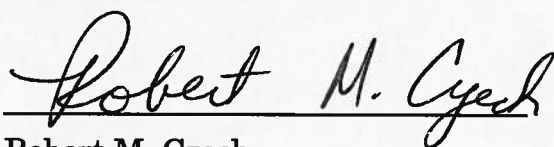




Re: Miosha Sorey

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

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



Robert M. Czech  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Henry Maurer  
Director  
Division of Appeals  
and Regulatory Affairs  
Civil Service Commission  
Unit H  
P. O. Box 312  
Trenton, New Jersey 08625-0312

attachment



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. CSV 18756-13

AGENCY DKT. NO. 2014-1492

**THE MATTER OF MIOSHA SOREY,  
CITY OF NEWARK, PUBLIC SCHOOL DISTRICT.**

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**William P. Hannen, Esq.,** for appellant (Oxford Cohen, Attorneys)

**Bernard Mercado, Esq.,** for respondent (Internal Counsel Newark Public School)

Record Closed: December 12, 2014

Decided: March 25, 2015

BEFORE EVELYN J. MAROSE, ALJ:

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

On September 22, 2013, the City of Newark Public School District (Newark) served Security Guard Miosha Sorey (Sorey) with a Preliminary Notice of Disciplinary Action (PNDA) with attached Rider, pursuant to N.J.A.C. 4A:2-2.3(a). After a hearing conducted on October 4, 2013, a Final Notice of Disciplinary Action (FNDA) was issued on November 4, 2013. The sustained charges include conduct unbecoming a public employee, chronic or excessive absenteeism or lateness, neglect of duty, inability to perform duties, and other sufficient cause. Sorey was suspended for thirty working days.

On November 13, 2013, Sorey requested a hearing. Pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, the matter was transmitted to the Office of Administrative Law (OAL) on December 26, 2013. A hearing was conducted on November 24, 2014. The record remained open until December 12, 2014, for the submission of written summations, supplementing closing statements. Due to a medical leave and a voluminous caseload, the time for issuance of this Initial Decision was extended until April 27, 2015.

### TESTIMONIAL AND DOCUMENTARY EVIDENCE

#### For Newark

Senior Security Guard Steven Cullar (Senior Guard) stated that the school security guards in Newark are critical for the safety of the students. Among other things, Newark has a large gang population and high crime rate. An absence by one of the guards weakens the force and their ability to protect the students. It is also detrimental to staff morale. Unless several guards are absent in one school, no replacement is sent. If a replacement is sent, the replacement comes from another school, whose security workforce is then reduced. If a guard is late, there is no possibility of obtaining a replacement and a post remains unguarded.

The Senior Guard, to whom Sorey reported, provided the details of Sorey's absenteeism and lateness and the manner in which he advised Sorey of the necessity to improve. On February 4, 2013, he wrote Sorey a letter stating that it had come to his attention that Sorey had incurred eighteen absences (12/18/12, 12/19/12, 1/2/13, 1/7/13, 1/8/13, 1/14/13, 1/18/13, 1/22/13, 1/23/13, 1/24/13, 1/25/13, 1/28/13, 1/29/13, 1/30/13, 1/31/13, 2/1/13, 2/4/13, 2/5/13) and in addition was tardy three times (1/11/13, 1/15/13, 1/16/13). He requested that she appear in his office for a conference to discuss her absences and the State standard. (R-C.) Thereafter, he forwarded another letter to Sorey confirming that the conference was held and that if she failed to improve her pattern of attendance more harsh disciplinary action would be taken. (R-D.)

Sorey's attendance did not improve. The Senior Guard issued a Warning Letter dated March 18, 2013, wherein he noted that since their February conference Sorey had taken an additional five sick dates, for a total of twenty-three days. He reminded her, as he did in their February conference, that Newark considered any substantial number of occasional absences or tardiness a serious matter. He again warned her that continued absenteeism would result in further disciplinary action. (R-F.)

