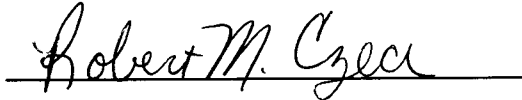


Re: Nicole Baldwin

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
SEPTEMBER 2, 2015

A handwritten signature in cursive script, reading "Robert M. Czech", is written over a solid horizontal line.

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. NOS. CSV 8272-14 and
CSV 8275-14
AGENCY DKT. NOS. 2014-3188 and
2014-3186
(CONSOLIDATED)

**IN THE MATTER OF NICOLE
BALDWIN, MERCER COUNTY
DEPARTMENT OF PUBLIC SAFETY.**

David B. Beckett, Esq., for appellant (Law Offices of David Beckett, attorneys)

Kristina Chubenko, Assistant County Counsel, for respondent (Arthur R. Sypek,
Jr., County Counsel)

Record Closed: June 9, 2015

Decided: July 23, 2015

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE

Respondent, Mercer County Department of Public Safety (hereinafter Appointing Authority), suspended appellant, Nicole Baldwin, for a total of nineteen days and an assessed fine in the amount of \$509.19 equivalent to one and one-half working days. The Appointing Authority alleges that appellant, a corrections officer, reported late for her scheduled tour of duty on December 22, 2013 and December 25, 2013, and that

suspensions for a period of seven days and twelve days, respectively, and a fine equivalent to one and one-half working days were the appropriate penalty.

Appellant was charged for this offense with violations of N.J.A.C. 4A:2-2.3(a)(4), chronic or excessive absenteeism or lateness; N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; and N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause (R-1 and R-2).

PROCEDURAL HISTORY

On January 9, 2014, the Appointing Authority issued a Preliminary Notice of Disciplinary Action setting forth the charges and specifications made against appellant for the December 22, 2013 lateness. On January 10, 2014, the Appointing Authority issued a Preliminary Notice of Disciplinary Action setting forth the charges and specifications made against appellant for the December 25, 2014 lateness. After a departmental hearing on May 22, 2014, the Appointing Authority issued two Final Notices of Disciplinary Action (R-1 and R-2) on June 10, 2014, sustaining the charges in the Preliminary Notices and suspending appellant from employment for a total of nineteen days and assessing a fine in the amount of \$509.19 which was equivalent to one and one-half working days. Appellant appealed, and two separate matters were filed at the Office of Administrative Law on July 1, 2014 for hearing as contested cases pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matters were heard together on May 18, 2015. The parties filed post-hearing briefs and the record closed on June 9, 2015.

FACTUAL DISCUSSION

Richard Bearden testified on behalf of the Appointing Authority. He is the captain assigned to Mercer County Correctional Center (MCCC) and has been employed since 1990. He assists the warden and administers most discipline at MCCC. Captain Bearden drafted the original charges against appellant after receiving a time and attendance report from the personnel department (R-5). The Appointing Authority's sick leave policy is memorialized in Standard Operating Procedure (SOP) 132 (R-3).

Fifteen sick days are credited to employees effective January 1 or each year pursuant to the collective negotiations agreement between the Appointing Authority and PBA local 167 (E-1). Unused sick time accumulates from year to year.

Bearden sent appellant correspondence dated April 4, 2013 advising her that her sick time balance for the remainder of the calendar year was sixteen hours and the time balances are reflected on her paystubs (R-4). Appellant acknowledged receipt of the correspondence on April 7, 2013 (R-4). Appellant had no sick or vacation time to carry over from prior years (R-5). Bearden began sending correspondence to employees similar to R-4 as a result of an agreement with PBA 167 to ensure that employees were notified that they were overusing leave time prior to being disciplined. As of December 2, 2013, appellant had exhausted all of her sick time allotment. Bearden did not send her another notification because he advised appellant in R-4 that her time balances were reflected on her paystubs. On December 22, 2013, appellant called out of work in accordance with the call out procedure (R-6). As a result of the call out, another officer received eight hours overtime (R-6). Appellant was charged in accordance with the MCCC table of offenses and penalties as a Step 3 offense and initially received a ten-day suspension (R-10). The penalty was decreased after a departmental hearing to a seven-day suspension and a fine equivalent to half a day.

