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STATE OF NEW JERSEY

In the Matter of Colby Adams
City of Newark
Police Department

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC DKT. NO. 2013-3549
OAL DKT. NO. CSV 09458-13

ISSUED: August 13, 2014 PM

The appeal of Colby Adams, a Police Officer with the City of Newark, Police Department, of his six month suspension, on charges, was heard by Administrative Law Judge Michael Antoniewicz, who rendered his initial decision on July 18, 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 August 13, 2014, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

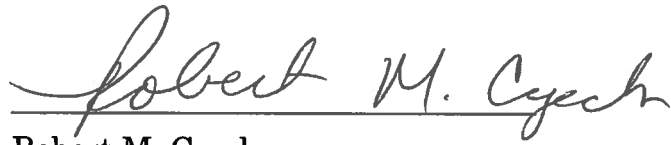
ORDER

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

Re: Colby Adams

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 13, 2014

A handwritten signature in dark ink, reading "Robert M. Czech", written over a horizontal line.

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
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attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 09458-13

AGENCY DKT. NO. 2013-3549

**IN THE MATTER OF COLBY ADAMS,
CITY OF NEWARK POLICE DEPARTMENT.**

Alfred V. Gellene, Esq., for appellant Colby Adams (Law Offices of Fusco & Macaluso Partners, attorneys)

Kenneth G. Calhoun, Assistant Corporation Counsel, for respondent City of Newark (Karen Brown, Corporation Counsel)

Record Closed: June 4, 2014

Decided: July 18, 2014

BEFORE **MICHAEL ANTONIEWICZ, ALJ**:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The City of Newark Police Department (Department) imposed a suspension of six months on police officer Colby Adams for: (1) incompetency, inefficiency or failure to perform duties; (2) chronic or excessive absenteeism; (3) chronic inefficiency or incompetency; and (4) other sufficient cause, for abuse of sick leave. The Civil Service Commission (Commission), under N.J.A.C. 4A:2-2.3(a)(4), recognized the imposition of major discipline for these infractions. At issue is whether Officer Adams engaged in the

alleged conduct and, if so, whether it constitutes an action for which a penalty of a suspension of six months is warranted.

By Preliminary Notice of Disciplinary Action, dated May 10, 2013, the Department proposed to remove Officer Adams. On June 11, 2013, he was served with a Final Notice of Disciplinary Action sustaining all charges and suspending Officer Adams for six months from August 1, 2013, and ending January 31, 2014. On June 12, 2013, appellant filed an appeal with the Commission. Subsequently, the matter was transmitted to the Office of Administrative Law, where it was filed on July 2, 2013, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A hearing was held on April 10, 2014. Upon receipt of post-hearing briefs, the record closed on June 4, 2014.

FACTUAL DISCUSSION

The following is undisputed and is, therefore, I **FIND** as **FACT**.

1. Police Officer Colby Adams during early 2013 was assigned to the Prisoner Processing Division.
2. As part of his assignment, Lt. Robert L. Lockett (Lockett) initiated an investigation of Officer Adams because of continued calling out sick for an additional ten days (since being placed on medical certification and had not illustrated improvement).
3. Officer Adams, based on his record of sick time taken, was placed on Medical Certification.
4. In addition, Officer Adams while placed on Medical Certification, took ten days of sick time which resulted in eleven days of missed work. (R-5.)

5. Officer Adams was previously counseled on February 7, 2012, on his use of sick time and it was this counseling that lead to him being placed on Medical Certification.
6. Officer Adams was previously placed on Medical Certification for a separate incident after being counseled on his use of sick time. From March 4, 2012, through November 17, 2012, Officer Adams took off fifteen times resulting in twenty-four missed days of work. (R-9.)
7. In 2006, Officer Adams was placed on Medical Certification because even after being counseled for his excessive abuse of sick time leave, his attendance did not improve and, in fact, he took off sick an additional eight days.
8. Officer Adams was charged with violation of the Newark Police Department Rules and Regulations, Chapter 18:29.1 official inefficiency, and was suspended six weeks. His Medical Certification was then extended another six months. (R-3.)
9. Officer Adams attributed his book offs to an off-duty car accident in which he was struck by a taxi, which was supported by a note from his chiropractor stating that he had undergone physical therapy and treatment due to the accident.
10. Despite the fact that Officer Adams stated that many of his absences were due to complications he suffered because of the physical working conditions in the unit where he was assigned, he failed to provide a record of grievances, files, or complaints to his superiors. In addition, Officer Adams failed to present evidence from a physician or medical professional attesting to the complications suffered by him as related to his working conditions.