From March 18, 2013, to May 22, 2013, Sorey was absent an additional twenty-eight days, for a total of fifty-one days. Her absences were not supported by medical documentation. Since Sorey had failed to improve her attendance, the Senior Guard made a letter Request for Disciplinary Action. Sorey was again advised that Newark considered any substantial number of occasional absences a serious matter. She was also advised that disciplinary actions against her could include, but not be limited to, tenure charges, disciplinary action, loss of increment and/or salary increase, or separation from employment. (R-I.).

The Senior Guard identified Sorey's Time Report from July 1, 2012, until June 30, 2013, and from August 20, 2013, to October 4, 2013, which reflected her attendance and tardiness. (R-J.)<sup>1</sup> He testified that on numerous occasions Sorey failed to even call in when she was absent, including absences on February 19, 2013; April 2, 4, 10, 16, and 23, 2013. (Rider to PNDA.)

The Senior Guard also stated that he saw Sorey exiting the school building on Thursday, March 12, 2013, around 10:00 a.m., when her scheduled break was from 10:30 to 10:50. He verbally warned Sorey, in the presence of the vice principal, that her action constituted "abandonment of post." The Senior Guard confirmed the verbal warning in writing on March 14, 2013.

Gemar Mills, principal (Principal Mills), testified that the school where Sorey is assigned is in a volatile area where crime, gangs, and drugs are common. Security guards in the school are essential for student safety. The guards secure the doors,

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<sup>1</sup> Sorey's absences and late arrival were summarized on a Rider attached to her PNDA, which detailed fifty-eight occasions during the 2012-13 fiscal year.

monitor the halls, and assist the teachers when students require discipline. Consistent with the testimony of the Senior Guard, Principal Mills stated that if a security guard is absent it is difficult to get a replacement. If a security guard is late, there is no chance of getting a replacement and that post is uncovered.

Principal Mills knew of numerous times that Sorey was absent or late and of an occasion that Sorey was in attendance but not at her post as scheduled. Sorey's absences and lateness had a negative impact on school safety and security. Principal Mills was never given medical documentation supporting Sorey's numerous absences.

#### For Sorey

Sorey stated that her absences were caused by gastro-intestinal problems, including colitis and a peptic issue. Sorey acknowledged that she did not give the Senior Guard or Principal Mills of the school where she worked any documentation in support of her absences. However, she asserted that she gave medical documentation in support of her absences to personnel located 2 Cedar Street, Newark. Sorey did not retain copies of the medical documentation that she provided and accordingly could not present any such documentation as evidence at the hearing. She denied ever failing to call in when she was going to be absent.

Sorey acknowledged that she was late on several occasions. However, she asserts that her lateness was through no fault of her own. The medications that she takes makes her drowsy and, as a single parent, her drop-off responsibilities sometimes make it impossible for her to arrive on time. Sorey asserts that if she were given the transfer to another school that she requested, it would have been easier for her to arrive on time. She further states that when she was absent, a replacement security guard would take her place.

## FACTUAL DISCUSSION AND FINDINGS

Based upon the evidence presented at the hearing, and the opportunity to observe the witnesses and assess their credibility, I **FIND** the following pertinent **FACTS**:

Sorey was absent fifty-one times during the 2012-2013 fiscal year. Sorey was late in arriving to her assigned post on fifty-eight occasions during the 2012-2013 fiscal year. Her attendance was summarized in a Rider to the PNDA and evidenced at the hearing by detailed time records. (R-I, R-J, and Rider to PNDA.)

Sorey was given verbal and written notice on numerous occasions that Newark concluded that her absenteeism and tardiness were excessive and that she needed to improve her job attendance and arrive on time. While there might be a separate procedure detailing a different number of violations/occasions of tardiness necessary to issue a verbal warning, a written warning, or conduct a conference with an employee for tardiness, I **FIND** Sorey's argument that her fifty-eight occasions of tardiness during the 2012-2013 fiscal year should not be considered because they were not addressed individually and separately from her absenteeism from work (after she was late on three occasions, after she was late on five occasions, and after she was late on seven occasions) untenable. In fact, despite all the notices that Sorey received, she arrived on her post late fifty-eight times during the fiscal year at issue.

