



STATE OF NEW JERSEY

:
 : FINAL ADMINISTRATIVE ACTION
 : OF THE
 : CIVIL SERVICE COMMISSION
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In the Matter of Bessie McDalton

CSC Docket No. 2014-991
 OAL Docket No. CSV 14904-13

ISSUED: JUL 16 2014 (SLD)

The appeal of Bessie McDalton, a Police Communications Clerk with the Newark Police Department, of her 30 working day suspension, on charges, was heard by Administrative Law Judge Kelly J. Kirk (ALJ), who rendered her initial decision on May 30, 2014. Exceptions were filed on behalf of the appellant and the appointing authority.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on June 18, 2014, accepted and adopted the Findings of Fact as contained in the initial decision but did not accept the recommendation to reverse the 30 working day suspension. Rather, the Commission modified the 30 working day suspension to an official written reprimand.

DISCUSSION

The appointing authority presented the appellant with a Final Notice of Disciplinary Action (FNDA) which charged her with a violation of departmental rules and regulations and incompetency or inefficiency. Specifically, the appointing authority asserted the appellant was placed on the Medical Certification list on November 18, 2012 for a pattern of absences which extended her days off, and that since that time she had been absent for a total of five days, all of which extended her days off. The appointing authority asserted that her excessive use of sick time demonstrated her unwillingness and/or inability to meet, obtain or produce results necessary for a satisfactory performance. Upon the appellant's appeal, the matter

was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In her initial decision, the ALJ found that the appellant, a 63 year old female, with multiple medical issues, worked the 11 p.m. to 7 a.m. shift on a four day on, two day off schedule. The ALJ found that the appointing authority's witnesses testified that although the appellant's absences were not excessive, they did occur just prior to or just after her days off. However, the ALJ found that the appellant had presented medical documentation for all of her absences and that the appointing authority failed to present any evidence which established that those absences were not legitimately covered by medical documentation. Moreover, the ALJ noted that the appellant was a 16 year employee with no disciplinary history. Based on these findings, the ALJ determined that the charge should be dismissed and the 30 working day suspension be reversed.

In its exceptions, the appointing authority, in part, asserts that, as noted by the ALJ, the appellant's absences did occur either immediately preceding or after her days off. Therefore, it argues that the charge should have been upheld, since it had established that the appellant's absences evidenced a pattern. Additionally, the appointing authority maintains that the appellant's abuse of her sick time negatively impacted its operations, and thus, the charge of inefficiency was appropriate. Consequently, the appointing authority argues that based on the foregoing, a 30 working day suspension was warranted.

In her exceptions, the appellant argues that she should receive 30 days of back pay as well as counsel fees.

Based on its *de novo* review of the record, the Commission agrees with the ALJ's findings of fact as contained in her initial decision. However, the Commission does not agree with the ALJ's conclusion to dismiss the charges. In this regard, the Commission notes that regardless of the appellant's doctor's notes, her absences did occur either the day immediately preceding or after her days off, thereby establishing a pattern. Therefore, the charges as they pertain to the appellant's patterned absences should have been upheld.

Notwithstanding the fact that the appellant was guilty of the charges, the Commission does not agree that a 30 working day suspension is the appropriate penalty. Rather, it finds that an official written reprimand is a more appropriate penalty. In determining the proper penalty, the Commission's review is *de novo*. The Commission, in addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). The ALJ indicated that the appellant was employed approximately 16 years with

the appointing authority and she did not have a prior disciplinary record.¹ Moreover, although charges were upheld, the ALJ found that the appellant had presented medical documentation excusing her from work for every absence. Therefore, while the appellant was guilty of patterned absences, this infraction was minimized by the fact that she provided documentation for those occurrences. That, coupled with the appellant's lack of any significant disciplinary history over many years of service convinces the Commission that the appointing authority's action in suspending the appellant for 30 working days was not warranted. Rather, the appellant should receive an official written reprimand.

