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STATE OF NEW JERSEY

In the Matter of Kimberle Malta-Roman, Hudson County Department of Family Services

CSC Docket No. 2013-2883
OAL Docket No. CSV 06087-13

DECISION OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 07 2015 (SLK)

The appeal of Kimberle Malta-Roman, Human Services Specialist 1 (HSS1), Hudson County, Department of Family Services, of her removal effective June 12, 2013, on charges, was heard by Administrative Law Judge Evelyn J. Marose (ALJ), who rendered her initial decision on March 13, 2015. Exceptions were filed on behalf of the appointing authority and cross exceptions were filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on April 15, 2015, adopted the Findings of Fact and the ALJ's recommendation to reverse the removal. However, the Commission ordered that the appellant undergo a psychological fitness-for-duty examination prior to returning to work.

DISCUSSION

The appointing authority removed the appellant on charges of conduct unbecoming a public employee and inability to perform duties. Specifically, the appointing authority asserted that the appellant did not pass a fitness-for-duty examination. 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 in March 2012, the appellant took a leave of absence and her treating psychiatrist, Lina Shah, M.D., found her fit to return to work in June 2012. However, prior to the appellant returning to work, the

appointing authority required the appellant to undergo a fitness-for-duty examination. Dr. Robert Kanen, a licensed psychologist, evaluated the appellant on behalf of the appointing authority, and in a report issued on June 21, 2012, determined that the appellant was fit to return to work, but also concluded that she needed long-term therapy. Although the appellant was advised that Dr. Kanen found her fit to return to work, she was not told that he had recommended long-term therapy. As part of her recommendation, Dr. Shah requested that the appellant return to work on a part-time basis for the first two weeks, however, the appointing authority denied that request. Therefore, the appellant returned to full time work on June 26, 2012. On her first day back, the appellant had not yet been acclimated to her new medication which resulted in Dr. Shah placing her back on leave until July 16, 2012. Before the appointing authority would permit the appellant to return to work from this second leave, it required her to submit to another fitness-for-duty examination conducted by Dr. Kanen. Unaware that the appellant had not been advised of his recommendation for individual therapy, Dr. Kanen found in this examination that the appellant's failure to enter therapy was indicative of her unwillingness to deal with her problem. Additionally, he stated that the appellant could have difficulty making accurate decisions and perceiving situations at work, had the characteristics of unreliability, impulsiveness, restlessness, and moodiness, described her as untrustworthy and unreliable, and stated that she persistently seeks attention and excitement as she is often engaged in seductive and self-dramatizing behavior. Dr. Kanen acknowledged in his testimony at OAL that he never saw the appellant exhibit any of those characteristics on either day that he evaluated her and said that his predictions were based upon the appellant's diagnoses of major depression, Attention Deficit/Hyperactivity Disorder, and cognitive impairments. Therefore, Dr. Kanen concluded that the appellant was unfit to return to work.

Based on Dr. Kanen's report, the appointing authority charged the appellant with inability to perform duties. Since there was a conflict of medical testimony at the departmental hearing, the appointing authority afforded the appellant the opportunity to undergo another fitness-for-duty evaluation conducted by a different doctor. The appellant was evaluated by psychiatrist, William B. Head, Jr., M.D., who issued reports on April 1, 2013 and May 3, 2013 indicating that the appellant was not fit for duty. However, Dr. Head testified that it was his understanding that the appellant would return for a future evaluation after a few months of psychotherapy. In this regard, Dr. Head stated that it was an oversight on his part that he did not recommend that the appellant receive psychotherapy and then be re-evaluated rather than just stating that appellant was not fit for duty.

Dr. Shah testified that she had been treating the appellant since 2008. In March 2012, she recommended that the appellant stay out of work for approximately one month. Subsequently, she concluded that the appellant could return to work on a part-time basis in June 2012 based on her improvement and

strong desire to work. Dr. Shah testified that she revised her recommendation to have the appellant to return to work in July 2012 so that the appellant could get acclimated to her new medicine. Additionally, Dr. Shah indicated she had reviewed the appellant's job duties and found that there were not any duties that she could not perform as an HSS1. Further Dr. Shah disagreed with Dr. Kanen's conclusion that the appellant possessed certain negative characteristics and had a low level of motivation toward work as she had never observed the appellant as having these negative traits during her treatment and the appellant had expressed a strong desire to her to go back to work.

Based on the foregoing, the ALJ determined that Dr. Shah, the appellant's treating physician, credibly testified that the appellant was fit to return to work on July 16, 2012. The ALJ noted that Dr. Shah's conclusions were based on her review of the appellant's job duties, her opinion that that she could handle the stress of work once acclimated to her new medicine, that the appellant was highly motivated to return to work, and the appellant's satisfactory work history. Conversely, the ALJ found Dr. Kanen's and Dr. Head's concerns and testimony about the possibility that the appellant could have further depressive episodes because she had past episodes was not enough to support a determination that she was unfit for duty. Further, the appellant was not made aware of their recommendation that she enter therapy and there was no evidence that psychotherapy should have been mandatory before she could return to work. Therefore, the ALJ concluded that the appointing authority failed to meet its burden of proof that the appellant was unable to perform her job duties and recommended reversing the removal.

In its exceptions to the ALJ's decision, the appointing authority argues that the ALJ applied the wrong interpretive framework to the expert testimony. Specifically, the appointing authority argues that since expert testimony was provided, the credibility of the expert witnesses was not the issue. Rather, it contends that the issue is which expert is more persuasive regarding the facts in this matter. The appointing authority maintains that Dr. Kanen's opinion is persuasive as he is an expert in occupational testing and his conclusions were based on well accepted scientifically based occupational psychology in the context of fitness for duty examinations. Further, it asserts that Dr. Head's expert opinion should also be given greater weight as he had a full understanding of the appellant's background and determined that she should not be put in a situation where she would most likely malfunction again. In contrast, it argues that Dr. Shah's opinion should not be considered because it is biased as she is the appellant's treating physician. Additionally, the appointing authority emphasizes that Dr. Shah only met with the appellant for 15 minute increments, and as such, knew very little of her background. The appointing authority also highlights that Dr. Shah does not have a background in occupational psychology and testing and that she had never performed a fitness for duty examination. Moreover, the appointing authority argues that the appellant's testimony supports the conclusion that she is

unfit. It also contends that the reinstatement of the appellant is harmful to the appointing authority's work force, undermines its management responsibility and will have an adverse effect on the particularly vulnerable population served by an HSS1.

In response, the appellant argues that the ALJ correctly stated the legal standard. Therefore, the appellant maintains that the Commission should defer to the ALJ's finding that her treating psychiatrist was more credible than the appointing authority's witnesses.

Upon on its *de novo* review of the record, the Commission agrees with the ALJ's Findings of Fact and assessment of the charges and affirms the ALJ's decision to dismiss the charges and to reverse the removal. In this regard, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 *N.J.* 644 (1999) (quoting *State v. Locurto*, 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by the credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super*. 527 (App. Div. 2004).

In this matter, there are conflicting medical opinions. The appellant presents testimony from her treating physician, Dr. Shah, that she was cleared to return to work in June and July 2012. Dr. Shah's opinion was based on her on-going treatment of the appellant since 2008. Dr. Shah observed that the appellant had improved since taking her medical leave in March 2012 and that she had a strong desire to return to work. Although Dr. Shah initially found the appellant fit to return to work in early June 2012, an incident at work demonstrated that she needed additional time off in order to acclimate herself to her new medicine. Additionally, Dr. Shah reviewed the appellant's job duties and concluded she was fit for duty in July 2012. Conversely, Dr. Kanen's second evaluation of the appellant did not account for the appellant's need to adjust to her new medicine and he acknowledged that he never saw the appellant exhibit any negative personality traits. Further, Dr. Kanen also strongly relied upon the fact that the appellant had not entered into long-term therapy as a basis for his conclusion that she did not want to deal with her problems. However, the appellant was never apprised of the fact that Dr. Kanen recommended that she receive long-term psychotherapy. Dr. Head acknowledged that the appellant was normal, bright, articulate, capable,

eager to return to work, and confident in her ability to perform her job duties. However, Dr. Head also inferred that the appellant lacked a desire to resolve her issues as she did not enter into long-term psychotherapy, but was still of the opinion that she was only temporarily disabled. Significantly, Dr. Head testified that it was an oversight on his part that he did not recommend in his report that the appellant receive psychotherapy and then be re-evaluated rather than just find that she was unfit for her job.

