

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 29th DAY OF JULY, 2020



Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
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 03063-18

AGENCY DKT. NO. 2018-2473

**IN THE MATTER OF LUIS SUAREZ,
MIDDLESEX COUNTY SHERIFF'S OFFICE.**

Catherine M. Elston, Esq., for appellant (C. Elston & Associates, LLC, attorneys)

Kyle J. Trent, Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy,
P.C., attorneys)

Record Closed: June 4, 2020

Decided: June 25, 2020

BEFORE **SARAH G. CROWLEY, ALJ**:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant Luis Suarez (appellant) is a Sheriff's Officer with the Middlesex County Sheriff's Department. On October 20, 2017, he was served with Preliminary Notice of Disciplinary Action (PNDA) for violations of rules and regulations related to calling out sick when he was not sick and attending an event out of town. He was given a ten-day suspension for the violations. A departmental hearing was conducted on December 19, 2017. On February 16, 2018, a Final Notice of Disciplinary Action (FNDA) was issued upholding the discipline and imposing a ten-day suspension. An appeal was filed, and the matter was transmitted to the Office of Administrative Law and as a contested matter

on February 28, 2018. The hearing was conducted on October 7, 2019, and October 19, 2019, written submissions and replies were filed by the parties on May 6, 2020. The record closed after post-hearing submission were filed on June 4, 2020.

TESTIMONY AND FINDINGS OF FACT

For respondent:

Sergeant Bruce Palomba is in charge of the Detective Bureau which includes Internal Affairs for the Middlesex County Sheriff's Department. He has been employed with the Sheriff's Department for over twenty years. He explained that the Sheriff's office is responsible for the courthouse security and prisoner transportation to and from the County jail. In addition, they serve subpoenas and warrants, and do investigations. They are considered a para-military law enforcement organization. He conducts internal affairs investigations or assigns them to one of the detectives working for his department.

Sergeant Palomba conducted the investigation of Sergeant Suarez in September of 2017. The appellant had recently been promoted to Sergeant and assigned to a weekend shift. He was to work Sundays and Mondays, starting at 11:00 p.m. on Saturday night and then he was assigned three days to the courthouse. He called out sick on Saturday, September 16, 2017. They received a report from someone that he was not sick and had been seen at a wedding out of town. During the course of his investigation he confirmed that the appellant was at a wedding in Sea Bright, New Jersey and was not home sick.

Sergeant Palomba identified the Rules and Regulations for Middlesex County Sheriff's Office and identified the rules relating to calling out sick, reporting and providing your place where you will be while sick. You are to report to your shift commander within an hour of your shift and report your place of confinement. When you provide a place of confinement, you are required to be there unless you have to go to the doctor. Every Officer receives a copy of the rules and regulations and takes an oath to abide by the rules. The appellant received the rules and regulations.

Sergeant Palomba played the audio tape of appellant calling in sick and advising that his place of confinement was his home at 88 Buttonwood Drive in East Brunswick, New Jersey. He spoke to Sergeant Fircano when he called in. As a result of his call in, someone else had to be called in to work overtime, and that officer would be paid at a higher rate. In connection with his investigation he conducted several interviews, including the appellant. He confirmed that the appellant was not sick and was not at home. He was aware that he did try to make a shift change and request time off, but he had just started in his new position and he was told that a shift change was not possible because it would have put the person who he wanted to change with into overtime status and that was not permitted.

When he interviewed appellant, he admitted that he was not sick and had attended a wedding out of town and was not confined at his home. Sergeant Palomba identified his report which concluded that he had called in sick when he was not sick and was charged with violating standards of conduct, conduct unbecoming, and truthfulness. He submitted to undersheriff Harris for his review, and it is Undersheriff Harris who makes the recommendation to the Sheriff regarding discipline. He was questioned on cross examination about any mitigating factors which may have been present and he said he did not find any. In terms of using vacation or a personal day, he questioned appellant about using such time and he advised that he had a prepaid vacation in November and December and did not want to use that time to attend the wedding.

Undersheriff Kevin Harris is employed by Middlesex County Sheriff's Office and has been employed there for eight years. Prior to that, he was a police officer with the Piscataway Police Department for over twenty-five years. As undersheriff he oversees the operations, administration internal affair and anything else the sheriff gives him. He makes recommendations to the Sheriff about discipline, but the Sheriff ultimately decides what the final discipline is. He was familiar with the appellant and advised that he was just promoted to a Sergeant and was still in his ninety-days working test period when the infraction occurred. The Sheriff asked to investigate an allegation that he called in sick and was not sick and confined at his home. He called Sergeant Palomba and assigned the case to him. He identified the report from Palomba of the investigation and the conclusion. He agreed with the findings in the investigation and submitted a report to the

Sheriff recommending discipline. The PNDA was identified, which included several violations of rules and regulations as well as civil service rule violations. The Sheriff agreed with the recommendation and signed the PNDA which imposed a ten-days suspension.