Since the penalty has been modified from a 30 working day suspension to an official written reprimand, the appellant is entitled to 30 days of back pay, benefits and seniority pursuant to *N.J.A.C.* 4A:2-2.10. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. See *Johnny Walcott v. City of Plainfield*, 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. Mar. 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, the Commission has upheld charges and only modified the penalty. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

ORDER

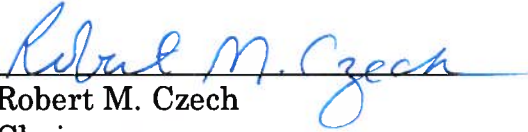
The Commission finds that the appointing authority's action in imposing a 30 working day suspension was not justified under the circumstances and modifies that action to an official written reprimand. The Commission further orders that the appellant be granted 30 days of back pay, benefits and seniority pursuant to *N.J.A.C.* 4A:2-2.10.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

¹ However, official agency records indicate that the appellant had a one-day suspension in 1997.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF JUNE, 2014



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
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Civil Service Commission
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 14904-13
AGENCY REF. NO. 2014-991

**IN THE MATTER OF BESSIE MCDALTON,
CITY OF NEWARK POLICE DEPARTMENT.**

William J. Volonte, Esq., for appellant Bessie McDalton (Oxford Cohen, attorneys)

Emily Truman, Esq., for respondent City of Newark (Anna Pereira, corporation
counsel)

Record Closed: March 11, 2014

Decided: May 30, 2014

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE

The City of Newark Police Department suspended communications clerk Bessie McDalton for thirty days for official inefficiency or incompetency for pattern book offs, extending her days off and excessive use of sick leave.

PROCEDURAL HISTORY

The City of Newark (City) Police Department (Department or Newark PD) suspended communications clerk Bessie McDalton for thirty days, effective October 21,

2013, pursuant to Newark Police Department Rules and Regulations Chapter 18:29.1 and N.J.A.C. 4A:2-2.3(a)(1) for incompetency or inefficiency, alleging pattern book offs, extending days off and excessive use of sick leave.

On August 26, 2013, the City served McDalton with a Preliminary Notice of Disciplinary Action. (J-1; R-9.) McDalton waived a departmental hearing, and the charge of official inefficiency or incompetence was sustained. On October 1, 2013, the City served McDalton with a Final Notice of Disciplinary Action, suspending McDalton for thirty days, beginning October 21, 2013, and ending November 29, 2013. (J-2; R-9.)

McDalton appealed and the Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 to the Office of Administrative Law (OAL), where it was filed on October 17, 2013. The hearing was held on February 25, 2014, and the record remained open for two weeks for post-hearing submissions. The record closed on March 11, 2014.

TESTIMONY AND FINDINGS OF FACT

Bessie McDalton testified on behalf of appellant. Sergeant Grissel Nieves-Hall and Captain Wilfredo Mercado testified on behalf of respondent.

Background

The following material facts are largely undisputed. Accordingly, I **FIND** them to be the **FACTS** of this case:

Bessie McDalton is sixty-three years old. She has been employed by the Newark PD as a communications clerk for sixteen years. Her shift is 11:00 p.m. to 7:00 a.m. She answers 911 calls and 6000 (non-emergency) calls and enters them into the computer database so the calls can be dispatched. She also is a teletype operator and sends out memos to other cities and states on wanted and missing persons and guns. 911 operators and teletype operators are civilians.

McDalton works a "4 and 2" schedule, meaning that she does not work Monday through Friday, but rather works four days and then is off two days. In order to call out sick, McDalton would have to call the supervisor desk, tell the supervisor what work hours she was calling out for and what her ailment was. The supervisor line is recorded, and every instance that an employee calls out sick is also recorded on a "blue and white card." An employee must book off (call out sick) and must also book back on. Civilian employees get fifteen sick days per year.

Captain Wilfredo Mercado has been employed by the Newark PD for twenty-one years, and has been commander of the Communications Division since November 2011. He runs day-to-day operations of his command, and supervises approximately 111 people, both civilians and sworn personnel. Mercado's shift is 9:00 a.m. to 5:00 p.m.

Sergeant Grissel Nieves-Hall has been employed by the Newark PD for twenty years. She was promoted to sergeant in 2002, and was assigned to the Communications Division approximately three years ago. Nieves-Hall traditionally works days. As part of her command responsibilities, Nieves-Hall reviews the entire Department's sick leave records every six months for patterns and excessiveness, and she prepares a "1001" administrative report. She utilizes the Sick Leave Policy and Procedures, General Order No. 94-4 (Revised), dated June 26, 2006 (Sick Policy) often, as it contains the guidelines she must follow when counseling personnel on sick leave, specifically Section IX "Medical Certification," Subsection B, as follows:

B. Monitoring Procedure

1. All commanding officers shall regularly review the absentee profile form of all personnel under their command, concentrating attention on patterns of possible abuse.
 - a. Booking off on weekends or;
 - b. Regular or frequent return from sick leave on days off.

[R-1.]