Therefore, the Commission agrees with the ALJ's credibility determination and also finds that Dr. Shah's testimony is more persuasive than the appointing authority's experts as her opinion is based on her on-going, long-standing relationship with the appellant, her actual observations of the appellant's characteristics and desire to return to work, the appellant's history successfully performing her job duties, and specific factors in this matter such as the appellant's need to adjust to her new medicine. On the contrary, Dr. Kanen and Dr. Head incorrectly assumed that the appellant did not desire to resolve her problems since she did not enter into long-term psychotherapy when the appellant was never made aware of this recommendation. Additionally, they did not account for the appellant's need to adjust to her new medicine, did not consider the appellant's successful work history, discounted the actual positive personality traits that they both directly observed from her, and instead speculated that the appellant would not be able to successfully perform her job duties based on inferences from psychological testing. Based substantially on the above factors, the Commission cannot find the ALJ's credibility determinations regarding the expert witnesses to be arbitrary, capricious or unreasonable. Moreover, the Commission has no issues with the standard used by the ALJ in making those findings. *See e.g., In the Matter of Mariano Del Valle, Township of Lakewood,* Docket No. A-3934-0575 (App. Div. February 8, 2007) (Removal of a Police Officer who suffered from panic attacks, depression, anxiety, alcohol dependence, and delusional thinking, including the ALJ's credibility determinations regarding the divergent findings of the parties' expert psychologists, upheld) and *In the Matter of David Figueroa* Docket No. A-3718-04T1 (App. Div. February 8, 2006) (Removal of a Police Officer on charges related to his psychological unfitness for duty upheld even though the parties presented conflicting expert testimony related to the appellant's psychological fitness for duty). *See also, In the Matter of Peter Kristensen* (MSB, decided June 25, 2003) (Removal of a Police Officer reversed where the appellant's psychologist's report was entitled to greater weight, since appointing authority's psychologist was speculative in nature).

However, the Commission notes that it is neither bound by nor adopts the standard found in the appellant's Collective Bargaining Agreement defining fitness for duty as an employee who is potentially dangerous to themselves or others. The basis for conducting a fitness-for-duty evaluation is to determine if an employee if physically or mentally able to perform his or her job duties. Should an appointing

authority believe an employee unfit, and an employee is properly evaluated as either medically or psychologically unfit to perform the essential functions of a position, it is of no consequence to the Commission as to whether they are found to also be a danger to themselves or others, aside from such a finding being part of the basis for the unfitness.

While the Commission has reversed the removal, it notes that the appellant did have issues after a one day return to work on June 26, 2012, which required the appellant to ask for an additional three week leave of absence. Accordingly, the Commission has trepidation ordering the appellant's reinstatement without some assurance that she is fully capable of performing the duties of her position. Thus, the appellant should be scheduled for an evaluation with an independent qualified psychiatrist or psychologist. The selection of the psychiatrist or psychologist shall be by agreement of both parties within 30 days of the date of this decision. The appointing authority shall pay for the cost of this evaluation. If the psychiatrist or psychologist determines that the appellant is fit for duty, without qualification, the appellant is to be immediately reinstated to her position. If the psychologist or psychiatrist determines that the appellant is unfit for duty, then the appointing authority should initiate a new charge for the appellant's removal due to her inability to perform duties based on her current unfitness, with a current date of removal. Upon receipt of a Final Notice of Disciplinary Action on that charge, the appellant may appeal that matter to the Commission in accordance with *N.J.A.C.* 4A:2-2.8. Upon timely submission of any such appeal, the appellant would be entitled to a hearing regarding the current finding of unfitness only. In either case, she would be entitled to mitigated back pay, benefits, and seniority from July 21, 2012[1] until the time she is either reinstated or removed.

With respect to counsel fees, *N.J.A.C.* 4A:2-2.12 provides for the award of full reasonable counsel fees incurred in proceedings before it and incurred in major disciplinary proceedings at the departmental level where an employee has prevailed on all or substantially all of the primary issues before the Commission. In this case, the Commission reversed the appellant's removal based on her alleged unfitness for duty. Therefore, she is entitled to reasonable counsel fees. Additionally, in light of the Appellate Division's decision in *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay or counsel fees are finally resolved. However, under no circumstances should her reinstatement be delayed pending resolution of any back pay or counsel fee dispute.

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[1] That is the date she was found fit for duty by Dr. Shah.

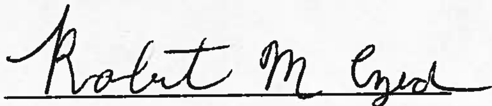
ORDER

The Civil Service Commission finds that the removal of the appellant was not justified and therefore, reverses that action. The Commission also orders, prior to reinstatement, the appellant undergo a psychological fitness-for-duty examination. The outcome of that examination shall determine whether the appellant is entitled to be reinstated or removed, as outlined previously. In either case, the appellant is entitled to back pay, benefits and seniority for the period from July 21, 2012, until she is either reinstated or removed. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10.

It is further ordered that counsel fees should be awarded to the appellant as the prevailing party pursuant to *N.J.A.C.* 4A:2-2.12. The appellant shall provide proof of income earned and an affidavit or services to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2-2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay or counsel fees within 60 days of the appellant's reinstatement or removal. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF APRIL, 2015



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries and Correspondence	Henry Maurer 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 06087-13

AGENCY DKT. NO. 2013-2883

IN THE MATTER OF KIMBERLE V. MALTA-ROMAN, HUDSON COUNTY DEPARTMENT OF FAMILY SERVICES.

Colin M. Page, Esq., for appellant (Berkowitz Lichtstein Kuritsky Giasullo & Gross, attorneys)

Daniel Sexton, Esq., Assistant County Counsel, for respondent Hudson County (Donato J. Battista, County Counsel)

Record Closed: January 20, 2015 Decided: March 13, 2015

BEFORE **EVELYN J. MAROSE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Kimberle Matla-Roman, was absent from work on medical leave from March 23, 2012, to June 26, 2012. Appellant was cleared to return to work by her treating physician, Lina, Shah, M.D. Respondent, the Hudson County Department of Family Services' (County), psychologist, Robert Kanen, M.D. (Dr. Kanen) performed a fitness for duty examination. In his report dated June 21, 2012, Dr. Kanen determined that appellant was fit for duty. After "a one day return to work" appellant's treating

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physician determined that appellant needed to be on medical leave for two additional weeks, until July 21, 2012. The County required a second fitness for duty examination. After a second evaluation, Dr. Kanen, in a report dated July 15, 2013, opined that appellant was unfit to return to work.

Appellant was served with a Preliminary Notice of Disciplinary Action (PNDA), dated January 30, 2013. The violations cited were insubordination, N.J.A.C. 4A:2-2.3(2); conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(6); neglect of duty N.J.A.C. 4A:2-2.3(7); other sufficient cause, N.J.A.C. 4A:2-2.3(2); and abandonment of her position/resignation not in good standing, N.J.A.C. 4A:2-6.2(b). Subsequent to Departmental Hearings, a Final Notice of Disciplinary Action (FNDA) was issued on March 14, 2013. All charges, detailed in the PNDA, were noted to be sustained on the FNDA. Appellant filed a Major Disciplinary Appeal, dated March 26, 2013.

