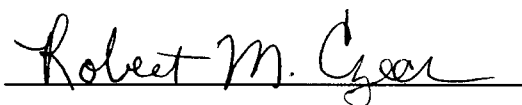


Re: Azalia Rivera

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
AUGUST 19, 2015

A handwritten signature in cursive script that reads "Robert M. Czech". The signature is written in black ink and is positioned above a 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. NO. CSV 14906-13

AGENCY DKT. NO. 2014-990

**IN THE MATTER OF AZALIA RIVERA,
CITY OF NEWARK POLICE DEPARTMENT.**

Samuel Wenocur, Esq., for appellant (Oxford Cohen, attorneys)

Allison Brown-Jones, Assistant Corporation Counsel, for respondent City of
Newark (Karen Brown, Corporation Counsel)

Record Closed: February 4, 2015

Decided: July 23, 2015

BEFORE **CARIDAD F. RIGO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Azalia Rivera, appeals her September 17, 2013, removal as a communications clerk at the Newark Police Department–Communications Division, for failing to report for a psychological fitness for duty examination.

On July 22, 2013, appellant was personally served with a Preliminary Notice of Disciplinary Action charging her with violation of Newark Police Department Rules and Regulations Chapter 18:14-Disobedience of Orders. Specifically, respondent alleged that appellant failed to complete the psychological fitness for duty evaluation on June 6,

2013, as ordered. A departmental hearing occurred on September 17, 2013, sustaining the charges and the penalty of termination was imposed.

Rivera appealed and the matter was transmitted by the Civil Service Commission to the Office of Administrative Law (OAL), where it was filed on October 17, 2013, as a contested case pursuant to N.J.S.A. 52:14B-1 to -15, N.J.S.A. 52:14F-1 to 13. Hearings were held on March 20, 2014, July 11, 2014, and December 19, 2014. The parties requested the opportunity to submit written closing statements and legal memorandums supporting their respective positions. The record closed on February 4, 2015, upon receipt of post-hearing submissions. Due to the voluminous case load of this ALJ coupled with a crashing of this ALJ's computer this Initial Decision was delayed.

ISSUES

Did appellant disobey an order? Was her removal warranted?

SUMMARY OF TESTIMONY

Sgt. Fiore Purcell

Sergeant Purcell at the time of his testimony had been with the Newark Police Department for twenty-four years. At the time of the events surrounding this matter, he was in the Medical Services Division of the Newark Police Department, part of his duties was to keep track of employee's sick time, leave time, and scheduling medical appointments.

He said appellant was a civilian communications clerk working in the Communications Center of the Newark Police Department. She would take either regular non-emergency or 911 calls. She worked the 11:00 p.m. to 7:00 a.m. shift. This was a very stressful job.

He testified that appellant had booked off her job with stress on November 11, 2012. He said it is the Department's policy to have an employee undergo a psychological fitness for duty evaluation before that employee can return to work if that employee booked off due to stress. He scheduled appellant to have a psychological evaluation on May 9, 2013, but appellant did not attend that evaluation stating that her son was sick. Appellant provided a doctor's note substantiating her son's illness.

Sergeant Purcell furthered that he then arranged for appellant to be evaluated on June 6, 2013, at 8:30 a.m. Sergeant Purcell explained to appellant the extent and nature of the evaluation on the day he advised her of the scheduled date and time.

On the morning of June 6, 2013, he called the testing center to see if appellant was at the center and he was told she was. Sergeant Purcell furthered that he was told by the testing center's staff that appellant arrived fifteen minutes late and was not being cooperative. He spoke with the appellant while she was at the testing center. Appellant complained to him that the paperwork was too onerous and invasive; that the testing required too much personal information; she complained about staying at the center all of that time. He told her she had to stay and she responded she would stay at the center and complete the evaluation.

When he spoke with the testing proctor he was told appellant complained to them about completing a form that she said required too much personal information. She complained that the testing room was filled with men. She asked to sit in another room by herself; her request was denied because she was not sitting near anyone and no one could look at what she was writing. He was told that appellant had her own table. He was told that Rivera came out of the testing room two minutes into the test saying she had to use the bathroom, after being told no one was allowed to leave the room. She returned a few minutes later only to leave again after several minutes. He later found out appellant left the testing center without completing the evaluation.

Sergeant Purcell said he next called appellant on June 12, 2013, but she did not answer and he left a message. He called her again on June 13, she did not answer,

and he again left a message. Appellant returned his call in the afternoon of the 13th. Appellant again complained that there were too many questions on the test and the questions were too personal. Appellant also told him she had car problems. He told her that her future employment was at risk. He said appellant said she understood.

