

A-9



STATE OF NEW JERSEY

In the Matter of
Mallory Suarez
Hudson County
Department of Corrections

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC DKT. NO. 2014-2473
OAL DKT. NO. CSV 05424-14

ISSUED: December 17, 2014 PM

The appeal of Mallory Suarez, a County Correction Officer with Hudson County, Department of Corrections, 10-day suspension, on charges, was heard by Administrative Law Judge Joan Bedrin Murray, who rendered her initial decision on November 21, 2014. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on December 17, 2014, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

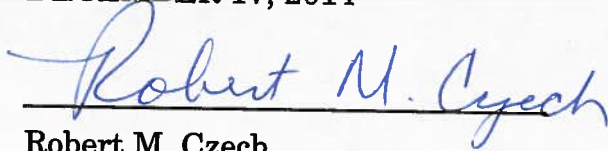
ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was justified. The Commission therefore affirms this action and dismisses the appeal of Mallory Suarez.

Re: Mallory Suarez

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
DECEMBER 17, 2014

A handwritten signature in blue ink, reading "Robert M. Czech", is written over 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
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attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 05424-14

AGENCY DKT. NO. 2014-2473

**IN THE MATTER OF MALLORY SUAREZ,
HUDSON COUNTY DEPARTMENT
OF CORRECTIONS.**

Merick H. Limsky, Esq., appearing for appellant Mallory Suarez (Loccke, Correia, Limsky & Bukosky, attorneys)

Daniel W. Sexton, Esq., Assistant County Counsel, appearing for respondent, Hudson County Department of Corrections (Donato J. Battista, Hudson County Counsel)

Record Closed: October 3, 2014

Decided: November 21, 2014

BEFORE JOAN BEDRIN MURRAY, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Hudson County Department of Corrections ("Respondent" or "County") suspended Mallory Suarez ("Appellant" or "Suarez"), County Correction Officer, for a period of ten days beginning April 13, 2014 for failing to report for duty or "call off"¹ duty

¹"Call off" is the term used when an employee calls in to advise that she will not be reporting to duty for a particular shift.

on July 21 and July 22, 2013, resulting in her being marked as 'Did Not Report" (DNR) on both dates. Suarez does not dispute that she failed to call off on those two dates. Instead, she contends that she was not obligated to do so as she had requested an extension of her leave that ended on July 18, 2013, and the formality of calling off was not necessary due to the pending extension. At issue is whether Suarez had a duty to call off, and was thereby properly marked DNR on both dates; further, if so, whether her actions constitute insubordination and neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(2) and (7) so as to warrant a ten-day suspension by the County.

On July 26, 2013, the County prepared a Preliminary Notice of Disciplinary Action (PNDA) against appellant. After a departmental hearing, the County prepared a Final Notice of Disciplinary Action (FNDA) on April 8, 2014, suspending Suarez for ten days effective April 13, 2014. After Suarez requested a hearing on April 8, 2014, the Civil Service Commission transmitted the contested case, 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), where it was filed on May 2, 2014. The matter was heard on September 10, 2014 by the undersigned, and the record closed after the receipt of post-hearing submissions.

FACTUAL DISCUSSION AND FINDINGS

BACKGROUND

The following background facts are undisputed. Accordingly, I **FIND** them to be the **FACTS** of this case:

Suarez has been a Correction Officer with the County since March 2006. In April 2013, she requested and received an intermittent family leave that expired on May 22, 2013. She then applied for and received two additional leaves that required her to report back to work on July 19, 2013. On July 12, 2013, Suarez applied for an additional leave that was to commence on July 20, 2013. Since approval for this new leave was not granted as of July 20, 2013, Suarez's leave expired and she was placed on the line-up for the midnight shift on both July 21 and July 22. However, she failed to call in to work to advise that she would not be reporting for either shift.

As a result of Suarez's failure to call off on those two dates, she was marked DNR for each shift. The County's protocol is for a correction officer to call one hour before her shift starts to report that she will not be coming in to work. This gives the shift commander time to call the "voluntary list" of correction officers in order to get a replacement on duty. If the voluntary list does not yield a substitute, the "mandatory list" is used. When there is a DNR, however, there is no opportunity to utilize either list due to time constraints. Instead, the shift commander is forced to use one person to cover two posts simultaneously. Lt. Thomas Monteleone (Monteleone) is Suarez's supervisor, and the Unit Manager who is in charge of attendance. He explained that in the case of a DNR, it is necessary to use someone on a non-security post to cover both jobs. He further noted that a DNR is a disciplinary measure, unlike an "Absent-No Pay." When a correction officer has applied for a leave and it is pending, the officer's obligation is to call off until the leave is extended. When Monteleone called Suarez about the DNR's, she told him that she thought her leave had been extended, and didn't know that it expired on July 19, 2013.

To that point, a corrections officer has access to her schedule via the Corrections Officer Scheduling System (COSS), which is available around the clock by internet or any number of "smart" devices.