The Civil Service Commission – Division of Appeals and Regulatory Affairs transmitted the matter, 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) on May 6, 2013, where it was filed as a contested case. When the parties appeared for the OAL hearing, they agreed that not all charges were sustained subsequent to the Departmental Hearings conducted February 15, 2013, and April 24, 2013. An application was filed with the Civil Service Commission to amend, *nunc pro tunc*, the FNDA of March 13, 2013, because of a clerical error. The amended FNDA, which was entered, reflects as sustained only the charge of other sufficient cause—namely inability to perform, and dismisses all other charges. The amended FNDA notes that appellant was removed effective June 12, 2013.

Hearings were conducted on October 10, 2013, and February 21, 2014. The record initially closed upon receipt of written summations on April 14, 2014. Due to a voluminous caseload and medical leave by the judge, the time for issuance of the Initial Decision was extended. The record was re-opened in connection with the submission of additional documentation and closed January 20, 2015.

After conferring with both parties' counsel and considering their written summations on point, the three exhibits attached to the County's written summation were returned to counsel for the County for the following reasons:

1.) Exhibit A was already admitted into evidence and thus was a duplicate. (J-11.)

2.) Not all documents attached as Exhibit B were marked during any hearing or entered into evidence. Two Certifications of Health Care Providers, which were attached as Exhibit B, were also marked as Joint Exhibit 5 and Joint Exhibit 6, and admitted into evidence during the hearing. However, the County also included as Exhibit B, a Leave Request, another Certification by Health Care Provider and a Notification of Expiration of Leave that were never marked, identified or admitted into evidence.

While the Leave Request appears to have been completed by appellant, the form also contains handwriting that has not been identified and authenticated. The Third Certification of Health Care Provider contains different information than J-5 and J-6, does not contain a signature page or indicate who authored the document. The Notification of Expiration of Medical Leave either was not signed by any party or is a document where the signatures were redacted.

Accordingly, except for the documents marked as J-5 and J-6, the additional documents attached as Exhibit B, which were not produced, identified, or admitted into evidence at the hearing, will not be admitted into evidence at this time.

3. The County states that Exhibit C, a draft of a proposed Complaint, was only provided to the County post hearing. Accordingly, the County did not, and could not, seek to have it marked, used for impeachment, and admitted into evidence at the hearing. Appellant argues that the use of this document without the opportunity for re-direct examination would be prejudicial and opposes its admission. I find merit in the opposition of the appellant. I further find that failure to admit the draft complaint will not be prejudicial to the County. As stated in the

County's Conclusion to its written summation, the issue is whether appellant was fit to return to work and accordingly the credibility of the experts and expert reports, not a draft of a pleading written by legal counsel.

FACTUAL DISCUSSION AND FINDINGS

Joint Stipulation of Facts:

1. Appellant has suffered from depression her adult life.
2. Appellant has worked "off and on" for the county from 1997 to 2012.
3. Appellant has consistently received satisfactory, or better, performance evaluations.
4. Appellant has had several leaves due to her depression.
5. Appellant went on leave March 23, 2012, and was cleared to return to work June 26, 2012.
6. Appellant resumed leave after working one day and was cleared by her treating doctor.
7. Dr. Kanen found appellant unfit for duty on July 16, 2012.
8. Appellant sought to return to work.
9. Hudson County directed appellant to see another doctor selected by the County.
10. Appellant refused on the basis that she had not been found to be a threat to safety of herself or others.

11. The County Hearing Officer directed appellant to be evaluated by a doctor from a list. She chose Dr. Head.

12. Dr. Head evaluated and found appellant unfit.

TESTIMONIAL EVIDENCE

For Appellant:

Appellant stated that she worked for the Hudson County Sheriff's Department from 1996 to 2000, when she resigned to accept a better position in New York. Appellant was rehired to work in the Welfare Department in Hudson County in 2003 and worked there until approximately 2008, when she again voluntarily left to accept another position in New York. She was once again rehired to work in a clerical position in the Hudson County Department of Welfare in 2010. In 2011, after passing the civil service examination, she became a Human Services Specialist I. She completed the six-month training program at the "top" of her class." Appellant was always ranked above average in her yearly performance evaluations. She was only disciplined on one occasion, for calling "out" during a snow storm.

Though she suffered from major depression since she was a teenager, appellant, who was forty-eight years of age at the time she testified, has been consistently employed throughout her lifetime. She had four medical leaves during the periods that she was employed by the County. One leave was to take care of her grandfather; one leave was because of chicken pox; and two leaves were as a result of her depression.

In March 2012, several things impacted appellant's mental health. Menopause was affecting her hormonal balance and thyroid condition, and consequently her medication. In addition, she was experiencing stress related to the personnel director at work. Appellant had complained that the personnel director placed a relative of a member of his department in a position in the Social Services Department with a "made-up" title, and that the new hire had not taken a civil service examination. Thereafter, appellant was removed from the Social Services Department because she was "working

out of title." After she complained, the personnel director verbally told appellant, "He was going to make sure that he did everything that he could to make sure that she was terminated."

Appellant's doctor initially placed her on medical leave from March 23, 2012, to July 27, 2012. The doctor later released her at an earlier date in June, but requested that appellant return to work part time for two weeks since appellant was still adjusting to her new medication. Since she was not yet used to the medication, it made her jittery for a few hours in the morning after she ingested it. The doctor's request was denied. Appellant was told that the basis for the denial was that it "would take too long for her employer to handle the request and process all the paper work and the two week period would be up." Appellant is aware that other people were permitted to return part time after they were on leave.

When appellant returned from her prior medical leaves relating to her depression, she was never required to submit to a fitness for duty examination. However, in this instance, after appellant advised the County that she was ready to return to work, the County required that she take a "fitness for duty examination." Appellant is unaware of any other employee, who did not "act out" on the job, threaten a client, or have an argument with a co-worker, who had to take a fitness for duty examination before returning to work after a personal medical leave.

The fitness for duty evaluation was performed by Robert Kanen, a licensed psychologist. Appellant was advised that Dr. Kanen found appellant fit to return to work. She requested a copy of Dr. Kanen's expert report several times, but was never provided with a copy.

On June 26, 2012, the first day that appellant returned to work, she became "stressed" when she was told by co-workers that the personnel director, to whom she had to reveal the reason for her leave in order to have the leave processed, had told her co-workers that appellant was on medical leave for mental illness. Appellant also became upset because her former computer, which contained the programs that she needed to perform her job, had been removed from her work station. It had been

replaced with a computer that did not contain the programs that she needed to perform her job duties nor provide her with internet access, both of which she needed for her job. Since appellant was already jittery from her new medication, to which she had not yet had time to adjust, she left work that first day and drove to the office of her treating physician. The doctor placed her on medical leave for an additional two weeks, designed to allow appellant time to adjust to the medication that she was currently taking without the stress of a return to work.

The County required that appellant again be evaluated by Dr. Kanen prior to returning to work after the two additional weeks of leave. Appellant describes this second evaluation as shorter than her initial evaluation and states that Dr. Kanen was very, very hostile toward her—much different than how he was the first time that he evaluated her. When appellant was advised that Dr. Kanen had concluded that she was not fit for duty, she send approximately sixteen e-mails asking what she needed to do to come back to work. She never received a response. Appellant filed an **EEOC** complaint, asserting that she was denied the ability to return to work while she was able to do so. (J-11.) Appellant's union filed a grievance on her behalf seeking her return to work, which was denied. On January 30, 2013, some six months after appellant was told that the County found that she was not fit to work; the PNDA in this matter was filed.

After the PNDA was issued, the County gave appellant the names of three doctors from whom to choose for further evaluation. Appellant chose to see the doctor closest in proximity to her, William B. Head, Jr., M.D. (Dr. Head). Dr. Head examined appellant for approximately twenty-five minutes. The doctor asked her simple questions such as, "Do you brush your hair every day?" He also questioned her desire to return to her last assignment—asking if she wanted to be placed in a less stressful job, and asked appellant if she had filed a lawsuit against the County. Appellant told Dr. Head that she was "capable of doing her job and that her job was not the stress." In response, he told her that they would talk about her "returning to work part-time." After her dialogue with Dr. Head, appellant believed that she would be returning to work.