As a result of a six-month review for the period from July 2011 through December 2011, Nieves-Hall prepared a Medical Certification Report, dated February 29, 2012 (First Report) for McDalton, which reflects a recommendation of "Counseling Only. Reason: Pattern (combining days off)." (R-2.) Section 3 of the First Report states as follows:

The employee being counseled or being placed on Medical Certification shall sign and date the "Absentee Profile Form" (DPI:1864).

By signing below the employee acknowledges the special status and restrictions which will apply to him/her while on Medical Certification as follows:

Upon returning to duty from each absence for ailments or injures [sic] the employee shall produce written medical certification from a treating physician explaining the absence.

The employee shall be subject to all provisions of Newark Police Department General Order #94-4 pertaining to Medical Certification.

The employee shall forfeit Department authorization to work any "Outside Employment" while on Medical Certification.

If after a three (3) month period the sick record of an employee on Medical Certification has not significantly improved the employee will be considered for disciplinary charges under Newark Police Department Rules and Regulations for Official Inefficiency or Incompetence and/or violation of Civil Service Rules Title 4A:2-2.3, Section (a)(4), Chronic Absenteeism.

If after a six (6) month period from the date an employee was placed on Medical Certification the employee's sick record has substantially improved the employee may be recommended for removal from Medical Certification in accordance with General Order #94-4.

The "Additional Remarks" section reflects only "Six-month review July 2011-December 2011." Nieves-Hall prepares the medical certification report and gives it to the Captain with an administrative report of her findings. If the pattern continues after

an employee is counseled, the next step is making a recommendation for medical certification.

As a result of the next six-month review, for the period of January 2012 through June 2012, Nieves-Hall prepared a Medical Certification Report, dated October 1, 2012 (Second Report) for McDalton, which reflects a recommendation of "Medical Certification. Reason: Pattern (combining days off)." (R-3.) Section 3 of the Second Report is identical to Section 3 of the First Report. The "Additional Remarks" section states: "Six-month review January 2012-June 2012. [McDalton] was counseled on her sick time in March 2012. [McDalton] booked off 5 times during the 6 month period for a total of 8 days. [I]n four out of the five instances she extended her days off."

After an employee is placed on medical certification, the employee's sick time continues to be monitored, and the special status and restrictions set forth in the medical certification reports apply.

The Administrative Submission, dated October 23, 2012, regarding "Sick Time Analysis" from the deputy chief of police to the chief of police, reflects that Nieves-Hall recommended that two communications clerks be placed on medical certification. (R-5.) Thereafter, a Memorandum, Number 12-0377, dated November 15, 2012, from the chief of police to Mercado reflects that effective immediately, approval was granted for medical certification placement for McDalton (Chief's Memorandum). (R-4.) The Chief's Memorandum is prepared for all the personnel in every command and lists all the employees on medical certification. Placement on medical certification is not official until Chief's Memorandum comes out. The Chief's Memorandum must be authorized and signed by medical services before it is forwarded to the chief's office. The opinion of Nieves-Hall or Mercado is not sufficient to place an employee on medical certification. The chief either agrees or disagrees with the findings. If the chief agrees, the employee is placed on medical certification. After the Chief's Memorandum is issued, the employee gets a copy to advise that the employee is on medical certification.

Mercado personally reviewed McDalton's sick time on July 26, 2013. He utilized McDalton's Sick or Injured Leave Record (Sick Record) as the record for his

investigation. (R-7.) Every time an employee calls out sick, it is recorded in the employee's Sick Record, and McDalton's Sick Record for the period reviewed reflects the following dates:

- McDalton booked off on January 31, 2013 (2nd day), and she booked off the remaining days of her tour. She booked back on February 3, 2013. The nature of sickness was recorded as "migraine" and she was out sick a total of three days. McDalton had submitted a doctor's note, dated January 4, 2013,¹ reflecting that McDalton had been sick since January 31, 2013, and was able to return to work full-duty on February 7, 2013. (A-1.)
- McDalton booked off on February 5, 2013 (1st day) and booked back on February 7, 2013. The nature of sickness was recorded as "cold/flu" and she was out sick a total of two days. McDalton had submitted a doctor's note, dated January 4, 2013,² reflecting that McDalton had been sick since January 31, 2013, and was able to return to work full-duty on February 7, 2013. (A-1.)
- McDalton booked off on March 25, 2013 (1st day) and booked back on March 27, 2013. The nature of sickness was recorded as "cold" and she was out sick a total of two days. McDalton had submitted a doctor's note, dated March 26, 2013, reflecting that McDalton was out of work from March 25, 2013, to March 26, 2013, and was able to return to work on March 27, 2013. (A-2.)
- McDalton booked off on May 6, 2013,³ (1st day) and booked back on May 9, 2013. The nature of sickness was recorded as "sinus headache" and she was out sick a total of three days. McDalton had submitted a doctor's note,

¹ Although the note is dated 1/4/13, it likely was 2/4/2013, as it reflects that McDalton was sick since January 31, 2013, and may return on February 7, 2013.