TESTIMONY**Lt. Robert L. Lockett**

Lt. Robert Lockett (Lockett) is employed by the Newark Police Department for twenty-five years. Lockett became aware of Officer Adams's sick time issue and created a report (R-4) dated April 24, 2013. According to Lockett's report, "Officer Adams was counseled on February 7, 2012 about his sick time." From March 4, 2012, to November 17, 2012, after counseling, Officer Adams continued to book off. Specifically, fifteen separate incidents of "book offs" resulted in a total of twenty-four total days missed for that time period. As a result of his continuing to call out sick, Officer Adams was placed on Medical Certification on November 20, 2012, under Chief of Police Memorandum number C.O.P. 12-379. Since being placed on Medical Certification, Officer Adams has continued to call out sick an additional ten days. He has not illustrated improvement in the use of his sick time as outlined in General Order #94-4 "Sick Leave Policy and Procedures" Section E. (R-4.)

Lockett stated that even after being placed on Medical Certification, Officer Adams continued to call out sick. Counseling provided the employee with an in-depth explanation of sick leave, an education of the policy, the Department's expectation regarding sick leave and provided the employee with a re-education of the policy. After counseling, while on Medical Certification, the employee would be closely monitored and would not be allowed any outside employment.

On April 17, 2012, Officer Adams was placed on Medical Certification. On May 8, 2013, Lockett created an Investigative Submission. (R-5.) On February 7, 2012, Officer Adams was counseled with regard to his sick time. After being on Medical Certification, Officer Adams took ten more sick days (including seven weekend sick days, i.e., January 12 and 13, 2013; February 9 and 17, 2013; and March 1, 7 and 8, 2013, which reflects a pattern that the days he took as a sick usually lead into a weekend. Excessive taking of sick days makes it difficult for the City of Newark to manage its employees and staffing. This leads to the City being short-staffed and adds

to the expense of maintaining such staff. In addition, a police officer's attendance is critical to ensure the safety of the public and also to ensure the safety of the Department's own members. When an officer does not appear at work on his/her assigned date, the staff who appears at work must share the workload in order to make up for the missing officer. In many cases, the police officers who appear have to work overtime in order to cover shifts at extra costs to the City. Lockett testified that Officer Adams's absences had an adverse impact on the operation of the Department.

Officer Colby Adams

Officer Colby Adams (Adams) has been a police officer for Newark for seventeen years. From 2012-2013 Adams was assigned to the cell block. Adams testified that he suffers from asthma, which he had for some time prior to his employment and received medical treatment. Adams stated that the condition comes and goes and that in order to treat it he takes medication and uses an inhaler. Both treatments help control the symptoms to a certain extent. Adams further stated that in the past, he went to work with asthma, however, when the symptoms got worse, he would call out sick. It was his belief that when he went into the jail area, his conditions worsen. No medical documentation was supplied by Adams in support of same.

In addition, Adams was in a car accident on January 21, 2013, where he was struck by a taxi cab. As a result of the car accident, Adams received medical attention. He went three times a week to a chiropractor commencing in April 2013. Adams also received physical therapy for the injuries sustained in the accident.

Adams was out of work for the following reasons on the following dates: March 1 and 26, 2013, for asthma; and April 6 and 21, 2013, for shoulder and neck pain due to the auto accident. Adams stated that he would have good and bad days, but the bad days were real bad days and he went to work when he could. When he booked out, he stated that no one asked for a note until charges were filed. When he went back to work, he would oversee prisoners and records.

On cross-examination, Adams stated that he had asthma for the past two or three years of his seventeen years. Adams explained that he got asthma after working in the cell block for some time. He was unable to tell how many days he took off for asthma as he did not know. Adams also stated that when he was on Medical Certification, he was counseled, advised of his rights, his sick time was monitored and he was required to bring a note. Adams stated that he would bring in a note from a doctor or Union Hospital and provide it to his captain. Adams also admitted that he was on Medical Certification prior to this time due to sick time.