Neither Dr. Head, nor Dr. Kanen, nor anyone else, ever told appellant that they recommended that she have intensive psychotherapy. Neither Dr. Head, nor Dr. Kanen, nor anyone else, ever told appellant that if she had intensive psychotherapy, she could be re-evaluated as to her fitness to return to work.

Appellant later learned that Dr. Head had incorrectly indicated in his expert report that she was taking a certain medication when he evaluated her that she was not taking. Appellant was unable to afford her medication when she was not permitted to return to work. Accordingly, she had not taken any medication since July 2012. Further, when Dr. Head evaluated her, some eight months had already passed since her depression had flared up. Appellant's depressive episode was "way over." Appellant was 100% positive that she could perform her job in an above average manner, just as her performance evaluations indicated that she had done in the past. In fact, she had felt able to return to work in July 2012, after the end of the two-week extension requested by her treating doctor, who wanted the extension so that appellant could adjust to a change in medication before incurring the stress of a return from leave.

At her disciplinary hearing, the Hearing Officer asked appellant if she was requesting an accommodation. Appellant responded that she wanted to be able to take a medical leave, if needed in the future. The FNDA was issued on March 14, 2013. The charges against appellant were sustained and she was deemed to have abandoned her job and resigned not in good standing.

Lina Shah, M.D. (Dr. Shah) has been treating appellant since 2008. She is board certified in psychiatry. She received her undergraduate degree in psychology, graduated from Robert Wood Johnson Medical School, and did her residency at St. Vincent's Hospital in New York. Dr. Shah is licensed to practice in New York and New Jersey. She worked at the University Behavioral Healthcare in Newark for about ten months. She left in 2006, to accept her current position, as an outpatient attending psychiatrist in a private practice. Appellant had already been a patient at the private practice that Dr. Shah joined, from the mid-90's, and had been diagnosed with depression and attention deficit hyperactivity disorder (ADHD) prior to the time that she

with Dr. Shah. The doctor acknowledged that patient visits are usually scheduled at fifteen-minute intervals.

Dr. Shah stated that major depression affects about fifteen percent of the population. Symptoms may include sleep disturbance, appetite disturbance, changes in concentration and energy level, hopelessness, guilt, feelings of worthlessness, changes in psychomotor activity, and thoughts of suicide. While an episode of severe major depression may make it difficult for a person to work and may even require hospitalization, persons who suffer from major depression are not necessarily unable to work. Working is good for people in general, including those who suffer from major depression. Among other things, working allows people to earn money for their financial needs.

Dr. Shah noted that, from 2008 to March 2012, appellant's major depression was relatively mild. Then, in 2012, appellant suffered a panic attack while at work and was sent to the hospital by ambulance. There was no suicidality or homicidality. Appellant remained at the hospital for only about twelve hours. Dr. Shah recommended that appellant stay out of work for approximately a month and changed her medicine "a little bit." After her symptoms improved, the doctor concluded that appellant could return to work but recommended that she return, starting part time for two weeks. Appellant was not permitted to return to work part time.

On the first day when appellant returned to work, her co-workers told her that the personnel director said she was on medical leave because she had mental health issues. She felt that she was being "targeted" and became extremely stressed. When she left work she went to her doctor.

Dr. Shah directed appellant to stay out of work for a few more weeks. During her medical-leave extension, appellant improved greatly. Her depressive symptoms decreased and Dr. Shah determined that appellant was ready to return to work full time. When Dr. Shah went on maternity leave, Devendra Kurani, M.D., a colleague of Dr. Shah and the owner of the practice where Dr. Shah worked, completed the necessary paperwork to clear appellant to return to work.

Dr. Shah noted that she had reviewed appellant's job description in July 2012, prior to clearing appellant to return to work. She found that there were no duties listed that appellant would be unable to perform at that time.

Dr. Shah reviewed the report of the County psychologist, Robert Kanen, dated July 16, 2014. She noted that his physical description of appellant was consistent with her observations of appellant. However, she disagreed with some of his comments including that appellant was "probably untrustworthy and unreliable, persistently seeks attention and excitement, often engages in seductive and self-dramatizing behavior, and is characteristically unreliable, restless, moody, and impulsive." Dr. Shah has been treating appellant for several years and she never observed any of those characteristics nor did she know of any factual basis to believe that appellant possessed those characteristics. She completely disagreed with Dr. Kanen's comment that appellant had an "unusually low level of motivation towards work." That comment directly conflicted with appellant's strong desire to go back to work, which was clearly and definitely observed by Dr. Shah on numerous occasions. Dr. Shah further noted that she had actually accelerated appellant's return to work date in July 2012 because appellant was "doing much better and wanted to go back to work." Dr. Shah also noted that appellant's desire to return to work reflected appellant's confidence in her ability to do her job.

On cross-examination, Dr. Shah agreed that she does not perform psychological testing or "fitness for duty examinations." However, she noted that she often makes medical decisions as to whether her patients are able to return to work. Dr. Shah acknowledged that "a good psychiatrist wants her patient to succeed." She further acknowledged that statistically, since appellant has had several episodes of major depression, it is likely that she may suffer another episode in her lifetime. Dr. Shah is aware that appellant was not permitted to return to her job.

For Respondent:

Robert Kanen earned a bachelor of arts in psychology from Northeastern Illinois University and a doctorate in clinical psychology from Illinois School of Professional Psychology. He is licensed in Illinois, New York, and New Jersey. Dr. Karen has taken numerous continuing education credits, including courses such as "Introduction to the Psychological Screening for High Risk Occupations" and "Civil Forensic Applications of the MMPI." Since approximately 1985, he has been performing fitness for duty examinations and has performed four to five hundred such examinations. His current practice is essentially limited to performing such examinations. Over ninety percent of the evaluations that he performed are conducted for government agencies. (R-2.)

Appellant was sent to Dr. Kanen for a fitness for duty examination by the County. Prior to examining appellant, he reviewed a letter written by appellant to certain County employees, a letter regarding appellant's grievance and appellant's psychiatric diagnosis. He interviewed appellant regarding where she was born and raised, her marital status, whether she had any children, her childhood history, her educational background, work history, and years of employment at her existing job. He inquired as to concerns that she had at her job and as to the reasons for her being sent for a fitness examination. He further interviewed appellant regarding her psychiatric history, history of psychiatric hospitalizations, medications that she was taking now or had taken in the past, whether the medication helped her, any history of suicide attempts, any history of hallucinations or delusions, history of episodes of depression, current and past treatment including therapy and, if any, history of drug and/or alcohol abuse or arrest history. Dr. Kanen also administered the Millon Clinical Multiaxial Inventory III (MCMI). Dr. Kanen estimates that his evaluation took approximately forty-five minutes to one hour.

Dr. Kanen diagnosed appellant with major depression—recurrent, severe without psychotic features; anxiety disorder; and personality disorder with dependent, self defeating, and depressive features. The diagnosis was based in part on the social history provided by the appellant and in part based upon her responses to the personality testing. Dr. Kanen stated that appellant had a history of abuse and neglect

as a child, which he opined had a negative impact on her interpersonal relationships and needed to be addressed by long-term individual psychotherapy rather than a fifteen-minute visit with a psychiatrist and medication.[1]

Dr. Kanen concluded that appellant could return to work. He further concluded that appellant should continue with her antidepressant medication and that she should be involved in individual long-term therapy, not just for two or three months. If appellant terminated counseling prematurely and/or failed to take her prescribed medication, he predicted that her severe depression would likely emerge and be disruptive to her social and occupational functioning. If this occurred, Dr. Kanen recommended that she be placed on disability. (J-3.)

