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DECISION OF THE CIVIL SERVICE COMMISSION

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DPF-439 * Revised 7/95

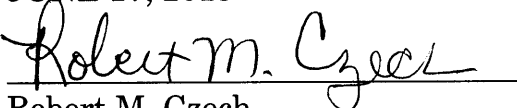
ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Maribel Candelo. The Commission further orders that the appellant be granted back pay, benefits and seniority for the period of the suspension. The amount of back pay awarded shall be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C. 4A:2-2.12*. Proof of income earned and an affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2-2.10* and *N.J.A.C. 4A:2.12*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees.

The parties must inform the Commission, in writing, if there is any dispute as to back pay and counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R. 2:2-3(a)(2)*. After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION
JUNE 17, 2015



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 05613-14

AGENCY DKT. NO. 2014-2597

**IN THE MATTER OF MARIBEL CANDELO,
THE CITY OF PATERSON POLICE
DEPARTMENT.**

Charles J. Sciarra, Esq., for Maribel Candelo (Sciarra & Catrambone, attorneys)

Steven S. Glickman, Esq., for City of Paterson (Ruderman & Glickman, attorneys)

Record Closed: April 9, 2015

Decided: May 15, 2015

BEFORE **JESSE H. STRAUSS, ALJ**:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Police Department of the City of Paterson (Department) suspended Police Officer Maribel Candelo for 180 days for insubordination and for a violation of Department Rules and Regulations. The Department contends that: (1) On January 23, 2010, Candelo violated its chain of command; (2) on April 8, 2011, Candelo was insubordinate by not writing a report in a manner as directed; and (3) on September 16, 2013, Candelo was insubordinate by not reporting medication to her supervisor. At

issue is whether Candelo violated Civil Service rules related to insubordination and Departmental policy, and, if so, what is the appropriate penalty.

The Department issued Preliminary Notices of Disciplinary Action (PNDA) regarding the first two of the above charges in 2010 and 2011 and did nothing with them. On September 19, 2013, it issued a PNDA with regard to the medication notification charge. (R-1.) On April 23, 2014, the Department issued a Final Notice of Disciplinary Action (FNDA) (R-2) sustaining, not only the September 19, 2013, charges, but the unrelated February 1, 2010, and May 19, 2011, charges as well and suspending Candelo for 180 working days.

Following Candelo's April 25, 2014, appeal to the Civil Service Commission, the Department of Personnel transmitted the matter 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) on May 7, 2014, where it was filed for determination as a contested case. I heard the matter on March 18, 2015, and I closed the record on April 9, 2015, upon the receipt of closing briefs.

At the commencement of the hearing, I granted a Motion by Candelo to **DISMISS** the charges arising out of the 2010 and 2011 PNDA's on the ground of laches. Until the situation leading to the 2013 PNDA and the subsequent April 23, 2014, FNDA, the Department had abandoned and did absolutely nothing to move forward on the two earlier matters. There was no evidence that there was a prolonged or continuing investigation with regard to the earlier matters or that Candelo was responsible for any delay or inaction. Counsel for the Department could not give an explanation for the inaction. In other words, the delay is unexplained, unjustified, and inexcusable. The allegations in the earlier matters are relatively minor, and there has been no showing that they should be pursued at such a late date as a matter of public policy, health, or safety. Condonation of a practice of allowing an appointing authority to sit on a PNDA and holding it in abeyance for an indeterminate amount of time and only activate it in order to enhance the penalty for a much later offense, would subvert the underpinning of the important progressive discipline principle. 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. The Department's abandonment of the earlier charges and belated attempt to resurrect them is a breach of this responsibility. Candelo was prejudiced by this delay in that she had no reason to preserve evidence or recollections of the circumstances surrounding the earlier charges in light of what reasonably appeared to be an abandonment of the charges. She relied on the apparent abandonment of the charges by the Department to her detriment.

FACTUAL DISCUSSION

After having heard the testimony of the witnesses and reviewed the documentary evidence, I make the following **FINDINGS OF FACT** arising out of the September 2013 PNDA.

Section 17.2 of the Police Department's Rules and Regulations entitled "Medication" provides that,

when a member is required to take any prescription or non-prescription medication which may diminish their alertness or impair their senses they shall notify their supervisor as to the medication, its properties, the dosage and the period during which it is to be taken. This notification shall be made prior to the member reporting for duty. The information will be kept confidential.

[R-3.]