Sergeant Purcell said he ultimately charged her with disobeying an order pursuant to the Department's rules and regulations Chapter 18:14.

Sergeant Purcell acknowledged that Exhibit R-1 was his written report of the events that led to appellant's dismissal from the Department. R-1 was admitted into evidence without objection.

Under cross-examination Sergeant Purcell stated that prior to 2013 he had no interaction with appellant—his first contact was on or about March 2013.

He acknowledged that the notice provided to appellant about reporting to the psychological fitness for duty evaluation did not say how long the test would be.

Appellant never notified him or his office that she was not and did not appear for the first scheduled fitness for duty exam scheduled for May 9, 2013. The department had to pay for that evaluation although appellant did not appear.

He reiterated that he told appellant on June 6 that there would be negative repercussions if she did not complete the psychological fitness for duty evaluation.

Civilian employees do not need to take a psychological fitness for duty evaluation prior to initial employment.

Lt. Lillian Carpenter

Lieutenant Carpenter is employed by the City of Newark Police Department-Medical Services Division. She has been employed by the City for twenty-four years. While in the Medical Services Division she became familiar with the appellant.

Cpt. Ronald Kinder was her boss and in charge of the Medical Services Department.

Lieutenant Carpenter testified that initially appellant was out on family leave to take care of her son. Her family leave started October 12, 2012, and she was scheduled to return on November 16, 2012. However, appellant returned to work early on November 4, 2012. When appellant returned from her family leave she worked a few days and then she called out sick due to stress on November 10-11, 2012.

Lieutenant Carpenter said she spoke to appellant asking her to sign a HIPPA release form so she could get the medical information from her treating doctor. She also told appellant that she needs a psychological evaluation before returning to work because she had booked off for stress. Lieutenant Carpenter said that initially appellant was uncooperative and did not want to sign the HIPPA release form. However, after she explained why it was necessary appellant signed the release. The release was signed on March 13, 2013. (See Exhibit R-6.)

Lieutenant Carpenter stated that appellant was scheduled twice for the psychological fitness for duty evaluation and both times appellant did not comply. Employees can see their own personal doctors for treatment but before they can come back they must be examined by their independent psychologist, the same goes for a physical injury.

Under cross-examination, Lieutenant Carpenter testified that when an employee books off for stress her department requires that the employee undergo a psychological fitness for duty evaluation.

Lieutenant Carpenter was told by appellant that her treating doctor was Paula Sociedad, Ph.D. She said she spoke to Dr. Sociedad and asked her for an authorization for appellant to return to work.

Her department had difficulty contacting the appellant.

Azalia Rivera

Azalia Rivera testified that she was hired by the City of Newark Police Department in April 2007, as a communications clerk. She was responsible for answering a high volume of calls for the police, fire, and emergency medical services department. She did not take a pre-employment physical or psychological exam. She stated that the job was very stressful.

She took a leave of absence from October 11 through November 16, 2012, because her son broke his arm. (See Exhibit P-2 and 3.) However, she returned to work twelve days early on November 4, 2012. (See Exhibit P-4.) She worked the 11:00 p.m. to 7:00 a.m. shift. Her actual first day of work was on November 8, 2012.

Rivera explained that November 8 to 9 was actually her first and last day of work because she never returned after that day when her shift was over. She said she was scheduled to work on November 9 at 11:00 p.m., but called and booked off sick because the day before the officers complained about her job performance and her personal appearance. She called Officer Velez and told him she was booking off due to stress.

Appellant acknowledged that Officer Velez told her that when she books off due to stress she would need a psychological fitness for duty evaluation before she can return to work. She spoke with Lieutenant Rubeck who also told her she will need a psychological fitness for duty evaluation before returning to work. She furthered that

she then began to see Dr. Sociedad and saw her for about four weeks. She said Dr. Sociedad found her fit to return to work on December 4, 2012. (See Exhibit P-5.)

Between early January 2013 and May 2013, she called her department once.

In December 2012, the department gave her a HIPPA form to sign so they could contact Dr. Sociedad but she did not sign it because she did not know what it was for. She then asked Dr. Sociedad to explain the HIPPA form and that was when she understood and signed the form on March 13, 2013. (See Exhibit R-6.) She last saw Dr. Sociedad in December 2012.