Dr. Kanen stated that he came to learn that appellant had an incident during the first two days after she returned to the job with one of the persons to whom she had written a letter that the doctor reviewed. The incident led to her leaving the job again and to Dr. Kanen being asked to perform another evaluation on appellant.

In connection with her second evaluation, Dr. Kanen interviewed correspondence written by appellant relating to her job and County employees. He reviewed the prior history from the first examination. He discussed with appellant her past stressors including stressors from her childhood and at work. Dr. Kanen stated that appellant told him she was not in individual therapy and that her medication was not working. Based upon appellant advising him that years ago a treating psychologist had told her that she suffered from ADHD and a perceptual impairment, Dr. Kanen also administered a cognitive test, the Wechsler Adult Intelligence Scale, and a personnel test, the Hilson Personnel Profile/Security. In addition, he re-administered the MCMI. Dr. Kanen stated that the tests confirmed his earlier diagnosis of ADHD and perceptual impairment. (J-4.) Dr. Kanen did not receive, request or review any treatment records from appellant's psychiatrist.

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[1] Appellant has advised Dr. Kanen that the longest time that she had been in individual therapy was two to three months. (J-3.)

Dr. Kanen concluded that, among other things, since appellant had not entered into long-term therapy, she did not want to deal with her problem. Despite appellant's test results indicating that she had an average IQ, he stated that appellant could have difficulty making accurate decisions and perceiving situations at work. He postulated that such difficulties would lead to numerous mistakes on the job. Dr. Kanen described appellant as having a characteristic unreliability, impulsiveness, restlessness, and moodiness. He described her as untrustworthy, and unreliable. He asserted that she persistently seeks attention and excitement and often engaged in seductive and self-dramatizing behavior. Yet, he never saw her exhibit any of those characteristics on either day that he evaluated her. He said that his predictions were based upon appellant's diagnoses of major depression, ADHD, and cognitive impairments.

At the hearing, Dr. Kanen acknowledged that he did not observe the personality traits that he noted in his July 2012 report concerning appellant, but rather characterized appellant with having those personality traits since they were generally seen more frequently in persons with the diagnoses of appellant. Dr. Kane also acknowledged that he had no knowledge if the assertions made by appellant about certain persons at work were accurate and/or true and accordingly if her perceptions were accurate.

In his expert report, dated July 16, 2012, Dr. Kanen found appellant was <u>not</u> fit to return to work. This second evaluation was just three weeks after his first evaluation, on June 21, 2012, when he concluded that appellant was fit to return to work.

Upon cross-examination, Dr. Kanen stated that he did not opine that appellant was permanently disabled from working at any job. He did not believe that major depression precluded someone from performing the job of human services specialist. He also did not opine that a personality disorder, such as indicated in the testing of appellant, would automatically preclude someone from performing their job. Dr. Kanen stated that he only found appellant not fit to return to work on the second day he saw her based upon "how bad" her disorder was at that time. Dr. Kanen did not review the bargaining agreement that indicated that the standard for determining whether someone is fit for duty is whether they are a danger to themselves or another and acknowledged that he did not know the standard to be "fit for duty" was that low. (J-7.)

Though Dr. Kanen was aware that appellant worked for the County for many years after being diagnosed with major depression, he did not review any of her job evaluations to ascertain how she performed. In fact, he did not identify any job duty that appellant could not perform at the time he found her unfit to work. Dr. Kanen also did not consider whether appellant could perform the essential functions of her job with an accommodation, or whether appellant's diagnoses qualified her for an accommodation.

William B. Head, Jr., M.D., also evaluated appellant on behalf of the County. Dr. Head graduated from the University of Southern California, University of Medicine; completed an internship at St. Vincent's Hospital of Staten Island; completed a residency in psychiatry at Columbia Presbyterian Medical Center; and completed a second residency in neurology at Mount Sinai Hospital in New York. Initially, he became board certified in psychiatry and neurology. Then he became certified in neuropsychiatry and behavioral neurology and later became certified in neuro-imaging, which is the interpretation of MRI's and CT scans of the central nervous system and peripheral nervous system.

Dr. Head practiced psychiatry and neurology for many years and also did many consultations for third parties, including for the Federal Government and the States of New York and New Jersey. He has testified in court proceedings on numerous occasions. His practice, in recent years, has been eighty percent evaluations, and twenty percent psychotherapy. Approximately forty percent of the time, he is retained for joint examinations as a neurologist and as a psychiatrist in connection with people who have sustained a head injury and who also have an emotional reaction to the head injury, and with people who have sustained a back injury and have an emotional reaction to that injury. About fifty percent of those cases are personal injury cases and about fifty percent of those cases are workers' compensation cases. The remaining sixty percent of his practice is divided approximately thirty percent pure "pure psych" and thirty percent neurology. He is retained about eighty percent of the time for government entities. Once or twice a month he performs fitness for duty examinations. He has been retained on other occasions for Hudson County. Most of Dr. Head's business is from people or entities that have used his services before.

In the Spring of 2013, when the County required that appellant submit to another fitness for duty examination, they provided her with a list of three doctors from whom to choose. Dr. Head was on that list.[2] Dr. Head was aware that other medical providers had performed a fitness for duty examination upon appellant and had differing opinions. He knew that appellant's treating doctor believed that she could return to work. He was also aware that appellant had requested two leaves of absence, rather close to each other. He knew that on her first day on "a return to work," appellant had an anxiety attack and went "off work" again. Dr. Head believed that he would be the "final word" as to whether or not appellant returned to work.

Dr. Head reviewed, among other things, the expert reports of Dr. Kanen, obtained by the County, and Dr. Shah, appellant's treating physician. The doctor stated that a psychiatric association opined that a treating physician should not testify in court for a patient, since the doctor is supposed to put their patient's interests above everything else and accordingly a treating physician is biased. However, Dr. Kanen acknowledged that such an ideal is not reality. Doctors, including Dr. Head himself, testify for their patients.

Dr. Head stated that appellant spend several hours at his office on the day that she was evaluated. When appellant arrived, one of his history takers took a detailed history from appellant. Then Dr. Head met with appellant for some fifty-four minutes, took additional history, and evaluated her psychiatrically. Despite the fact that Dr. Head described appellant's appearance as pretty good/ostensibly normal, he opined that she should not go back to work until she underwent therapy. He based his opinion, in large part, on her failed return to work "first day" that occurred nine months earlier. He postulated that since she had never returned to work since that "failed" day, she had emotional difficulties at work that were not resolved. He "did not say forever"; however, at the time of his exam he opined that she was not ready to go back to work." Dr. Head's opinion was rendered in two reports. The first report was dated April 1, 2013. The second report was dated May 3, 2013.

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[2] Appellant stated that she chose Dr. Head based on the proximity of his office to her home.

Dr. Head described appellant as bright and articulate. He noted that she was able to provide a detailed personal and job history without recourse to notes. He stated that she had a fairly good work history, except that she had held a lot of different jobs. He noted that she was raised by her maternal grandparents and had a "stormy" relationship with her mother. He did not ask appellant very detailed information regarding her mother's personality or emotional problems. He stated that he did not think that such information was materially significant at that point, though he acknowledged that it would have been helpful.

Dr. Head termed appellant's fitness examination as "ostensibly normal" and noted that appellant expressed her eagerness to return to work. He was aware that she was treated for depression in 2002 and that she had experienced an emotional reaction to the "9/11" incident. Since he was conducting his examination in 2013, he stated that appellant's history included "twelve years of psychotherapy." He said that at the time of his examination, appellant was taking medication, including Wellbutrin and Klonopin. Dr. Head had no idea how many times appellant had taken leave from work in the last ten years. His opinion that she unfit at the time of his examination was based on the two incidents of medical leaves in 2012 taken in close proximity to each other.