On December 25, 2013, appellant again called out of work in accordance with the call out procedure (R-8). As a result of this call out, another officer received eight hours of double overtime as it was a holiday (R-8). Appellant was charged in accordance with the MCCC table of offenses and penalties as a Step 4 offense and initially received a twenty-day suspension. The penalty was decreased after a departmental hearing to a twelve-day suspension and a fine equivalent to one day. Not only did these call outs drain resources as a result of overtime being paid to other officers, it also created concern for morale as other officers had to work longer shifts during the holiday season. No internal affairs investigation or any other investigation was conducted into appellant's December 2013 call outs. No one asked her why she was calling out or asked her for medical documentation.

Nicole Baldwin, appellant, next testified on her own behalf. She has been a corrections officer for twenty-one years and was on "B tour" in December 2013. Her shift started at 7:00 a.m. and ended at 3:00 p.m. She did not dispute that she exhausted her allotted amount of sick days and used most of her time to care for her mother and her nephew. She called out on December 22, 2013 and December 25, 2013 because her mother was depressed due to the murder of appellant's brother which occurred in 2004. She is the primary caregiver for her mother and father and her mother gets depressed around the holidays and she had to be there for her family. She did not apply for coverage under the Family Medical Leave Act (FMLA) and did not provide any medical documentation as to the reason for her December 2013 call outs. Baldwin has had to take sick leave in past years to aid her mother.

Ray Peterson next testified on appellant's behalf. He is the current President of PBA Local 167 having held that position since September 2014. Peterson agreed with Bearden's testimony that Bearden began sending correspondence to employees similar to R-4 as a result of an agreement with PBA 167, but in addition to the correspondence the administration agreed to meet with the employees to advise them of their right to apply for FMLA. No such meeting occurred between administration and appellant. Peterson was not present at the meeting between the PBA and administration that resulted in the aforementioned agreement. Prior to September 2014, he had not held a union position since 2005 or 2006 when he was Vice President.

Richard Bearden was recalled by the Appointing Authority as a rebuttal witness. He and the warden met with the union in or about 2013 regarding the issuance of letters to employees when they were low on sick leave. There was no discussion of meeting with employees to advising them of their rights under FMLA. When he distributes the letters he is not generally aware of the specific health reason for which an employee calls out.

FINDINGS OF FACT

After carefully reviewing the exhibits and documentary evidence presented numerous times during the hearing, and after having had the opportunity to listen to

testimony and observe the demeanor of the witnesses, I **FIND** the following to be the relevant and credible **FACTS** in this matter:

Bearden sent appellant correspondence dated April 4, 2013 advising her that her sick time balance for the remainder of the calendar year was sixteen hours and the time balances are reflected on her paystubs. Appellant acknowledged receipt of the correspondence on April 7, 2013. As of December 2, 2013, appellant had exhausted all of her sick time allotment. Bearden did not send her another notification. Appellant had no sick or vacation time to carry over from prior years. On December 22, 2013, appellant called out of work in accordance with the call out procedure. As a result of the call out, another officer received eight hours overtime. Appellant was charged in accordance with the MCCC table of offenses and penalties as a Step 3 offense and initially received a ten-day suspension (R-10). The penalty was decreased after a departmental hearing to a seven-day suspension and a fine equivalent to half a day.

On December 25, 2013, appellant again called out of work in accordance with the call out procedure. As a result of this call out, another officer received eight hours of double overtime as it was a holiday. Appellant was charged in accordance with the MCCC table of offenses and penalties as a Step 4 offense and initially received a twenty-day suspension. The penalty was decreased after a departmental hearing to a twelve-day suspension and a fine equivalent to one day.

Appellant called out on December 22, 2013 and December 25, 2013 because her mother was depressed due to the murder of appellant's brother which occurred in 2004. She is the primary caregiver for her mother and father. Her mother gets depressed around the holidays and she had to be there for her family. She did not apply for coverage under the Family Medical Leave Act (FMLA) and did not provide any medical documentation as to the reason for her December 2013 call outs.