² Although the note is dated 1/4/13, it likely was 2/4/2013, as it reflects that McDalton was sick since January 31, 2013, and may return on February 7, 2013.

³ The Investigative Submission and Investigation of Personnel Report reflect this date as May 16, 2013. (R-6, R-12.) This appears to be an error, as this date is not consistent with McDalton's Sick Record or her doctor's note, nor is it consistent with the Individual Absence Record Profile. (A-3, R-7, R-8.)

dated May 8, 2013, reflecting that McDalton was sick since May 6, 2013, and was able to return to work full-duty on May 9, 2013. (A-3.)

- o McDalton booked off on June 8, 2013, (4th day) and booked back on June 9, 2013. The nature of sickness was recorded as "backache" and she was out sick a total of one day. McDalton had submitted a doctor's note, dated June 10, 2013, reflecting that McDalton was there for a follow-up and she was sick on June 8, 2013, and able to return to work full-duty on June 10, 2013. (A-4.)
- o McDalton booked off on July 17, 2013,⁴ (1st day) and booked back on July 20, 2013. The nature of sickness was recorded as "backache" and she was out sick a total of two days. McDalton had submitted a doctor's note, dated July 19, 2013, reflecting that McDalton was there for a sick visit, that she was sick since July 17, 2013, and was able to return to work full-duty on July 20, 2013. (A-5.)

There were doctor's notes in McDalton's file for all the dates she called out sick while she was on medical certification. An Individual Absence Record Profile was prepared by Mercado (Absence Profile). (R-8.) The slashes on the Individual Absence Record Profile are used to mark days off in order to get a visual to determine patterns, specifically for weekends. This stands out for someone working Monday through Friday, but does not stand out for someone on a 4 and 2 schedule because normally only every sixth week is a weekend off. Mercado prepared a DPI:1005 Investigative Submission, dated August 9, 2013. (R-6.)

McDalton has no prior disciplinary history.

⁴ The Investigative Submission and Investigation of Personnel Report reflect this date as July 7, 2013. (R-6, R-12.) This appears to be an error, as this date is not consistent with McDalton's Sick Record or her doctor's note, nor is it consistent with the Individual Absence Record Profile. (A-5, R-7, R-8.)

Testimony

Bessie McDalton

McDalton has diabetes, anemia, a thyroid condition and hemorrhoids. She takes medications for her illnesses daily. She also suffers from allergies and sinus headaches, especially in the spring, and from migraines. She has prescription medication for migraines. She was unable to recall the specific instances she had called out, but her standard procedure if she is sick is to try to make sure that she calls before 10:00 p.m. She calls her supervisor, who asks what shift and for what days and what hours that week. When McDalton is not feeling well, she normally takes some medication and goes to bed. "Backache" was McDalton's own code for when her hemorrhoids were acting up, because she did not like to say that the reason she was calling out sick was hemorrhoids. McDalton was examined by a doctor each time she provided a note, and usually blood was drawn. Sometimes medication was prescribed and she was typically told to go home and rest. If the visit was for hemorrhoids, the doctor examined her rectum. Dr. Tasneem Rashid has been her general practitioner for approximately seven years. If McDalton is unable to get an appointment with Dr. Rashid on the same day, she makes an appointment for a later date.

With respect to the medical certification reports, no one talked to McDalton or counseled her about problems with her sick leave. Papers were presented to McDalton, she looked at the papers, and was told to sign the papers. McDalton signed the papers and was given a copy. That was the extent of the counseling she received. She was never advised to try not to get sick the day before or the day after her scheduled days off, nor was she advised that she would be in trouble if she called out on the day before or the day after her scheduled days off. Her understanding of why she was placed on medical certification was that she had missed too many days. McDalton testified that most of the time when she was given something to sign, she was just told that it came from the office and she had to sign it. McDalton believed that pattern meant missing too many days. She did not know what was meant by combining. McDalton testified that she was given the Second Report and Sick Policy by her supervisor and told that she was on medical certification.