Dr. Head stated that appellant's primary diagnosis is recurrent major depression, which would not preclude her from working except when significant depression is present. Still, Dr. Head described himself as "somewhat reluctant" to let her go back to work based upon her recurrent past anxiety and depression. Dr. Head stated that someone who goes back to work and has to almost immediately leave again must experience a loss of confidence. Dr. Head was concerned that he could not see that appellant had a personality change from the start of her last two medical leaves. He was also concerned because he did not know of anything in her work situation that had changed, since she needed an additional medical leave shortly after her last return to work. Dr. Head opined that appellant needed psychotherapy, which she had not yet received.

Dr. Head acknowledged that returning a person to work can sometimes ameliorate the symptoms of depression. However, he was concerned, in this matter, since appellant had stressors at work. Dr. Head did not have a list of appellant's job duties. He was only aware of her job duties in general. Prior to forming his conclusions and drafting his expert report, Dr. Head did not speak to appellant's treating psychiatrist, who he was aware had concluded that appellant could return to work.

Dr. Head stated that while appellant was not fit to return to work at the time of his evaluations, his opinion was not indicative of appellant's ability to return to work at a later date. In fact, he stated that he "thought he made his position clear." It was his understanding that appellant would probably be returning to him for another evaluation in a few months after she had been seeing her doctor for a while for treatment and after she had the benefit of psychotherapy. At the time of this "future" evaluation, Dr. Head would want to speak to the treating physician and see his/her report. Dr. Head stated that he essentially wanted proof that appellant was not going to go out again quickly. Dr. Head describes it as an oversight on his part that he did not recommend, in his report, that appellant receive psychotherapy and then be re-evaluated rather than just state that appellant was not fit for her job. He characterized appellant as temporarily disabled from her job at the time of his evaluation.

Dr. Head did not conduct an accommodation analysis regarding any limitations that appellant might have or any actions that the County could have taken to accommodate any limitation. He opined that appellant was capable of doing other work, working with a different supervisor, or working someplace else in another department. However, Dr. Head did not suggest that the County move appellant to another job or ask if the County could move appellant to another job. Dr. Head stated that he was not thinking in terms of a long-term medical disability, but in terms of the immediate situation. Could she return to work at that point?

Dr. Head stated that his goal is "not to return a person to work if they are a danger to themselves or another person or if they are just not ready to go to work." Dr. Head acknowledged that he did not find appellant was a danger to herself or others. He also acknowledged that his observations of her manner and presentation, including

her personal hygiene, driving herself to his office, and arriving on time for the evaluation, were not consistent with a person having an episode of major recurrent depression. Appellant was able to provide the doctor with a running commentary of her history. Her ability to concentrate was intact. She was able to perform mathematical calculations. Her thinking was logical and coherent. There was no evidence of aphasis, dysarthria, motor apraxia, delusions, hallucinations, concreteness of thinking, looseness of associations, illusions, ideas or reference to personalized thinking, de-realized thinking, phobic thinking, obsessions, compulsions, or bizarre personal mannerisms.

Dr. Head drafted a second expert report on May 3, 2013, approximately one month after he drafted his first expert report on April 1, 2013. Prior to drafting his second expert report, he received and reviewed appellant's treatment records. Dr. Head did not ask for, receive, or review appellant's performance reviews, disciplinary records, or job specifications, though ideally he likes to review job duties and performance evaluations since he considers the duties of the job when making his determination. Dr. Head also did not interview appellant a second time.

FACTUAL ANALYSIS AND FINDING OF FACTS

Based upon the credible evidence, including testimony and documentation, and the opportunity to observe the witnesses and assess their credibility, I **FIND** the following pertinent **FACTS**:

All three experts opined that appellant suffered from major depression. None of the three experts opined that her depression caused her to be permanently disabled. Appellant suffered from depression from approximately fifteen years of age and throughout her adult life. However, her depression did not prevent her from working successfully. She worked for the County, with breaks of service, from 1997 to 2012. Two of the breaks of service occurred when petitioner left the County for other employment. On each occasion, she was re-hired by the County, though she suffered from depression. Appellant testified that she was an above-satisfactory employee throughout her employment and no evidence was presented by the County to the contrary. In addition, no evidence was presented nor did any doctor opine that

appellant posed a direct threat to the health or safety of herself or of other individuals in the workplace, during her employment or when she sought to return from a break in service.

In March 2012, appellant took a leave of absence in connection with her depression. Dr. Shah, her treating doctor, initially found her fit to return to work as of July 27, 2012. Because appellant was doing well and wanted to return to work earlier, Dr. Shah later cleared appellant to return to work in June 2012. However, Dr. Shah requested that appellant work part time during the first two weeks of her earlier return. The treating physician's initial request for a July return date and her request for a part-time return were based, in part, on petitioner receiving new medicine to which she was still adjusting. The medication made appellant somewhat shaky for a period of time after ingestion.

Both parties testified that the County immediately denied the requested two-week part-time return. The County stated that the basis of the denial was that consideration of such a request would require more than two weeks. The County provided no factual basis for the necessity to have such a length of time for consideration of a brief period of part-time return. The County did not state that allowing appellant to return to work, initially for two weeks part time, would be burdensome. The County did not address the impact that the denial of an initial part-time return would have upon appellant or the fact that a return to work full-time was not recommended by her treating physician.

Appellant previously had four leaves of absence during her employment by the County. She had never been required by the County to have a fitness for duty before she was allowed to return to work. Pursuant to the "Agreement Between the County of Hudson and Local 2306 American Federation of State, County, and Municipal Employees AFL-CIO," County employees who were returning from sick leave could be required to be examined by the County's health services physician, or to bring in a certificate from the employee's own physician, in the County's discretion before being permitted to return to work. The County could exercise its authority under this Section solely for the purpose of determining whether the employee was able to perform job-

related functions without posing a direct threat to the health or safety of the employee or of other individuals in the workplaces. (J-7.)

Despite appellant's providing a certificate that she was able to return to work from her treating physician and despite there being no allegation that petitioner was, or would be, a direct threat to the health or safety of herself or other individuals in the workplace, the County required that petitioner have a fitness for duty examination prior to return to work, in addition to her physician's certificate.

Dr Kanen evaluated appellant on behalf of the County. Consistent with her treating physician, he diagnosed appellant with, among other things, major depression and determined that she was fit to return to work. However, in addition to concluding that she should continue with her antidepressant medicine, he concluded that appellant should be involved in individual long-term therapy, not just for two or three months. Appellant was advised that Dr. Kanen had found her fit to return to work, but was not told that he had also concluded that she should be in long-term therapy. Appellant was also not provided with a copy of Dr. Kanen's expert report, though she requested a copy on numerous occasions. The report was issued June 21, 2012.

Since appellant was not permitted to return to work part time, she returned to work full time on June 26, 2012. On her first day, in addition to not yet being acclimated to her new medication, she incurred some workplace stressors that she had not anticipated. Though the County was aware of her return date, appellant's work computer did not have internet access, which her job required. In addition, she was told by her co-workers that the personnel director had revealed that her leave of absence was a result of mental health issues. Appellant had never told any of her co-workers that her March 2012 leave was related to her mental health. Her request for medical leave was made only to personnel and not even to her work supervisor.[3]

Appellant went to her treating physician that same day. Dr. Shah determined that appellant was not ready to return to work in June 2012, especially full time. She

[3] Appellant acknowledged that she had to apply for medical leaves in the past to her supervisor, in accordance with prior County procedures.

placed appellant back on leave for approximately three more weeks until July 16, 2012, ten days earlier than the date that Dr. Shah initially projected for her return. The extension of leave was designed to allow appellant time to adjust to the medication that she was currently taking, without the stress of a return to work. The extension was only slightly greater than the two-week time period that Dr. Shah had requested for petitioner's initial part-time return.