LEGAL DISCUSSION

The Civil Service Act, N.J.S.A. 11A:1-1 et seq., governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Service Ass'n v. Gibson, 114 N.J. Super. 576, 581 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). The Act sets forth that State policy is to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). To carry out this policy, the Act authorizes the discipline (and termination) of public employees. N.J.S.A. 11A:2-6.

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 and N.J.A.C. 4A:2-2.3. The general causes for such discipline are set forth in N.J.A.C. 4A:2-2.3(a). 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, 149 (1962); In re Polk, 90 N.J. 550, 561 (1982).

The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 275 (1958). Therefore, the judge must “decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth.” Jackson v. Delaware, Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). 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) (citations omitted). Precisely what is needed to satisfy this burden must be judged on a case-by-case basis.

The reasons supporting disciplinary action must be sufficient and not arbitrary, frivolous or “likely to subvert the basic aims of the civil service program.” Prosecutor’s Detectives and Investigators Ass’n v. Hudson County Bd. of Freeholders, 130 N.J. Super. 30, 42 (App. Div. 1974) (quoting Kennedy v. Newark, 26 N.J. 178, 189-90 (1959)).

The Department charged Officer Adams with chronic inefficiency or incompetency; failure to perform duties; conduct unbecoming a public employee; neglect of duty; and, other sufficient cause, all reasons stemming from discipline under N.J.A.C. 4A:2-2.3(a)(4), chronic or excessive absenteeism or lateness.

“Incompetency” is defined as “inadequate for or unsuited to a particular purpose or application; devoid of those qualities requisite for effective conduct or action.” Another definition is “not having or showing the necessary skills to do something successfully.”

“Inefficiency” has been defined as the act of being incapable or indisposed to do things required in a timely and satisfactory manner. Glenn v. Twp. of Irvington, CSV 5051-03, Initial Decision (February 25, 2005), adopted, (May 25, 2005), <http://njlaw.rutgers.edu/collections/oal/>>. Inefficiency, incompetence or failure to perform duties exists where conduct fails to meet, obtain or produce the effects or results intended for the necessary and adequate performance of the job.

While not defined specifically, the failure to perform duties means failure to take an action reasonably anticipated from the duties of the position as set forth in the civil service regulations and job description. "Abuse of Sick Leave," which is a subset of chronic or excessive absenteeism or lateness, is defined in the Newark Police Department Sick Leave Policy as

patterns of excessive absenteeism or absences on certain days of the week disproportionate to other days, fraudulently claiming illness on holidays, on days immediately prior to or after other benefit days off, the use of eight sick days in a six-month period, the use of sick days in excess of seventeen days, booking off sick without accumulated sick leave or other approved leave.

As to conduct unbecoming a public employee, this term has been described as an "elastic phrase" that includes "conduct which adverse affects the morale or efficiency" of the public entity or "which has a tendency to destroy public respect for [government] employees and confidence in the operation of [government] services." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (citation omitted); see Karins v. City of Atl. City, 152 N.J. 532 (1998). "Neglect of duty" has been interpreted to mean that an "employee . . . neglected to perform an act required by his or her job title or was negligent in its discharge." In re Glenn, CSV 5072-07, Initial Decision (February 5, 2009) (citation omitted), adopted, Civil Service Commission (March 27, 2009), <http://njlaw.rutgers.edu/collections/oal/>. The term "neglect" means a deviation from the normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" means conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (citation omitted). Neglect of duty can arise from omitting to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job.

Maintenance of strict discipline is particular important in military-like settings such as police departments, prisons, and correctional facilities. Rivell v. Civil Serv. Comm'n,

115 N.J. Super. 64 (App. Div.), certif. denied, 59 N.J. 269 (1971); Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). A police officer “represents 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.” Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). As a paramilitary organization, respondent’s rules and regulations are to be strictly followed. Police officers are held to a high standard of conduct both on and off the job. In re Phillips, 117 N.J. 567, 577 (1990).