The leave that is at the heart of this matter was not Suarez's first. Since commencing employment with the County in 2006, she applied for and received leaves starting in 2007 and annually thereafter, with the exceptions of years 2011 and 2012. With regard to the 2013 leave, she took it in thirty-day increments from May to June, June to July, and July to August. For the leave in May, Suarez did call off while her application was pending per the directive of Monteleone. She was marked "Absent-No Pay" and the leave was later granted. She did not receive written notice that her leaves were granted in any of her applications, although each one was ultimately approved. For the last extension, Suarez requested her leave to begin July 20, 2013. Her medical certification (A-16), however, was not submitted to the personnel office until July 27, 2013, thereby rendering her application incomplete as of the dates of the DNR's.

TESTIMONY

The testimony of Suarez and Patricia Joyce, the County personnel official, concerning the details of the requested July 20, 2013 leave request is contradictory. They both recalled Suarez coming into Joyce's office on July 12, 2013 to request an extension. Joyce has worked in the personnel office for 17 years and has handled medical leaves for the past two to three years. Although the application had to be submitted ten working days before the end of her existing leave, Suarez gave only one week's notice. She testified that the reason she waited so long was because she had to wait for her doctor's appointment, and she saw him only once a week. In any event, Suarez testified that she filled out the application form and handed it to Joyce. Although she still had to submit the certificate from her physician, she maintains that Joyce told her on the spot that "everything was good", and that she led Suarez to believe that her leave was granted. Further, Suarez stated that no one told her to check COSS, and that there is no obligation to check COSS to see if you are on the roster. Moreover, she did not know about COSS in July 2013. She did not own a computer or a smart phone. Her husband did not have a cell phone either. Her smart phone had broken some time back, and she went on leave and decided she did not want one. She assumed that her leave commencing July 20, 2013 was approved. She did not believe she had an obligation to call in to work to report that she would be absent. The only time she did call off was with her initial leave in May 2013, when Monteleone told her to call because she was on the midnight roster.

Joyce testified that when Suarez came in to her office on July 12, 2013, she gave her the paperwork to give to her doctor. Although Suarez did sign everything on that date, Joyce could not do anything with the application until the doctor's paperwork was returned to her, which occurred on July 27, 2013. According to Joyce, the "doctor's certificate is needed to make the leave official." It is the completion of the process and usually the last thing that comes in on an application. Joyce does not submit the application to her supervisor until that occurs. She refuted Suarez's testimony that she told her "everything was good", stating, "No, I had nothing yet...she just picked up the doctor's certificate on that date so no, I did not say that." In addition, Joyce stated that an applicant is not even "pending" until the doctor's certificate is submitted.

Joyce also stated that she normally advises applicants to call off pending their leave approval, although she did not recall if she advised Suarez to do this. She stated that this is necessary because for the most part, employees come in to her office close to their leave dates. Suarez's extension was subsequently granted from July 20, 2013 to August 31, 2013.

FINDINGS OF FACT

In view of the contradictory testimony presented by Suarez and Joyce, the determination of the charges against Suarez requires that I make credibility determinations with regard to the critical facts. 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. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). 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).

After carefully considering the testimonial and documentary evidence presented, and having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, I credit the testimony of Joyce rather than that of Suarez. Joyce testified clearly and concisely, and was firm in her rejection of Suarez's recollection of Joyce's words to her. She is a 17-year personnel employee. She easily and fluidly related that an application isn't even considered pending until the doctor's certificate is returned to her office. She credibly testified that she usually advises applicants to call off, but that she cannot remember if she told Suarez to do so. As such, I **FIND** that Joyce did not tell Suarez that "everything was good", or give her the idea that her leave was granted or pending during their meeting on July 12, 2013.

In contrast, I do not view Suarez's testimony as credible. She had a number of leaves prior to the one at issue and had been a correction officer for approximately seven years in 2013. She should have been well versed in the protocol for leave requests. In this instance, she allowed only one week between her request and the

expiration of her leave on July 19, 2013. Assuming that she didn't have internet access to check her schedule on COSS, it was her obligation to then telephone her supervisor to determine if she was on the roster for July 21 and July 22, 2013. However, the tenor of Suarez's testimony in this regard is clear. It was not lack of a computer that left her in the dark about being on the line-up on those two nights, but a somewhat careless attitude based on an assumption that her leave was granted. Based on the foregoing, I determine that Suarez's testimony is not as persuasive as that of Joyce, and cannot be deemed credible. I further **FIND** that the two DNR's that Suarez received were appropriate.

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, -20; N.J.A.C. 4A:2-2.2, -2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied 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); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

Appellant has been charged with insubordination and neglect of duty. "Insubordination" is not defined in the regulation. Assuming that its presence is implicit, courts generally apply its ordinary definition since it is not a technical term or word of art and there are no circumstances indicating that a different meaning was intended. Ricci v. Corporate Express of the East, Inc., 344 N.J. Super. 39, 45-46 (App. Div. 2001). Black's Law Dictionary (7th Ed. 1999) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." To give one other example, Webster's New International Dictionary 1288 (2d Ed. 1943) defines

insubordinate as "not submitting to authority; disobedient; mutinous." See also Jeffrey F. Ghent, J.D., Annotation, What Constitutes "Insubordination" As Ground for Dismissal of Public School Teacher, 78 A.L.R.3d 83 (1977); A.L. Schwartz, Annotation, Employee's Insubordination as Barring Unemployment Compensation, 26 A.L.R.3d 1333 (1969).