After Dr. Shah ordered three more weeks of leave, the County again required that appellant submit to a medical evaluation before she could return to work. Not aware that petitioner had never received a copy of his expert report or been advised that she should become involved in individual therapy, Dr. Kanen inferred that appellant's failure to enter such therapy was indicative of appellant's unwillingness to deal with her problem. After administering several tests, including the Hilson Personnel Profile/Security test to petitioner, he postulated that appellant must have numerous characteristics common to testers who were diagnosed with major depression, ADHD, and/or with cognitive impairments, and concluded that she was not fit to return to work. Based upon Dr. Kanen's report, dated July 16, 2012, the County refused to allow appellant to return to work in July 2012. The County never advised appellant that Dr. Kanen concluded that she needed long-term therapy.

Despite appellant's numerous protestations, from July 2012 through January 2013, that she was ready, willing, and able to return to work but was not permitted to do so, the County served appellant with a PNDA, dated January 30, 2013, charging in part that she neglected her duty, abandoned her position/resigned not in good standing, and for other sufficient cause—that is that she was unfit to work. A departmental hearing was conducted, wherein the hearing officer found that there was a conflict of medical testimony. Accordingly, the hearing officer required a third medical evaluation. The appellant was directed to choose, from a list of three doctors picked by the County, a doctor who would conduct another fitness for duty examination.

Dr. Head evaluated appellant on April 1, 2013, and opined, in expert reports issued on April 1, 2013, and May 3, 2013, that appellant should not return to work at

that time since if she did so, she would then likely soon be applying for another leave of absence because of depression.

Subsequent to Dr. Head's evaluation of appellant, the County continued to refuse to allow appellant to return to work. A second departmental disciplinary hearing was conducted. The Hearing Officer asked appellant if she was requesting an accommodation. Appellant responded that she wanted to be able to take a leave in the future if needed because of her depression. The FNDA was issued on March 14, 2013, wherein charges against appellant were sustained. Appellant was terminated as being unfit for duty.

The County argues in its written summation that the sole issue in this matter is whether the petitioner was fit for duty in July 2012 and not whether she was fit for duty when Dr. Head saw her in April 2013 or at the time of the hearing. As noted above in July 2012, Dr. Shah, petitioner's treating physician, opined that appellant was fit to return to work and Dr. Kanen, who evaluated petitioner on behalf of the County, opined that appellant was not fit to return to work.

A careful analysis of credibility is necessary in order to make critical findings of fact. For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. "'[T]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the . . . [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div. 1952), certif. denied, 10 N.J. 316 (1952) (citation omitted). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963).

I **FIND** that the County's argument that Dr. Shah's testimony should be discounted because she is a treating physician is meritless. The County argues that Dr. Shah's testimony should have little to no weight, because Dr. Shah is appellant's treating physician; because she sees patients, including petitioner, on average fifteen

minutes a visit; because she does not administer evaluative tests; and because she is "young." None of those arguments are persuasive. Dr. Shah has been a practicing psychiatrist for approximately thirteen years and has treated hundreds of patients with major depression. While she may see patients at fifteen minute intervals, she has been treating appellant since 2008, on multiple days. That interaction is certainly greater than the time appellant spent with the County's experts. Dr. Kanen saw appellant twice for, at best, several hours. Dr. Head saw appellant once for approximately an hour. Though one of the County's experts supported the County's argument that testimony by a treating physician is inappropriate, Dr. Head's own actions conflict with his professed beliefs. Dr. Head stated that a treating physician is biased because the physician has a duty to do what is best for his client. He stated that a professional organization concurs with his belief. However, Dr. Head also acknowledged that it is common for a treating physician to testify for a patient. In fact, Dr. Head stated that he testifies on behalf of his patients. Further, Dr. Head failed to address how testifying accurately about a client might not also be consistent with a client's best interest. He seems to assume, without stating a factual basis, that a treating physician would change his opinion or recommendations if they were not consistent with the desires of a patient.

I **FIND** Dr. Shah's opinion to be credible and Dr. Kanen's opinion to not be credible. Dr. Shah's testimony was consistent and hung together with other evidence. Dr. Shah initially found appellant fit to return from medical leave as of July 2012. Based upon appellant's improvement and strong desire to return to work, she found her fit to return earlier in June. However, Dr. Shah was aware that appellant had yet to acclimate to new medication that was making her shaky after ingestion. Accordingly, Dr. Shah requested that appellant's return be on a part-time basis for two weeks until her body adjusted to the medication. When appellant was not permitted, or even considered for part-time return to work, and she had difficulty after returning for one day, Dr. Shah again recommended that appellant return to work in July 2012 so that acclimation to her medication could be eliminated as a stressor. Dr. Shah consistently found appellant to be motivated to return to work and able to perform her job duties of Human Services Specialist I that she reviewed.

I **FIND** that Appellant's motivation to return to work and her ability to perform her job duties is also supported by evidence submitted on the record, including appellant's work history. Appellant testified that her performance was rated more than satisfactory throughout her employment by the County. The County did not submit any evidence to the contrary. In fact, when appellant voluntarily left employment by the County on two occasions, the County re-hired her.

In contrast, I **FIND** Dr. Kanen's testimony in his July 2012 report not to be credible. It is contrary to his June 2012 opinion, given just three weeks previous, that petitioner was fit for work and not supported by credible evidence. Dr. Kanen never addressed the need for appellant to complete her acclimation to new medicine by a part-time return or the effect that such a temporary stressor might have on her return. He never addressed the briefness of the second leave, or that the "second" return date was less than the first projected date that Dr. Shah had given for appellant's return. Dr. Kanen did not review any of appellant's job duties or identify any duty that she could not perform. Dr. Kanen did not consider the union bargaining agreement, which provided the standard for determining whether someone is fit for duty is whether they are a danger to themselves or another. At the hearing, he acknowledged that he did not recognize that the standard "to be fit for duty" was that low.

Though Dr. Kanen was aware that appellant's test results had indicated an average IQ, in his second report he concluded that appellant could have difficulty making accurate decisions and perceiving situations at work and that her mis-perception would lead to numerous mistakes on the job. He did not request or obtain any objective documentation upon which to affirm this subjective conclusion, such as appellant's performance evaluations from her many years as a County employee. Instead, he speculated that appellant had numerous personality traits that would not be positive for an employee based upon the test scores of others who were allegedly statistically like appellant. Further, he acknowledged that he never saw appellant exhibit any of the negative personality traits he characterized her as possessing in either of the two days that he interviewed her. Dr. Kanen strongly relied upon the fact that three weeks had passed since his initial evaluation and appellant had not yet entered into long term therapy. He concluded that appellant simply did not want to deal

with her problem. In fact, appellant had never received Dr. Kanen's initial expert report and had no idea that he recommended that she enter into long-term psychotherapy. The only information provided to appellant regarding Dr. Kanen's June 2012 evaluation was that he found her fit to return to work.

Though the County argues that the sole issue of this matter is based on the two expert opinions as of July 2012, at the departmental hearing appellant was directed to pick a third doctor from a list of three provided by the County to conduct an evaluation of her fitness to return to duty. I will address Dr. Head's opinion since, after his expert report was received, the County issued a FNDA sustaining all of the charges against appellant and, in essence, appellant was terminated based on Dr. Head's opinion.

I **FIND** that appellant's evaluation by Dr. Head was also less credible that her evaluation by Dr. Shah. Appellant's reported that her examination by Dr. Head was approximately twenty-five minutes. The doctor asked her simple questions such as, "Do you brush your hair every day?" Dr. Head, *sua sponte*, asked appellant if she wanted to be placed in a less stressful job. Appellant told him that she was "capable of doing her job and that her job was not the stress." Dr. Head told appellant that they would talk about her "returning to work part-time." He further also asked appellant if she had filed a lawsuit against the County. After her dialogue with Dr. Head, appellant felt like she would be returning to work.