Rivera explained that the Newark Police Department did not accept Dr. Sociedad's letter claiming they needed more information. She said she provided another note from Dr. Sociedad but that the department still would not accept it. By January 2013, she realized that the department was not going to accept anything from Dr. Sociedad. She then stated that not until she received the first notice to take a fitness for duty exam on May 9, 2013, did she know that the evaluation had to be done by the city's doctor.

Rivera testified that she went to the testing center in Oakland, New Jersey on June 6, 2013. She stated no one told her the exam was fitness for duty; no one told her it was required; and no one told her what would happen if she did not take the exam.

Rivera said she was uncomfortable in the small testing room and it was filled with men. She said it was about thirty people in a very small room; she anticipated being in a room by herself. She completed the forms but was uncomfortable answering all sorts of personal questions with men sitting around her. She went in and out of the room twice. At one point she was motioned to take a call from Sergeant Purcell. She spoke to him and it was then that she was told the exam would take all day. She said after she spoke with Sergeant Purcell her mother called telling her she had no one to watch her son after school. She called several family and friends but no one could help her.

It took her about thirty minutes to determine that she had no child care. She left the center about 12:30-1:00p.m.

Several days later she spoke with Sergeant Purcell. She explained that she had no child care that afternoon and had to leave the testing center. She did not ask to reschedule the evaluation. She said Sergeant Purcell told her on June 13, 2013, that she could not return to work until she got a psychological fitness for duty evaluation.

She spoke with Lieutenant Rubeck a few days later and after that conversation she anticipated that the city would reschedule the fitness for duty evaluation again; but no one did.

Under cross-examination appellant testified that on June 6, 2013, she told Sergeant Purcell she was uncomfortable with the questions in the evaluation. She complained to Sergeant Purcell that she had to answer a lot of personal questions. During her initial conversation with Sergeant Purcell she did not tell him she had a child-care problem. She said she did not tell Sergeant Purcell anything about her child-care problems on June 13, 2013, because he was reprimanding her.

She said she did not call the department after June 6, 2013, to reschedule. She called Sergeant Purcell after she missed the May 9, 2013, test to reschedule.

She never called Sergeant Purcell and she never told anyone at the testing center that she had to leave abruptly because she had child-care problems.

On November 8-9, 2012, she left after completing her shift because she felt uncomfortable and stressed. She called the next day to return to work but Officer Velez told her she needed to see the doctor first.

Documentary Evidence

Exhibit R-7 was introduced and admitted into evidence without objection. This document was authored by Captain and Commanding Officer Ronald Kinder of the Medical Services Division on January 14, 2013. A reading of this exhibit shows that Lieutenant Carpenter received the note from Dr. Sociedad but she needed more details about Rivera's current state. The document states and confirms Lieutenant Carpenter's testimony that she reached out to Rivera and Dr. Sociedad several times but could not get more details.

R-7 also indicates that on January 10, 2013, Captain Kinder explained to Rivera in a telephone conversation that she needed to sign a HIPPA release so the department could get her medical information and that Rivera refused to sign a release stating her medical information was private.

R-7 also shows Rivera's "out sick" history. It shows she had a very poor "out sick" record. In 2010, she was out sick twelve times for a total of sixteen days lost, in 2011 she was absent seventeen times for a total of twenty-and-a-half days lost, and in 2012, she was absent twenty-eight times for a total of eighty-three days lost, this includes thirty-four days due to the present issue. Of significance is a sustained complaint for A.W.O.L. in 2008.

This report concludes that Rivera had a poor attendance record and a poor disciplinary record. But the report also recommends that she be evaluated by a departmental psychologist or Dr. Sociedad provides the department a complete psychological history.

ARGUMENTS OF THE PARTIES

Appellant argues that she always represented an interest to return to work. That she was not responsible for the delays in getting the psychological fitness for duty evaluations. And, lastly that she was terminated without just cause.

Respondent argues that appellant failed to follow an order that was given pursuant to the department's policy, rules and regulations and that once an employee books off due to stress he/she cannot return to work without first undergoing a psychological fitness for duty evaluation. Respondent presents that appellant knew as early as November 2012, that because she booked off sick due to stress she had to undergo a psychological evaluation before returning to work.

FINDINGS OF FACT

In an appeal such as this, where a disciplinary action resulted in the termination of employment, the appointing authority has the burden of proving the charges upon it which relied on by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). Precisely what is needed to satisfy this standard must be determined on a case-by-case basis. 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).

Where facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings. Credibility is the value that a finder of fact gives to a witness's testimony. It 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). There is no mechanical formula to determine the truth to the extent it can be discerned, and many factors may be considered and weighed. Corroboration, knowledge, and common experience also play a role in assessing credibility. Credible testimony must be credible in itself.