The PNDA, dated October 20, 2017, and provides as follows:

Prior to 9-16-17, you requested your 9-16-17 shift off, which request was denied by your lieutenant. Thereafter, you requested to switch your 9-16-17 shift, which was denied by Capt. Pepenella.

In the afternoon of 9-16-17, you called Sgt. Fricano to give him a "heads up" that you were going to call out sick for your shift that night.

At approximately 18:13 on 9-16-17 you called out sick from your 11pm-7am shift that evening and gave your place of confinement as 88 Buttonwood Dr, E. Brunswick NJ. Thus, you did not report to work as scheduled.

That night you actually attended a wedding in Sea Bright. You admitted that you were untruthful, and that you were sick and were untruthful about your place of confinement. Your absence caused overtime.

Undersheriff Harris was questioned about a memo dated December 6, 2017,¹ from the Sheriff regarding notification that appellant did not pass his working test period. He advised that the petitioner was demoted after his working test period. However, that demotion was not part of the ten-days suspension, which was served on the petitioner in October, prior to the expiration of his working test period. After a departmental hearing, a Final Notice of Disciplinary Action (FNDA) was issued on February 15, 2011, sustaining the following charges:

- Standard of Conduct R&R 3:1.1

¹ The appellant sought to challenge the demotion in this matter. The undersigned declined to include issues relating to the demotion, which were not part of the FNDA which was transmitted. The appellant filed an interlocutory appeal of that denial which was affirmed by the Civil Service Commission, who ruled that any issues related to the demotion were not part of the FNDA and the undersigned had no jurisdiction to hear that issue.

- Truthfulness R&R 3:13.5
- Feigning Illness R &R 4:3.4
- Address of Confinement: R&R 4:3.2
- Absence from Duty: R&R 3:7.2
- Conduct Unbecoming a Public Employee 4A:2-2.3(a)6
- Neglect of Duty 4A:2-.2.3(a)7
- Other Sufficient Cause 4A:2-2.3(a)12 (abuse of Sick Leave)
- Neglect of Duty R&R 3:1-6

The FNDA was served on February 15, 2018, and the appeal followed.

For petitioner:

Chantel Church is a sheriff's officer with the Middlesex County Sheriff's Department. She was permitted to testify over the objection of the County on this issue of disparate treatment. On one occasion, she had requested a personal day that was denied, and then called in sick when she was not sick. She was given a written reprimand for misuse of sick time and had to use a vacation day. There was no investigation conducted but she conceded her guilt immediately. Her disciplinary record was not moved into evidence, nor was any other evidence regarding the circumstances surrounding the infraction.

Javon Hodges was also sheriff's officer for Middlesex County Sheriff's Department before he transferred to Bergen County. He was not an officer, and was disciplined in March of 2017, for calling in sick when he was not sick. He called in sick when he had overslept. He received a one-day suspension and had to use a personal day. He was not aware of whether they had to pay someone overtime to cover his shift. Neither his disciplinary record nor evidence regarding the circumstances surround the infraction were provided.

Sergeant Kelvin Jensen was working at the Middlesex County Sheriff's Department at the time of appellant's infraction. He recalled when Suarez asked him to

make a shift change with him in September 2017. He agreed to do it, but it was not approved because it would have resulted in him going into overtime status that week. He does not specifically recall whether Detective Palomba asked him such questions about the incident, but he knew Palomba and talked to him about various things.

Officer Luis Suarez (appellant) has worked for the Middlesex County Sheriff's Department for ten years. He has had no other discipline. He was promoted in September of 2107 to Sergeant, which resulted in a change in his shift. He had already accepted an invitation to attend a wedding on September 16, 2017, so he tried to make a shift change with someone. Unfortunately, it was denied because it would have resulted in that person having to work overtime. He had scheduled vacation and personal time in November and December and no more time left. His vacations in November and December were prepaid. There was no evidence submitted of the prepaid vacation and the inability to modify these plans. He testified that he called earlier to give them a heads up that he was going to call in sick. He does not dispute that he called in sick and provided his home as the place of confinement when he was not sick and attended a wedding out of town.

FINDINGS OF FACT

In order to make findings of fact in the present case where the evidence is disputed, the court must make credibility determinations. Testimony, to be believed, must not only proceed from the mouth of a credible witness, but it must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954). Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I **FIND** that all of the witnesses were sincere and credible, and I **FIND** the following as **FACT**:

1. Appellant is a sheriff's officer for Middlesex County Sheriff's department. He was a Sergeant at the time of the infraction, having been recently promoted.
2. The appellant was scheduled to work the 11:00 p.m. to 7:00 a.m. shift on September 16, 2017.

3. Prior to that date, appellant made a request for a shift change, which was denied due to the person he asked to change with would have to work overtime to cover this shift. He made no other efforts to find a replacement.
4. On September 16, 2017, the appellant called in sick at approximately 18:13, and gave his place of confinement as his home address at 88 Buttonwood Drive, East Brunswick, New Jersey.
5. The appellant was not sick and attended a wedding in Sea Bright, New Jersey that evening.
6. The appellant had personal and vacation time remaining in November and December.