Like Dr. Kanen, Dr. Head did not consider the standard provided in the union bargaining agreement for determining if an employee was unfit for work and based his determination on the lesser standard of being "somewhat reluctant" to let appellant return to work. Dr. Head did not focus on appellant's then-current condition, though he acknowledged that she was "ostensibly normal"; that she was bright, articulate, able to provide a detailed personal and job history without recourse to notes; and that she was eager to return to work and confident of her ability to perform her job duties. Dr. Head gave no weight to the span of time, approximately one year, from the start of her March 2012 leave of absence to the time of her examination or that such a time span might have lead to reduction or elimination of appellant's depression symptoms. Instead, he strongly focused on what he termed appellant's "need for two medical leaves in the past

in close proximity." Dr. Head did not consider how the need for two leaves, almost simultaneously, was impacted by the County's failure to allow appellant to return to work part-time for two weeks, to the stressors that she encountered on her first day of work, and to the impact that her failure to be acclimated to her new medication might have had. Rather, like Dr. Kanen, he postulated that appellant could not be fit to return to work because she had not been in long-term psychotherapy since her first two medical leaves. Like Dr. Kanen, he assumed that appellant's failure to initiate long-term therapy was caused by a lack of desire to resolve issues. He never inquired and was unaware that appellant was never told of Dr. Kanen's recommendation that she begin psychotherapy. Still, like Dr. Kanen, Dr. Head made a determination that appellant was only temporarily disabled from her job. He testified that it was his understanding that appellant would probably be returning to him for another evaluation after having psychotherapy. Yet, his opinion did not provide for her future evaluation or possible return to work,

I **FIND** that appellant's need for accommodation was addressed twice. Her treating physician requested in June 2012 that appellant return from medical leave on a part-time basis for two weeks since she was getting used to new medication and temporarily feeling jittery after taking it. The County does not deny that it flatly denied the request without any meaningful interaction as to the request. Appellant also credibly testified that she made a request during the departmental hearing that she be permitted to take medical leave, if necessary in the future. While the County disputed this request, it did not present any witness, documentation, or recording to support its denial. However, appellant also acknowledged that during the period at issue, she repeatedly stated that she was ready, willing, and able to return to work and perform the essential functions of her job.

LEGAL ANALYSIS AND CONCLUSIONS

Termination due to inability to perform duties pursuant to N.J.A.C. 4A:2-2.3(a)(3) constitutes major discipline and accordingly the appointing agency must prove its case by the preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962). Preponderance may be described as the greater weight of credible evidence in

the case, not necessarily dependent on the number of witnesses. State v. Lewis, 67 N.J. 47 (1975). 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 (1958).

The Law Against Discrimination (LAD) prohibits an employer from dismissing a handicapped employee because of a disability that does not reasonably preclude the performance of the particular employment. N.J.S.A. 10:5-4.1. Reasonable accommodations include, but are not limited to, job restructuring, modified work schedules and leaves of absence. N.J.A.C. 13:13-2.5(a); Greenwood v. State Police Training Ctr., 127 N.J. 500, 511 (1991). Under the LAD the critical inquiry is "whether the handicapped person can do his or her work without posing a serious threat of injury to the health and safety of himself or herself or other employees. Ibid. (citing Jansen v. Good Circus Supermarkets, 110 N.J. 363, 374 (1988)). As detailed above, appellant was denied an accommodation when her treating physician initially requested that she be able to return to work part-time for two weeks and the County alleged, without a factual basis, that it could not grant her request because even considering the request would take longer than two weeks. Throughout the vast majority of the period at issue, appellant never asserted that she needed an accommodation in order to perform the essential functions of her job. In fact, she repeatedly stated that she was ready, willing, and able to return to work in July 2012 after an extension of a medical leave of absence that began in March 2012.

An employer may not base a decision to discharge an employee for safety reasons on subjective evaluations or conclusory medical reports. Id. at 375. Rather the employer must produce factual or scientifically validated evidence indicating that employment of the disabled person will probably cause substantial injury to that employee or others. Ibid. (citing N.J.A.C. 13:13-2.8). Concerns that an employee may be injured are not enough. Greenwood, supra, 127 N.J. at 514. In this case, all three experts stated that they did not believe that appellant was a threat to herself or others.

Dr. Shah, appellant's treating physician, credibly and convincingly testified that appellant was fit to return to work on July 16, 2012. She reviewed her job duties and found that she was capable of performing all of those duties. She knew that appellant

had stressors at work but opined that appellant could handle those stressors as long as she was acclimated to her new medication. She described appellant, with whom she had a long-term treatment relationship, as highly motivated to return to work and able to perform her job duties in a more than satisfactory manner, as her work history indicated she had in the past. Again, pursuant to case law, Dr. Kanen's and Dr. Head's concerns about the possibility of appellant having a further depressive episode, because she had past episodes, were not enough to support a determination that she was unfit nor to support her termination by the County. Further, while both doctors would have preferred that appellant enter long-term psychotherapy, appellant had no knowledge of this recommendation and further no credible evidence was presented that such psychotherapy should have been mandatory before she could be return to work. I therefore **CONCLUDE** that the County failed to prove, by a preponderance of the credible evidence, that petitioner was unable to perform her job duties.

ORDER

It is **ORDERED** that the charge of other sufficient cause, namely inability to perform job duties, be **DISMISSED**.

It is further **ORDERED** that the termination of appellant, effective June 12, 2013, be **REVERSED** and that appellant be returned to the position of Human services Specialist I.

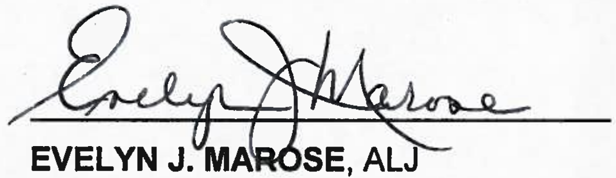
It is further **ORDERED** that appellant receive back pay and any other accompanying employment benefits from July 21, 2012.

It is further **ORDERED** that counsel fees should be awarded to appellant as the prevailing party, subject to an affidavit of services and supporting documentation to the appointing agency, if settlement of fees is not successful, in accordance with N.J.A.C. 4A:2-2.12.

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 the decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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



March 13, 2015
DATE

EVELYN J. MAROSE, ALJ

Date Received at Agency: March 13, 2015

Date Mailed to Parties: March 13, 2015

kep

APPENDIX

WITNESSES

For Appellant:

Kimberle Malta-Roman

Lina Shah, M.D.

For Respondent:

Robert Kanen, Psy.D.

William B. Head, Jr., M.D.

EXHIBITS

Joint Documents:

J-1 Employee Profile

J-2 Job Specification—Human Services Specialist I

J-3 Confidential Psychological Evaluation, by Robert Kanen, licensed psychologist, dated June 21, 2012

J-4 Confidential Psychological Evaluation, by Robert Kanen, licensed psychologist, dated July 16, 2012

J-5 Certificate of Health Care Provider for Employee's Serious Health Condition, Lina Shah, M.D., dated July 9, 2012

J-6 Certificate of Health Care Provider for Employee's Serious Health Condition, Devendra Kurani, M.D., dated August 1, 1992

J-7 Agreement Between County of Hudson and Local 2306, American Federation of State, County and Municipal Employees, AFL-CIO, dated July 1, 2006, to June 30, 2011

J-8 Report of Psychiatric Condition, William B. Head, Jr. M.D., dated April 1, 2013

J-9 Report of Psychiatric Condition, William B. Head, Jr. M.D., dated May 3, 2013

J-10 Letter to Civil Service Commission, from County of Hudson, dated January 30, 2014

J-11 Charge of Discrimination and Dismissal and Notice of Rights, New Jersey Division of Civil Rights, dated January 17, 2013

Appellant's Documents:

P-1 Curriculum Vitae, Lina Y. Shah, M.D.

P-2 Not admitted into evidence

Respondent's Documents:

R-1 Letters from Appellant to Ms. Clinton, dated December 16, 2011, with attached documentation regarding grievance

R-2 Curriculum Vitae, Robert Kanen, Psy.D.

R-3 Curriculum Vitae, William B. Head, Jr., M.D.