As a paramilitary organization, the Newark Police Department’s rules and regulations are to be strictly followed. As was stated in Akridge v. Barres, 122 N.J. Super. 476, 477 (App. Div. 1973), aff’d, 65 N.J. 266 (1974), “[i]t is no longer open to question that the members of a police department ‘in many respects constitute a military organization,’ 16 McQuillin, Municipal Corporations (3d ed., 1972 rev’s vol.), Section 45.16, at 621, and as such are necessarily subject to reasonable regulations having to do with discipline and morale.”

Officer Adams, who had been determined to be a sick leave abuser, was required to bring in medical documentation when he was out sick. In the current instance, it is undisputed that on May 12, 2012, he called out sick with a headache and on his next day of duty, May 13, 2012, failed to bring in the required documentation.

The case of Officer Adams is clear in that he was counseled twice and yet continued to book off sick. Adams continued to call out sick even when he was on Medical Certification. Thus, in this case, even after Officer Adams was counseled and even after being placed on Medical Certification twice and even after being suspended after being charged with official inefficiency for violating the sick leave policy, he did not change his behavior in order to comport with the rules and regulations of the Department.

By not following the Department’s policy with respect to providing medical documentation, Officer Adams both failed and neglected his duty. By failing and

neglecting his duty, his conduct was unbecoming a public employee. With respect to the remaining charges: incompetency, inefficient or failure to perform duties; conduct unbecoming a public employee; neglect of duty; and, other sufficient cause, I **CONCLUDE** that the Department has also met its burden in sustaining each of these charges.

Accordingly, I **CONCLUDE** that the Department has met its burden of proof by a preponderance of the credible evidence that Officer Adams violated Department policies and N.J.A.C. 4A:2-2.3(4), and is guilty of chronic or excessive absenteeism or lateness.

PENALTY

Once a determination is made that an employee has violated a statute, regulation or rule concerning his employment, the concept of progressive discipline must be considered. W. New York v. Bock, 38 N.J. 500 (1962). However, it is well-established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate regardless of the individual's disciplinary history. Henry v. Rahway State Prison, 81 N.J. 571 (1980). Progressive discipline is not a "fixed and immutable rule to be followed without question." Carter v. Bordentown, 191 N.J. 474, 484 (2007). Rather it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished record. Ibid.

The Department imposed a suspension of six months. Officer Adams's past disciplinary record reflects he had been cited previously for sick leave abuse: on April 19, 2010, he had been given remedial training for a violation; on August 6, 2010, and January 7, 2011, he was counseled each time for violations.

I thereby **CONCLUDE** that the Department appropriately applied progressive discipline in this matter and that a suspension of six months is appropriate.

ORDER

It is hereby **ORDERED** that the charges against Officer Adams are **SUSTAINED**. It is further **ORDERED** that a suspension of six months be imposed. Appellant's appeal is hereby **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, 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 18, 2014
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency:

July 18, 2014

Date Mailed to Parties:

July 18, 2014

jb

APPENDIX

LIST OF WITNESSES

For Appellant:

Colby Adams

For Respondent:

Lieutenant Robert L. Lockett

LIST OF EXHIBITS

For Appellant:

None

For Respondent:

- R-1 Final Notice of Disciplinary Action with Specification of Charges dated June 4, 2012
- R-2 Newark Police Department Rules and Regulations Chapter 18:29.2 (Chronic Inefficiency or Incompetence) and General Order 94-4 (Revised) (Sick Leave Policy and Procedures)
- R-3 Concise Officer Disciplinary History – Police Officer Colby Adams
- R-4 Newark Police Department Investigation of Personnel Report date stamped April 24, 2013
- R-5 Investigative Submission by Lt. Robert L. Lockett dated May 8, 2013
- R-6 Individual Absence Record Profile and Sick or Injured Leave Record for period beginning January 1, 2013, through April 30, 2013
- R-7 Medical Certification Report (January 25, 2012, medical record review)
- R-8 Medical Certification Report (October 17, 2012, date of medical record review)
- R-9 Medical Certification Report dated October 17, 2006
- R-10 Investigative Submission by Captain Anthony Ruggiero dated March 13, 2007
- R-11 Newark Police Department Complaint Against Personnel dated May 9, 2013
- R-12 Administrative Submission of Police Officer Colby Adams dated May 2, 2013