LEGAL ANALYSIS AND CONCLUSIONS

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2. In an appeal from such discipline, the appointing authority bears the burden of proving the charges by a preponderance of the credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). In re Polk License Revocation, 90 N.J. 550, 560 (1982); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

The appellant has been charged with violating the standard of Conduct, 3:1.1; Truthfulness R & R 3:13.5; Feigning Illness R & R 4:4.3; Address of Confinement, 4:3.2; Absence from Duty R & R 3:7.2; Conduct Unbecoming a Public Employee 4A:2-2.3(a)6; Neglect of Duty 4A:2.2(a)7; Other Sufficient Cause 4A:2.2.3(a)12 (abuse of Sick leave) and Neglect of Duty R & R 3:1.6. All of the charges stem from the appellant's call in sick on September 16, 2017, when he was not sick. The appellant does not contest that he

was not sick and was not confined to the address that was provided. Appellant concedes that he attended a wedding out of town.

Conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6) is an elastic phrase, which 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 Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. 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, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). The Department has proven by a preponderance of the evidence that the appellant called in sick and reported he was infirmed at his home when he was in fact out of town at a wedding. The Department has also proven by a preponderance of the credible evidence that appellant violated standards of conduct, truthfulness, absence from duty, neglect of duty, feigning illness, and other sufficient cause (abuse of sick leave). Accordingly, I **CONCLUDE** that all of the charges are sustained.

PENALTY

When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and “penalty” on appeal, based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); W.N.Y. v. Bock, 38 N.J. 500 (1962). This is a hearing de novo so it is the obligation of the factfinder to determine penalty, which the Civil Service Commission can then accept, reject, or modify. It is not necessary to have the witness who recommended the penalty testify when the nature of the offense and the prior record of the appellant are the main factors in the penalty determination. Where appropriate, concepts of progressive discipline involving penalties of increasing severity are used in imposing a penalty and in determining the reasonableness of a penalty. W.N.Y. v. Bock, 38 N.J. at 523–24. Factors determining the degree of discipline include the employee’s prior disciplinary record, the gravity of the instant misconduct, and any aggravating or mitigating factors.

The appellant argues that the penalty of ten-days is too severe for the offense in question. He further argues that others guilty of similar offenses were treated less severely. Although the appellant had no prior discipline, he was an officer and in law enforcement and such, was appropriately held to a high standard. In addition, the disciplinary records of the other two individuals who were given a lesser penalty were not entered into evidence. It is undisputed that they were not officers, as the appellant in this matter was. In addition, the appellant has not demonstrated that he is a member of protected group, and the other nonminority employees involved in acts of comparable seriousness and having comparable prior records, were treated favorably. See Johnson v. East Jersey State Prison, 92 N.J.A.R.803(1992). Accordingly, I conclude that the appellant has not demonstrated disparate treatment.

In considering aggravating and mitigating factors, I find the fact that appellant had personal and vacation time, that he chose not to use an aggravating factor. I also find the fact that he tried to get a shift change from one person and went to no other efforts to find a replacement further, aggravation of the offense. Finally, the fact that someone had to work overtime when he called in sick is further aggravation. The appellant has submitted several documents and letters of commendation for Officer Suarez. No one disputes that he was a good officer and thus, had received a promotion. However, I find no mitigating factors present in the circumstance surrounding the infraction at issue. Based on the severity of the offense, I **CONCLUDE** that the penalty of a ten-days suspension is appropriate and is hereby **AFFIRMED**.

ORDER

I **ORDER** that the action of the respondent Middlesex County Sheriff's Office in imposing a ten-days suspension is hereby **AFFIRMED**, and the appeal is **DISMISSED**.

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.



June 25, 2020

DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency:

June 25, 2020

Date Mailed to Parties:

June 25, 2020

SGC/cb

APPENDIX

WITNESSES

For appellant

Chantel Church
Officer Javon Hodges
Sergeant Kelvin Jensen
Officer Luis Suarez

For respondent

Sergeant Bruce Palomba
Undersheriff Kevin Harris

EXHIBITS

For Appellant

- P-1 Internal Affairs Policy and Procedure
- P-2 Appeal Package, dated February 20, 2018
- P-3 Appeal Package, dated February 22, 2018
- P-4 Progressive Evaluation Reports, November 2016 – October 2018
- P-5 Discovery Letter, October 24, 2017
- P-6 Transcript of departmental hearing
- P-7 ???
- P-8 Letters and documents in support of appellant

For Respondent

- A. PNDA
- B. Notice of demotion and the end of working test period
- C. FNDA
- D. MCSO Rules and Regulations
- E. Receipt Printout for Rules and Regulations
- F. Oath of Office

- G. Internal Affairs Investigation, dated September 28, 2017
- H. CD of audio of call out September 17, 2017
- I. MSCO call out list of September 17, 2017
- J. Internal Affairs Investigation Report, dated October 12, 2017
- K. Memo from Undersheriff Harris to Sheriff Scott, dated October 13, 2017