Having considered the testimony of the witnesses and the documentary evidence presented, I **FIND** Azalia Rivera guilty of disobeying the order to complete a psychological fitness for duty evaluation on June 6, 2013.

I **FIND** Rivera knew as early as November 9-10, 2012, that if she booked off due to stress she would have to undergo a psychological fitness for duty evaluation before she could return to work. I **FIND** Rivera thwarted the department's efforts to get information about her mental state and readiness to return to work.

I **FIND** and it was undisputed that the job of a communications clerk—who answers calls for the police, fire, and emergency medical services department for the City of Newark—is very stressful. I therefore also **FIND** that respondent had good cause to demand that appellant undergo a psychological fitness for duty examination prior to returning to work.

I **FIND** Rivera incredible. Her testimony is contradictory, not rational, lacks internal consistency, and does not “hang together” along with the other testimony and documentary evidence. She says she always had an interest in returning to work and yet from November 2012 to March 13, 2013, she refused to sign the appropriate medical release forms. Appellant called her workplace once between December 2012 and June 2013. She delayed seven (7) days in returning Sergeant Purcell's call of June 6, 2013. She put up a series of objections for taking the examination and producing the medical information.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Civil Service employees' rights and duties are governed by the Civil Service Act and regulations pursuant thereto. N.J.S.A. 11A:1-1 to 11A: 12-6; N.J.A.C. 4A: 1-1.1. The Act is an important inducement to attract qualified people to public service and it is to be liberally applied toward merit appointment and tenure protection. However, consistent with public policy and civil service law, a public entity should not be burdened with an employee who fails to perform his or her duties as required by the appointing authority.

A request that an employee attend a psychological fitness for duty examination cannot be made lightly. The request for the examination must be reasonably related to

the individual's job duties. N.J.A.C. 4A:6-1.4(g) allows an appointing authority to require a medical examination as a condition of an employee's return to work after sick leave. Moreover, employers have been permitted to require psychological examinations in cases where an employee's fitness for duty is at issue in jobs that include special responsibilities. See In re Recine, CSV 834-97, Initial Decision (January 26, 1998), <http://njlaw.rutgers.edu/collectios/oal/>. In this case it is clear that respondent's policy rules and regulations required a psychological fitness for duty evaluation once an employee booked off due to stress. It is clear from appellant's testimony that she knew of this rule. It is clear from appellant's own testimony that she was stressed and that the job was stressful.

An employee's prior disciplinary history cannot be considered as evidence to establish new and different charges. However, the doctrine of progressive discipline permits consideration of an employee's prior disciplinary history to calculate a penalty. W. New York v. Bock, 38 N.J. 500 (1962).

Therefore taking into consideration appellant's prior disciplinary history as outlined in Exhibit R-7. Appellant has a poor attendance record and one sustained complaint for being absent without leave. I therefore **FIND** that respondent's termination of appellant is warranted and appellant clearly failed to follow her superior's order to take a psychological fitness for duty evaluation twice.

Based on the above findings and the applicable law and regulations, I **CONCLUDE** that the respondent City of Newark Police Department has met its burden of proof and that Communications Clerk Azalia Rivera failed to follow a lawful order and her termination was proper.

ORDER

For the reasons stated above, I hereby **ORDER** that the removal of Azalia Rivera by the City of Newark Police Department is **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.

July 23, 2015
DATE



CARIDAD F. RIGO, ALJ

Date Received at Agency:

July 23, 2015

Date Mailed to Parties:

JUL 24 2015



DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

APPENDIX

WITNESSES

For Appellant:

Azalia Rivera

For Respondent:

Lt. Lillian Carpenter

Sgt. Fiore Purcell

EXHIBITS

For Appellant:

P-1 Notice to take Psychological Fitness for Duty Evaluation May 9, 2013

P-2 Doctor's note for family leave for her son dated October 2, 2012

P-3 Request for family leave dated October 5, 2012

P-4 Return Back to Work Notice dated November 4, 2012

P-5 Note from Dr. Sociedad dated December 4, 2012

For Respondent:

R-1 Appellant's Investigation Report

R-2 Newark Police Department Rules and Regulations

R-3 Revised Newark Police Department Rules and Regulations

R-4 Notice to take Psychological Fitness for Duty Evaluation dated June 6, 2013

R-5 Appellant's employment record

R-6 Authorization to Disclose Health Information (HIPPA) dated March 3, 2013

R-7 Report dated January 14, 2013, from Medical Services Division