McDalton testified that the days she had called out sick were days that she was actually sick. It surprised her that the days were deemed a pattern, and it was only coincidental that it was more often on a day before or after her scheduled days off. McDalton denied ever seeing her Sick Record before the hearing, but was aware that such record exists and is used to record when she calls out. In reviewing the record, she understood what "1st day" or "4th day" meant.

Sergeant Grissel Nieves-Hall

As a result of the July 2011 through December 2011 six-month review, she determined, using a calendar and McDalton's Sick Record that McDalton exhibited a pattern of combining days off, meaning that she booked off before or after a scheduled day off, or she was off and booked back on on a scheduled day off.

Nieves-Hall testified that McDalton and Mercado would have signed the medical certification reports, and that the signed and dated reports would be kept in McDalton's personnel folder. McDalton would also have been given copies of the medical certification reports for her records, as well as copies of her Sick Record and the calendar with the First Report, and the Sick Policy with the Second Report.

The First Report is simply a counseling form, and the first step before medical certification. Nieves-Hall testified that McDalton would have been counseled by either Nieves-Hall or Mercado. Nieves-Hall did not recall if she counseled McDalton, but further testified that McDalton would have been counseled by a supervisor and there would have been some personal interaction. Nieves-Hall did not recall whether she said anything to McDalton when McDalton was given the First Report, but testified that Mercado may have. McDalton works nights and Nieves-Hall traditionally works days. Given that two years had passed, she did not recall whether she personally counseled McDalton on either medical certification report. The medical certification report is the only document the employee would sign indicating that the employee was counseled. Nieves-Hall testified that there should be a calendar with the First Report.

Nieves-Hall also testified that the DPI:1001 is the attachment to the Administrative Submission, and that it would be one or two pages depending on the number of personnel listed, and is a synopsis of each person in the command. This is the report that recommends medical certification and then a chief's memorandum is generated thereafter. The correspondence attached to the Chief's Memorandum would have been the report that was submitted by the deputy chief of police, and Nieves-Hall's report, which would probably have had a cover from Mercado basically recommending what was in Nieves-Hall's report.

According to Nieves-Hall, her responsibility in this case was simply counseling McDalton and making a recommendation to place her on medical certification. She did not conduct an investigation or draw up any charges.

Captain Wilfredo Mercado

Mercado commenced his investigation on July 26, 2013, to determine whether to file disciplinary charges or remove McDalton from medical certification. He determined that in this case, the issue was not excessive absences, but that McDalton had a pattern of extending her two scheduled days off. He felt that none of the ailments in McDalton's Sick Record would justify a long time out of work, and with the exception of the first 2013 ailment, every ailment was one day out. She called out one day and booked back on the next day.

Although not part of his report, Mercado testified that he reviewed McDalton's Sick Record for the prior year to verify the pattern and to make sure that the reasons she was placed on medical certification were justified. He did not consider McDalton's 2012 records in the disciplinary charges, but explained that if the prior year's records did not support that she should have been on medical certification, the charges would not be justifiable. According to Mercado, in 2012, McDalton called out sick twelve times, and of those twelve times, ten extended her days off. He further testified that of the

eighteen⁵ times she had called out sick, sixteen of them extended her days off. Based upon his review, he determined that she was in violation of the Sick Policy for misusing sick time.

Since McDalton had submitted doctor's notes she was not charged with disobedience of that aspect of medical certification. However, her submission of doctor's notes did not change Mercado's opinion that it was a pattern of combining days off, because every time she called out sick in six months it extended her days off. Extending days off means calling out the day before a regularly scheduled day off or calling out day the employee is supposed to return to work. McDalton was charged with inefficiency because Mercado opined that extending days off sixteen of eighteen times was more than a coincidence and all but two were for one-day ailments. Excessive time off and pattern book offs are violations of the rules and regulations.

Mercado testified McDalton was aware of why she was counseled, because the First Report checked the box and specified the deficiency, and she was later provided with notice that she was placed on medical certification, and therefore on notice that she must improve. McDalton did not improve because the pattern remained the same, so Mercado charged her with inefficiency. Signed copies of the medical certification reports are kept in the employee's file.

Mercado testified that "counseled" means the employee is given the counseling form (First Report) that tells exactly what deficiency is found and the time frame within which to correct it. It is a review of performance. The medical certification reports are issued to the employee and the employee signs. According to Mercado, "counseling" is on paper. The employee is given a copy of the Sick Policy with the second medical certification report to inform the employee that if it continues the employee may be subject to discipline.