I **FIND** no merit to Sorey's assertion that she has meritorious defenses to excuse her failure to arrive on time. Her drop-off responsibilities for her children do not excuse her failure to appear at her assigned post on time, for the safety of the students where she worked. I also **FIND** no merit to her assertion that Newark could and should have transferred her to another school closer to her home to make it easier for her to arrive on time. Sorey's lateness was not the fault of Newark. Sorey clearly had a duty to arrive on time to perform her job duties at the school to which she was assigned.

I do not **FIND** Sorey's assertion that she provided Newark with medical documentation in support of her absences credible. 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). Sorey is appealing discipline. She is an interested party, highly motivated to develop a factual basis to assert that she provided medical documentation supporting her absences. Yet, while she claims to have obtained medical documentation regarding her gastrointestinal issues, she presented no evidence, either testimonial or documentary, at the time of the hearing to support her assertion that such medical documentation exists and/or that she provided it to personnel located at 2 Cedar Street, Newark. Sorey acknowledged and the Senior Guard and Principal Mills testified that she did not provide them with any medical documentation.

I **FIND** that the FNDA makes no reference to Sorey abandoning her post. Accordingly, this allegation of wrongdoing will not be considered when determining whether any of the charges sustained shall be affirmed. Exhibit R-E will not be admitted into evidence, but returned to Newark. As noted by Sorey in her supplemental submission, the charge of neglect of duty will be addressed solely with consideration of Sorey’s attendance.

### **LEGAL ANALYSIS AND CONCLUSIONS**

Employees of the State of New Jersey are governed by Title 11A of the New Jersey Statutes, known as the Civil Service Act. N.J.S.A. 11A:1-1 et seq.; N.J.A.C. 4A:8-1.1. The objectives of our civil service laws are articulated in N.J.S.A. 11A:1-2. They include rewarding employees for “‘meritorious performance’ and ‘separating’ others whose conduct is less than adequate.” City of Newark v. Gaines, 309 N.J. Super. 327, 332 (App. Div. 1998). Under N.J.A.C. 4A:2-2.3(a)(1), an employee may be



subjected to major discipline for "incompetency, inefficiency, or failure to perform duties." In general, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315 (1980). Neglect of duty implies nonperformance of some official duty imposed upon a public employee, not merely commission of an imprudent act. Rushin v. Bd. of Child Welfare, 65 N.J. Super. 504, 515 (App. Div. 1961). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960).

The only way for an employer to prove chronic or excessive absenteeism or lateness is by detailing a history of such abuse. West v. Newark Public Sch. Dist., CSV 07371-02, Initial Decision (March 4, 2003), <http://njlaw.rutgers.edu/collections/oal/>. Thus, it is possible for an employee to be disciplined for the same offense regardless of double jeopardy so long as the charge is for habitual misconduct like chronic absenteeism and/or tardiness. State-Operated Sch. Dist. of the City of Newark v. Gaines, 309 N.J. Super. 327, 333 (App. Div. 1998); W. New York v. Bock, 38 N.J. 500, 522 (1962). Further, such a charge is more serious if the habitual absence or tardiness is committed by an employee who is a security guard who is charged with protecting the public or maintaining safety. Ibid. Accordingly, Sorey's argument, as a security guard, that her "twenty-three absences prior March 18, 2013 cannot be part of the basis for [her] thirty-day suspension for chronic and excessive absenteeism or lateness" is meritless.

Sorey was advised on numerous occasions that Newark considered any substantial number occasional absences or tardiness as a serious matter, which could result in discipline. She was further advised on numerous occasions that if she did not improve, she would be disciplined. In particular, The Senior Guard to whom she reported wrote Sorey a letter on February 4, 2013, detailing eighteen absences and three late arrivals, conducted an in-person conference with her regarding her attendance, and confirmed the conference by letter. When her attendance did not

improve, the Senior Guard issued another written warning detailing further absenteeism and the seriousness of such conduct. When her attendance still did not improve, Sorey was further advised, in writing on May 22, 2013, that she was being referred for disciplinary action. Sorey failed to heed any of the disciplinary warnings that she received. She continued to be absent from her job duties and/or late in arriving to her post to the detriment of student safety at the school to which she was assigned for duty. She produced no medical documentation supporting her numerous days of absenteeism and no justifiable reason for the numerous days that she arrived late.

