorandum noted the deleterious impact that her absences caused the court, coworkers, and the organization. (R-31.)

I **FIND** that in 2007, petitioner requested and was granted six weeks of intermittent FMLA. This leave was requested to allow petitioner to have surgery to repair a torn rotator's cuff. (P-4(a), P-46). In that same year, petitioner exhausted all available leave time and was in a no-pay status for 236.5 hours (24.5 pay days). Likewise, in 2008, petitioner was in a no-pay status for 523 hours (65 days). Some 427 hours (53 days) was FMLA time. In 2009, petitioner again was in a no-pay status for 396 hours (49.5 days) of which 37 were FMLA days. In 2010, petitioner had 263 hours (32 days) of FMLA and 133 hours (16 days) of voluntary leave furlough time. In 2011, she took some 38 days of FMLA time. In 2012, petitioner took 420 hours (52.5 days) of FMLA and two discretionary leaves that exceeded 100 days.

There is no dispute that petitioner absences were all medically based. There was no suggestion that her absences were in bad faith. Further, there is no one scintilla of evidence present that remotely suggests any incompetency. Indeed, the record supports that when petitioner was a competent, productive employee.

I **FIND** that petitioner's illness prevents her from performing her job because her illness prevents her from being at work.

I have considered the doctrine of progressive discipline. I am persuaded by the case law that the doctrine is not applicable herein. Respondent argues that under the law, bad faith need not be demonstrated when dealing with chronic or excessive absenteeism. Further, that the LAD does not require accommodation of excessive absenteeism, Svarnas, infra. This is so because reliable and predictable attendance is a necessary prerequisite to performing one's job.

I **CONCLUDE** that because petitioner's illness prevented her from working, she should not be considered to have abandoned her position. A resignation not in good standing implies abandonment. I **CONCLUDE** that a resignation in good standing is more in line with the reality of the petitioner's situation since her illness was not within her control.

ORDER

I **ORDER** petitioner removed from her position as JC 3 and deemed resigned in good standing. I further **ORDER** petitioner's appeal **DISMISSED**.

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, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, 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.

October 15, 2014

DATE

IRENE JONES, ALJ

Date Received at Agency: 10/15/14

Date Mailed to Parties: OCT 16 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

sej

APPENDIX

WITNESSES

For Petitioner:

Keisha Singletary

For Respondent:

Kim Tuttle

Oretha Oniyama

Sheila Devereaux

EXHIBITS

For Petitioner:

P-1 Doctor's note dated 10/9/12

P-2 Prescription Blank 10/23/12

P-3 Doctor's Note – dated 11/1/12

For Respondent:

R-1 Agreement – Collective Bargaining Unit

R-2 Letter dated 8/20/12

R-3 Letter dated 10/12/12

R-4 Date of Hire 8/14/00

R-5 Absence Code Definition

R-6(a) Time for 2009 and Leave Reports 7/13/13

R-6(b) Time and Leave Report 2008

R-6(c) Time and Leave Report 2009

R-6(d) Time and Leave Report 2010

R-6(e) Time and Leave Report 2011

R-6(f) Time and Leave Report January 2012

R-7 ECatz Benefits Details

R-8 Letter date 5/2/13

R-9 Letter dated 7/3/13
R-10 US Dept. of Labor (FMLA)
R-11 Doctor's Note dated 9/24/12
R-12 Medical Leave Report dated 5/22/12
R-13 Medical Leave Request dated 7/24/12
R-14 Medical Leave Request dated 9/25/12
R-15 Note dated 10/17/12
R-16 Letter dated 10/19/12
R-17 Medical Leave Request
R-18 Medical Leave Request
R-19 Leave Request dated 1/18/13
R-20 Medical Leave from 3/12/13
R-21 Keisha Singletary's Job duties
R-22 Attendance Sheet
R-23 Sign-In Logs
R-24 Preliminary Notice of Disciplinary Action
R-25 Letter dated 7/26/00
R-26 Letter from Singletary doctor's (Prescription Blank)
R-27 Letter dated 11/2/12 from Division of Pensions
R-28 Final Notice of Disciplinary Action
R-29 Memo dated 11/19/04
R-30 Memo dated 4/21/05
R-31 Written Reprimand dated 1/31/06
R-32 Written Reprimand dated 3/23/06 (Amends R-31)
R-33 Settlement Agreement dated 10/24/06
R-34 Written Reprimand dated 12/18/08
R-35 Medical Examination