The Absence Profile is used to mark days off to give a visual to determine patterns. It stands out for weekends, but would not show patterns for a 4 and 2

⁵ Mercado testified that in 2012, McDalton extended her days off twelve times. He also testified that in 2013, she extended her days off six times.

schedule because only every sixth week is a weekend off. Mercado testified that the dates on the Sick Record correspond with the dates on the Investigative Submission. The Sick Record in evidence is only the last page of McDalton's record, and reflects only the dates that pertain to the period of time Mercado reviewed. Mercado also clarified that the date in the Specification should be 2012, not 2013.

Factual Discussion

Respondent's witnesses testified that appellant was "counseled," and that she would have received copies of the First Report, Second Report, her Sick Record, calendar and Sick Policy. However, neither of respondent's witnesses could recall who "counseled" McDalton and from the testimony "counseled" consisted solely of having McDalton sign the First Report. Although Nieves-Hall and Mercado both testified that signed copies of the First Report and Second Report are maintained in the employee personnel file, the documents presented by the City are not signed by McDalton or by Mercado. Accordingly, there was no evidence of when McDalton received the medical certification reports. There was also no evidence that McDalton ever received a copy of her Sick Record or a calendar with either the First Report or the Second Report. She denied receipt of either, and the City did not present her Sick Record or calendars for the corresponding time periods. Additionally, although required by the medical certification reports, the City did not present an "Absentee Profile Form" (DPI:1864) signed and dated by McDalton for any time period reviewed, nor was there testimony that she had signed one.

There is no evidence of any documents having been given to McDalton along with the First Report in March 2012, or the Second Report in October 2012, except a copy of the Sick Policy. None of these documents explains what is meant by "Pattern (combining days off)." McDalton was never shown her Sick Record. There is no evidence that she was "counseled" in the sense that there was any explanation either by verbal communication or by document of what constituted pattern book offs. Section 3 of the First Report and Second Report are identical and primarily address a situation where the employee is on medical certification. When the First Report was issued,

McDalton was not on medical certification. She received no personal counseling and would only have been on notice of "Pattern: Combining Days Off."

Once placed on medical certification, McDalton complied with the requirement that she provide a medical note from a physician for any leave time used, and she never exceeded her earned leave time. Mercado did not deny that McDalton always obtained a doctor's note as required, but pointed out that McDalton never went to the doctor on the same day she called out sick. It is noted that McDalton works the night shift, and it is unlikely that she would be able to obtain an appointment with her doctor in the late evening, unless she was already ill early in the day. Additionally, some of the ailments were "sinus headache" or "migraine" for which a person might not ordinarily see a doctor absent the doctor's note requirement. Accordingly, no significance is ascribed to the day she saw the doctor, or that she obtained the notes after she called out sick.

McDalton credibly testified that she was sick on the days she booked off, and that she did not realize that it was more often on a day before or day after her scheduled days off. Additionally, it is noted that it is more probable that someone on a 4 and 2 schedule would book off on a day before or after the scheduled days off because there are only two days that do not fall on a day before or after the scheduled days off, versus three days for someone on a 5 and 2 schedule.

The Administrative Submission, dated October 23, 2012, regarding "Sick Time Analysis" from the deputy chief of police to the chief of police, purportedly attached an administrative submission by Nieves-Hall and medical certification forms, sick/injured leave records and individual absence record profiles for each employee listed. (R-5.) However, the attachments were not included with the Administrative Submission.

The Investigative Submission reflects that McDalton had been on medical certification since November 18, 2012.⁶ The documents in evidence and the testimony are inconsistent with regard to the number of times McDalton booked off during the review periods and how many times she extended her days off.

⁶ The Chief's Memorandum is dated November 15, 2012. It is not clear whether this is an error or perhaps when McDalton may have been advised of the official medical certification.

One example is that page 1 of the Investigative Submission reflects “a review has revealed that she has booked off six times and out of those six instances five of them have extended her days off.” However, page 3 of the Investigative Submission reflects that “review on 7/26 revealed that she booked off six times and six of those instances extended her days off” and “[s]ince being placed on Medical Certification McDalton] has booked of [sic] an additional six times (6). Of the six days she has booked off all six (6) of those days extended her days off.” Thus, one portion of the Investigative Submission states she extended her days off six times, but another portion states she extended her days off five times. Further, the official charge states that since being placed on medical certification, McDalton was out sick “a total of five (5/times) days with all five days extending her days off.” Yet, the Investigative Submission reflects that McDalton called out sick six times beginning in January 2013, and a review of the Sick Record reflects that McDalton also booked off at least one other time since being placed on medical certification. Additionally, Mercado testified that with the exception of one time, every ailment was one day out, but it is noted that the Sick Record reflects that, with the exception of one time, she was out two or three days.