Based upon a preponderance of the credible evidence, I **CONCLUDE** that Newark sustained its burden in proving the charges filed against Sorey, pursuant to N.J.A.C. 4A:2-2.3(a).

#### **PENALTY**

Violations of N.J.A.C. 4A:2-2.3 constitutes grounds for major discipline. Major discipline may include removal. N.J.S.A. 11A:2-6(a).

A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number and proximity of prior disciplinary infractions, evaluated by progressively increasing penalties. Bock, supra, 38 N.J. at 523. Sorey has received verbal warnings, written warnings, and disciplinary charges relating to his absenteeism in the past.

On August 26, 2013, a Revised Final Notice of Disciplinary Action was issued, pursuant to a Settlement Agreement by the parties. Among other things, the Settlement Agreement provided that Sorey's suspension of twenty-five days was reduced to fifteen days, and the charge of conduct unbecoming a public employee relating to chronic or excessive absenteeism and/or lateness, neglect of duty and other sufficient cause was sustained. Accordingly, I **CONCLUDE** that disciplining Sorey with a thirty-day

suspension is appropriate and not excessive. I decline to increase the discipline to forty-five days, or fifteen days more than Newark determined after a disciplinary hearing.

**ORDER**

It is **ORDERED** that the charges of (1) conduct unbecoming a public employee, (2) chronic or excessive absenteeism or lateness, (3) neglect of duty, (4) inability to perform duties, and (5) other sufficient cause in violation of N.J.A.C. 4A:2-2.3 be **AFFIRMED**.

It is further **ORDERED** that the penalty imposed by the Appointing Authority of a thirty-day suspension be **AFFIRMED**.

I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

3/25/15  
DATE

*Evelyn J. Marose*  
EVELYN J. MAROSE, ALJ

Date Received at Agency:

*Laura Sanders*

Date Mailed to Parties:

MAR 26 2015

DIRECTOR AND  
CHIEF ADMINISTRATIVE LAW JUDGE

kep

**APPENDIX**

**WITNESSES**

**For Sorey:**

Miosha Sorey

**For the District of Newark:**

Steven Cullar, Senior Security Guard

Gemar Mills, Principal

**EXHIBITS**

**For Sorey:**

None

**For the District of Newark:**

- R-A Final Notice of Disciplinary Action Revised, dated August 26, 2013, and Civil Service Commission Final Decision and Settlement Agreement wherein Sorey was suspended for fifteen days for chronic or excessive absenteeism or lateness, neglect of duty, and other sufficient cause
- R-B Final Notice of Disciplinary Action dated November 4, 2013, wherein Sorey was suspended for thirty days for conduct unbecoming a public employee, chronic or excessive absenteeism or lateness, neglect of duty, inability to perform duties, and other sufficient cause
- R-C Letter from Senior Security Guard Steven Cullar, dated February 4, 2013, regarding Attendance Improvement Conference as to eighteen days absent and three days tardy
- R-D Letter from Senior Security Guard Steven Cullar, dated February 4, 2013, confirming Attendance Improvement Conference, in the presence of union representative, providing verbal warning that failure to improve pattern of attendance will result in more harsh disciplinary action being taken
- R-E Not admitted into evidence

- R-F Warning Letter, dated March 18, 2013, stating that Sorey has been absent an additional five days since the conference held on February 6, 2013, wherein Sorey was warned that continued absenteeism would result in further disciplinary action
  - R-G Not admitted into evidence
  - R-H Not admitted into evidence
- R-I Letter from Senior Security Guard Steven Cullar, dated May 22, 2013, stating that Sorey had been absence fifty-one days and that based upon her failure to improve her attendance, and in accordance with prior notice to her, Senior Security Guard Cullar was requesting that disciplinary action be taken
- R-J Time Report from July 1, 2012, until June 30, 2013 and from August 20, 2013, to October 4, 2013, 2012
  - R-K Not admitted into evidence