"Neglect of duty" is predicated on an employee's omission to perform, or failure to perform or discharge, a duty required by the employee's position and includes official misconduct or misdoing along with negligence. Clyburn v. Twp. of Irvington, CSV 7597-97, Initial Decision (September 10, 2001), adopted, Merit System Board (December 27, 2001), <http://lawlibrary.rutgers.edu/oal/search.html>; see Steinel v. Jersey City, 193 N.J. Super. 629 (App. Div. 1984), aff'd on other grounds, 99 N.J. 1 (1985).

Based on the foregoing, I **CONCLUDE** that the County has proven by a preponderance of the credible evidence that Suarez engaged in both insubordination and neglect of duty by failing to call off on July 21 and July 22, 2013, thereby placing her unit in a precarious situation and without recourse to a substitute officer.

The sole remaining issue concerns the penalty that should be imposed. When dealing with the question of penalty in a de novo review of a disciplinary action against a civil service employee, the Civil Service Commission is required to reevaluate the proofs and penalty on appeal based on the charges presented. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962). Depending on the conduct complained of and the employee's disciplinary history, major discipline may include removal, disciplinary demotion, suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.S.A. 4A:2-2.2, -2.4. 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. It underscores the philosophy that an

appointing authority has a responsibility to encourage the development of employee potential.

Suarez's employment record prior to July 21, 2013, consisted of four minor suspensions. The most recent suspension, which was for a period of five days, occurred in April 2013, just three months prior to the suspension in this matter. Like two of the other suspensions, the April suspension was for calling out sick without having sick time. In the instant matter, Suarez failed to report that she would be absent for two midnight shifts. Being marked DNR is a disciplinary measure and particularly in the context of a correctional facility, has the potential to affect the safety of the unit in question. Accordingly, I **CONCLUDE** that a ten-day suspension is warranted in this matter.

ORDER

It is hereby **ORDERED** that the charges by the appointing authority of insubordination and neglect of duty are **AFFIRMED**.

It is further **ORDERED** that the penalty of a ten-day suspension without pay is **AFFIRMED**.

It is also **ORDERED** that appellant's appeal be **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.

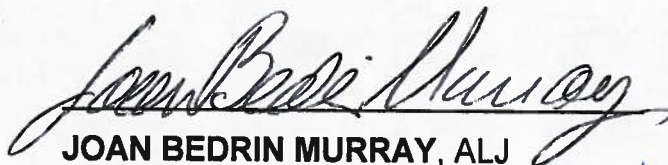
November 21, 2014

DATE

Date Received at Agency:

Date Mailed to Parties:

db


JOAN BEDRIN MURRAY, ALJ

November 21, 2014/87

November 21, 2014/87

APPENDIX

WITNESSES

For Appellant:

Mallory Suarez

For Respondent:

Lieutenant Thomas Monteleone

Patricia Joyce

EXHIBITS

For Appellant:

- A-1 Hudson County Leave Request dated April 15, 2013
- A-2 Hudson County Department of Corrections Notice dated April 15, 2013
- A-3 Notice of Eligibility and Rights & Responsibilities dated April 15, 2013
- A-4 Hudson County Leave Request Form dated May 23, 2013
- A-5 Hudson County Leave Request dated May 22, 2013
- A-6 Hudson County Department of Corrections Notice dated May 22, 2013
- A-7 Notice of Eligibility and Rights & Responsibilities dated May 22, 2013
- A-8 Hudson County Leave Request Form dated June 28, 2013
- A-9 Hudson County Leave Request dated June 28, 2013
- A-10 Hudson County Department of Corrections Notice dated June 28, 2013
- A-11 Hudson County Leave Request Form dated July 12, 2013
- A-12 Hudson County Department of Corrections Notice dated July 12, 2013
- A-13 Certification of Alan W. Schreiber, Ph.D. dated July 10, 2013
- A-14 Hudson County Leave Request dated July 12, 2013
- A-15 Notice of Eligibility and Rights & Responsibilities dated July 12, 2013
- A-16 Certification of Health Care Provider made by Alan W. Schreiber, Ph.D. dated July 27, 2013
- A-17 Letter from Alan W. Schreiber, Ph.D. to Hudson County Department of Corrections regarding Suarez's return to work, dated August 14, 2013

A-18 Notice of Eligibility and Rights & Responsibilities dated June 28, 2013

A-19 Hudson County Leave Request Form dated April 16,

For Respondent:

R-1 Preliminary Notice of Disciplinary Action (PNDA) dated August 22, 2013

R-2 Hudson County Department of Corrections View Activity Report for Mallory Suarez dated July 22, 2013 and July 21, 2013

R-3 Hudson County Department of Corrections Custody Staff Rules and Regulations Manual dated December 2009

R-4 County of Hudson Employee Profile for Mallory Suarez dated September 27, 2013

R-5 Final Notice of Disciplinary Action (FNDA) dated April 8, 2014