Another example of the inconsistencies is that with regard to the review prior to her placement on medical certification, page 3 of the Investigative Submission reflects that McDalton “had booked off five times in the review period and all five of those instances her days off were extended” and that this “is the same pattern that had her placed on Medical Certification in November. In that instance she had booked off five (5) times with five (5) of them extending her days off.” However, the Second Report reflects that McDalton “booked off 5 times during the 6 month period for a total of 8 days in four out of the five instances she extended her days off.” The sick records corresponding to the First Report and Second Report were not presented, thus there is no means by which to verify which is accurate.

A final example is that the dates in the Investigative Submission do not all correspond with the Sick Record. McDalton’s Sick Record reflects the dates she called out as January 31, 2013, February 5, 2013, March 25, 2013, May 6, 2013, June 8, 2013

and July 17, 2013, but the Investigative Submission incorrectly reflects the May date as May 16, 2013 and the July date as July 7, 2013.

Having had an opportunity to consider the evidence and to observe the witnesses and make credibility determinations based on the witnesses' testimony, I **FIND** the following additional **FACTS** in this case:

McDalton suffers from diabetes, anemia, a thyroid condition, and hemorrhoids. She takes medications for her illnesses daily. She also suffers from migraines, allergies, and sinus headaches, especially in the spring. She has prescription medication for migraines.

McDalton received no verbal counseling about the pattern book offs or combining days off. The extent of her counseling was receipt of the First Report, Second Report and Sick Policy. She was not advised that the reason for the medical certification reports was that she was calling out sick either the day before or the day after her scheduled days off and extending her days off. She believed that pattern meant she had missed too many days.

McDalton was physically examined by a doctor each time she provided a note, and usually blood was drawn. Excessive absences is not at issue in this matter. The various reports and testimony contain conflicting information as to the number of absences and the number of times an absence extended McDalton's scheduled days off.

"Counseled" means the employee is given the counseling form (First Report) that specifies what deficiency has been found and the timeframe within which to correct it.

LEGAL ANALYSIS AND CONCLUSIONS

N.J.S.A. 11A:1-1 through 12-6, the "Civil Service Act," established the Civil Service Commission in the Department of Labor and Workforce Development in the

Executive Branch of the New Jersey State government. N.J.S.A. 11A:2-1. The Commission establishes the general causes that constitute grounds for disciplinary action, and the kinds of disciplinary action that may be taken by appointing authorities against permanent career service employees. N.J.S.A. 11A:2-20. N.J.S.A. 11A:2-6 vests the Commission with the power, after a hearing, to render the final administrative decision on appeals concerning removal, suspension or fine, disciplinary demotion, and termination at the end of the working test period, of permanent career service employees.

N.J.A.C. 4A:2-2.2(a) provides that major discipline includes removal, disciplinary demotion, and suspension or fine for more than five working days at any one time. An employee may be subject to discipline for reasons enumerated in N.J.A.C. 4A:2-2.3(a), including "incompetency, inefficiency or failure to perform duties." N.J.A.C. 4A:2-2.3(a)(1). In appeals concerning such major disciplinary actions, the burden of proof is on the appointing authority to establish the truth of the charges by a preponderance of the believable evidence. N.J.A.C. 4A:2-1.4; N.J.S.A. 11A:2-21; Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

McDalton is charged with violation of Newark Police Department Rules and Regulations Chapter 18:29.1 and N.J.A.C. 4A:2-2.3(a)(1). Chapter 18:29.1 was not presented at the hearing, except as set forth in R-9, as follows: "[d]epartment members whose performance is demonstrably inadequate or inequitable and fails to meet, obtain or produce the effects or results mandated by Department orders, shall be deemed in violation of Department Rules and Regulations. Officers found guilty of official inefficiency or incompetency shall be subject to departmental charges." The specification was that since being placed on medical certification, McDalton was "out sick a total of five (5/times) days with all five days extending her days off. Though [sic] her excessive use of sick leave, she demonstrates an unwillingness and/or inability to meet, obtain or produce results necessary for a satisfactory performance."

The burden of proof is on the appointing authority to prove, by a preponderance of the credible evidence, that McDalton's book offs were a pattern and her use of sick

leave was excessive such that it constituted inefficiency or incompetency and a violation of the Department rules and regulations.