LEGAL ANALYSIS AND CONCLUSIONS

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act

related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The Appointing Authority shoulders the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate “if it establishes the reasonable probability of the fact.” Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, the evidence must “be such as to lead a reasonably cautious mind to a given conclusion.” Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Appellant was charged with “Chronic or excessive absenteeism or lateness.” N.J.A.C. 4A:2-2.3(a)(4). Conduct that occurs over a period of time, or frequently recurs, is considered “chronic,” and may be the basis of discipline or dismissal. N.J.A.C. 4A:2-2.3(a)(4). “Just cause for dismissal can be found in habitual tardiness or similar chronic conduct.” West New York v. Bock, 38 N.J. 500, 522 (1962). While a single instance may not be sufficient, “numerous occurrences over a reasonably short space of time, even though sporadic, may evidence an attitude of indifference amounting to neglect of duty.” Ibid.

Appellant’s status as a corrections officer subjects her to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). They represent “law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public.” Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm’n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

The need for proper control over the conduct of inmates in a correctional facility and the part played by proper relationships between those who are required to maintain order and enforce discipline and the inmates cannot be doubted. We can take judicial notice that such facilities, if not properly operated, have a capacity to become "tinderboxes."

[Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).]

Appellant contends that the charges of excessive absenteeism cannot be sustained because the Appointing Authority failed to investigate her reasons for calling out and did not provide her with an update to R-4 after she exhausted all of her sick time as required by the collective bargaining agreement with the PBA. She relies on Article G of the agreement which states:

An employee who has been absent on sick leave for five (5) or more consecutive work days shall be required to submit acceptable medical evidence substantiating the illness.

1. An employee who has been absent on sick leave for periods totaling more than fifteen (15) days in one calendar year consisting of periods of less than five (5) days shall have his/her leave record reviewed and thereafter may be required to submit acceptable medical evidence for an additional sick leave in that year. In cases where an illness is of a chronic or recurring nature causing recurring absences of one day or less, only one submission of such proof shall be necessary for a period of six (6) months.
2. The appointing authority may require proof of illness of an employee sick leave whenever such requirement appears reasonable. Abuse of sick leave shall be cause for disciplinary action.

(E-1 at 13).

Appellant asserts that the Appointing Authority institutes discipline for the use of leave time any time an officer is in dock pay status without investigating why the officer took the leave. There is, however, no such requirement in either the collective bargaining agreement or MCCC's sick leave policy. The only reference to an investigation in the sick leave policy is found in Article E(2)(d) relating to an investigation of abuse of sick leave (R-3, p. 3). In this case, there is no allegation that appellant abused her sick leave. The charge here is that she called out after she had exhausted her allotment of sick leave which subjects her to abuse of sick leave disciplinary action. SOP 132 j states that "employees who are in the disciplinary step process at the end of the calendar year will be charged progressively at the beginning of the new year until the disciplinary process progresses year-to-date for absences that exceed allowed sick leave time" (R-3, p. 4). SOP 132 l provides that employees will be subject to Abuse of Sick Leave disciplinary action on the first absence and any subsequent absence when allotted sick leave time is exhausted.

I **CONCLUDE** that appellant's behavior amounted to chronic or excessive absenteeism when viewed in light of the terms of the collective bargaining agreement and SOP 132. The collective bargaining agreement clearly states that abuse of sick leave shall be cause for disciplinary action. SOP 132 also makes it clear that an employee will be subject to disciplinary action on the first absence and any subsequent absence when allotted sick leave time is exhausted. Appellant was absent twice after she had exhausted her sick leave allotment for 2013. Therefore, I **CONCLUDE** that the Appointing Authority has met its burden of proof on this issue for both CSV 8272-14 and CSV 8275-14.

Appellant was also charged with "Conduct unbecoming a public employee." N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber,

156 A.2d 821, 825 (1959)). Such misconduct need not necessarily “be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.” Hartmann v. Police Dep’t of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep’t of Civil Serv., 17 N.J. 419, 429 (1955)).

I **CONCLUDE** that appellant’s behavior did rise to a level of conduct unbecoming a public employee. The basis for the charge of conduct unbecoming was appellant’s call out on two separate occasions after she had exhausted her allotment of sick leave. Appellant’s conduct was such that it could adversely affect the morale or efficiency of a governmental unit or destroy public respect in the delivery of governmental services. Absenteeism among essential personnel disrupts the operational effectiveness of the institution and causes poor morale among staff who are required to work involuntary assignments and those who have leave requests denied. Furthermore, poor attendance results in the ineffective allocation of capital resources (R-3, p. 2). SOP 132 defines “essential personnel” to include correction officers (R-3, p. 3).

Appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(11), “Other sufficient cause.” Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Appellant’s conduct was such that she violated this standard of good behavior. As such, I **CONCLUDE** that the Appointing Authority has met its burden of proof on this issue for both CSV 8272-14 and CSV 8275-14.

PENALTY

In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee’s offense, the concept of progressive discipline, and the employee’s prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are

used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). However, where the charged dereliction is an act which, in view of the duties and obligations of the position, substantially disadvantages the public, good cause exists for removal. See Golaine v. Cardinale, 142 N.J. Super. 385 (Law Div. 1976), aff'd, 163 N.J. Super. 453 (App. Div. 1978); In re Herrmann, 192 N.J. 19 (2007). The question to be resolved is whether the discipline imposed in this case is appropriate.

For her actions arising out of this incident, appellant has been found to have violated N.J.A.C. 4A:2-2.3(a)(4), "Chronic or excessive absenteeism or lateness", N.J.A.C. 4A:2-2.3(a)(6) "Conduct unbecoming a public employee" and N.J.A.C. 4A:2-2.3(a)(11), "Other sufficient cause." Appellant was on Step 2 of the disciplinary process for absenteeism immediately prior to December 22, 2013. She was initially charged with a ten-day suspension for the December 22, 2013 call out and a twenty-day suspension for the December 25, 2013 call out. These suspensions are consistent with the disciplinary process outlined in SOP 132 and in MCCC's table of offenses. These suspensions were reduced at the departmental hearing to seven days and a fine equivalent to one-half day's pay and twelve days and a fine equivalent to one day's pay, respectively. After having considered all of the proofs offered in this matter, and the impact upon the institution regarding the behavior by appellant herein, and after having given due deference to the impact of and the role to be considered by and relative to progressive discipline, I **CONCLUDE** that appellant's violations are significant enough to warrant a penalty, which, in part, is meant to impress upon her, as well as others, the seriousness of any further infractions by her in that regard. Therefore, I **CONCLUDE** that the imposition of both the seven-day suspension and fine attributable to CSV 8272-14 and the twelve-day suspension and fine attributable to CSV 8275-14 were appropriate penalties and consistent with the penalties specified in SOP 132 and MCCC's table of offenses.

DISPOSITION

I **CONCLUDE** that the Appointing Authority has sustained its burden of proof as to the charges of violation of N.J.A.C. 4A:2-2.3(a)(4), "Chronic or excessive absenteeism or lateness," N.J.A.C. 4A:2-2.3(a)(6) "Conduct unbecoming a public employee" and N.J.A.C. 4A:2-2.3(a)(11), "Other sufficient cause."

Accordingly, I **ORDER** that the action of the Appointing Authority is **AFFIRMED**. Appellant will receive a seven-day suspension and a fine equivalent to one-half day's pay attributable to the CSV 8272-14 and a twelve-day suspension and a fine equivalent to one day's pay attributable to CSV 8275-14.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

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

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

July 23, 2015
DATE



JOHN S. KENNEDY, ALJ

Date Received at Agency: July 24, 2015
Date Mailed to Parties: 7/28/15

cmo

APPENDIX
LIST OF WITNESSES

For Appellant:

Nicole Baldwin, Appellant
Ray Peterson, President of PBA local 167

For Respondent:

Captain Richard Bearden

LIST OF EXHIBITS

For Appellant:

E-1 Agreement between Mercer County and PBA Local 167 effective January 1, 2009 to December 31, 2014

For Respondent:

R-1 Final Notice of Disciplinary Action regarding December 22, 2013 call out
R-2 Final Notice of Disciplinary Action regarding December 22, 2013 call out
R-3 Standards and Operating Procedure 132
R-4 Attendance Notification dated April 4, 2013
R-5 Appellant's 2013 time sheet record
R-6 Attendance and overtime record dated December 22, 2013
R-7 Electronic timekeeping record for December 22, 2013
R-8 Attendance and overtime record dated December 25, 2013
R-9 Electronic timekeeping record for December 22, 2013
R-10 Correction Center table of offenses and Penalties, Effective Date 8/1/13
R-11 Final Notice of Minor Disciplinary Action Dated May 21, 2014
R-12 Disciplinary History of appellant