McDalton argues that the days she called out sick were days that she was actually sick, and that it was merely coincidental that the days she was out sick were often on a day before or day after her scheduled days off. Respondent argues that Nieves-Hall and Mercado determined that the absences were a pattern of extending days off, and that she called out sick in a manner that resulted in her being incompetent and inefficient and that she failed to perform her duties. However, respondent concedes that McDalton was never charged with feigning an illness, and Mercado testified that this matter involved pattern book offs, not excessive absences. If the City does not contend that McDalton feigned illness, it only stands to reason that she was legitimately ill when she called out sick. Further, although Mercado testified that the illnesses were primarily one-day illnesses, the Sick Record reflects otherwise.

Moreover, the Sick Policy also provides at Section IX Medical Certification, Subsection B Monitoring Procedure as follows:

2. When it has been determined by a Commanding Officer that an individual Department member exhibits a particular pattern or excessive absenteeism in any category, the individual shall be interviewed by the Commanding Officer or his designee **and be counseled as to his sick/injured record. All instances of counseling regarding sick/injured abuse shall be documented in writing and become part of the individual's permanent sick/injured record.** (Emphasis in original.)

3. In all cases where corrective action/counseling has been taken a report shall be submitted detailing the action with a copy of the individual's absence profile and sick/injured record to the Bureau Commander. In the event an individual requires counseling but is unable to be personally counseled shall submit reports detailing the situation and shall be forwarded.

[R-1.]

It is evident that the respondent failed to abide by its own Sick Policy, as there is no evidence in the record that McDalton was "personally counseled." From Mercado's testimony, the counseling is on paper, and the record reflects that the counseling consisted only of the language contained in the medical certification reports and that portion of the Sick Policy cited by Nieves-Hall ordering that commanding officers review the absentee profile forms of all personnel, concentrating on booking off on weekends or regular or frequent return from sick leave on days off. There is no evidence of counseling documented in writing, except for the unsigned and undated First Report and Second Report.

There was no testimony that McDalton ever exceeded her allotted yearly time off, and review of the time considered in the disciplinary charges reflects that McDalton booked out sick approximately one time per month. This does not appear out of line with respondent's age or medical issues, especially given that she works nights. Further, respondent has failed to demonstrate that McDalton's absences rendered her inefficient or incompetent.

In view of the testimony and documentary evidence, I **CONCLUDE** that the City of Newark Police Department has not met its burden of establishing that McDalton was incompetent or inefficient, and no cause existed to warrant any suspension, and certainly not a thirty-day suspension absent evidence of any prior disciplinary history.

ORDER

I **ORDER** that the charges against McDalton are **DISMISSED** and that the thirty-day suspension is hereby **REVERSED** in its entirety, and that McDalton be awarded back pay in accordance with the guidelines set forth in N.J.A.C. 4A:2-2.10 if she has already served any period of the suspension.

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.

May 30, 2014



DATE

KELLY J. KIRK, ALJ

Date Received at Agency:

Date Mailed to Parties:

db

APPENDIX

WITNESSES

For Appellant:

Bessie McDalton, appellant

For Respondent:

Grissel Nieves-Hall, Sergeant

Wilfredo Mercado, Captain

EXHIBITS IN EVIDENCE

Joint:

J-1 Final Notice of Disciplinary Action

J-2 Preliminary Notice of Disciplinary Action

For Appellant:

A-1 Doctor's Note, dated January 4, 2013

A-2 Doctor's Note, dated March 26, 2013

A-3 Doctor's Note, dated May 8, 2013

A-4 Doctor's Note, dated June 10, 2013

A-5 Doctor's Note, dated July 19, 2013

A-6 (not in evidence)

For Respondent:

R-1 Newark Police Department Sick Leave Policy and Procedures

R-2 Medical Certification Report, dated February 29, 2012

R-3 Medical Certification Report, dated October 1, 2012

R-4 Memorandum, dated November 15, 2012

R-5 Sick Time Analysis, dated October 23, 2012

R-6 Investigative Submission, dated August 9, 2013

R-7 Sick or Injured Leave Record

R-8 Individual Absence Record Profile

R-9 Specifications

R-10 Complaint Against Personnel

R-11 Investigation of Personnel

R-12 Investigation of Personnel Report

R-13 Letter from Mercado to Department, dated August 9, 2013

R-14 Letter from Mercado to Department, dated August 8, 2013

R-15 Personnel Roster