Internal Affairs Sergeant Manuel Hernandez investigated and reported on Candelo's conduct. On August 26, 2013, Candelo reported off-duty sick at 8:00 a.m., which was the first day of her four-day tour and call back on August 29, 2013, at 8:30 p.m., which was after her tour was over. Although she reported for work on September 3, 2013, she reported out sick at 5:35 a.m. Detective Richard Botbyl arranged for a fitness for duty examination of Candelo at Concentra Medical Center by a physician under contract with the Department. Botbyl instructed Candelo to report for the

examination on September 4, 2013, at 10:30 a.m. and to bring her medical records. Candelo obeyed this order as reflected in the September 4, 2013, reports of Oksana B. Luke, M.D., of Concentra. (A-2 and A-3.) Her medical records included a September 3, 2013, note from her primary medical doctor, Salvatore A. Conte, M.D. which stated, "please excuse Candelo, Maribel from work due to illness. My patient will be able to return to work on -11-2013." (A-1.) In the course of the examination by Dr. Luke, Candelo provided him with all the information regarding her condition including the medication she was on. In his September 4 Non-Injury Status Report, the Department's Dr. Luke remarked that, "patient advised to continue to do full work up of her medical condition problem with Dr. Conte PMD. She may return back to work I will recommend office work for her starting on September 5, 2013." (A-2.) In his Non-Injury Flowsheet, Dr. Luke remarked, "Patient advised to continue to do full work up of her medical problem with Dr. Conte her PMD. She may return back to work. I will recommend office work for her starting 9/05/13." (A-3.) Dr. Luke also recommended that Candelo have access to a lavatory while she is working, because working in a patrol car could hinder this requirement. It is evident that Candelo provided the Department's physician with records related to her condition and medications as he, separate and apart from the recommendation of Candelo's personal doctor, ordered that she be placed on restricted duty.

Notwithstanding the direction of restricted duty by the Department's own doctor, the Department nevertheless assigned her to a cellblock. On September 6, Sergeant Jaime Navarro reported that Candelo, then assigned to the cellblock, had advised him that she was under medication which she was required to take every three hours; the medication makes her groggy; and that she may not be able to perform some of the required tasks in the cellblock. Sergeant Navarro reported this information to Sergeant Hernandez in Internal Affairs who then directed Candelo to provide him with a report identifying the medications she was taking. Candelo replied that she did not remember the exact names of her two medications, but had an appointment during her lunch hour to see Dr. Conte. Detective Botbyl, himself, contacted Candelo's Dr. Conte and asked him if he had prescribed any medication that might make Candelo groggy. Dr. Conte advised Detective Botbyl that the medication he had prescribed could act as a sedative

and could cause her to feel fatigued. On September 10, Sergeant Rodriguez contacted Candelo by telephone and reminded her that she had to submit the names of the two prescriptions she was taking. They again spoke on September 12 after Sergeant Rodriguez received a note from Dr. Conte clearing Candelo for full duty on September 15. Sergeant Rodriguez again reminded Candelo that she still had not provided the names of the two prescriptions. She protested as she thought the request was an invasion of her privacy and was against the Health Insurance Portability and Accounting Act (HIPAA). When Candelo next reported for duty, she advised that she was no longer on any medications that affect her ability to function as a police officer. Candelo never specifically identified the two medications as Rodriguez had ordered her to do. However, Rodriguez admits that, if she had identified the medications to him, he would not have known whether or not they were likely to make her groggy without talking to the Department's doctor or Dr. Conte. The better information was that obtained directly from Dr. Conte by Detective Botbyl. Additionally, although the Department's own doctor knew of the medications Candelo was taking, and, indeed, directed that she be put on restricted duty, there is no indication that Sergeant Rodriguez or Detective Botbyl sought additional information from Dr. Luke.

The Department subsequently charged Candelo with insubordination with regard to her failure to submit the names of the prescriptions that she was taking on September 6.

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; N.J.A.C. 4A: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. Metro. 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). Both guilt and penalty are redetermined on appeal from a determination by the appointing authority. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

I **CONCLUDE** that the Department has not met its burden of proving by a preponderance of the credible evidence that Candelo engaged in an act of insubordination or other sufficient cause in violation N.J.A.C. 4A:2-2.3(a)(2), or (12).

Black's Law Dictionary 802 (7th Ed. 1999) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Such dictionary definitions have been utilized by courts to define the term where it is not specifically defined in contract or regulation.

"Insubordination" is not defined in the agreement. Consequently, assuming for purposes of argument that its presence is implicit, we are obliged to accept 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. Corp. Express of the E., 344 N.J. Super. 39, 45 (App. Div. 2001) (citation omitted).]

Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person. Insubordination is always a serious matter, especially in a paramilitary context. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div. 1971), certif. denied, 59 N.J. 269 (1971). However, there can only be insubordination if the order is reasonable.

Under all of the circumstances present here, Sergeant Rodriguez's insistence on disclosure of the medications by Officer Candelo is unreasonable and served no purpose. It is beyond debate that a law enforcement agency has the right and duty to insure that the assignments of its personnel are made in consideration of any diminished capacity that an officer may suffer as a result of certain medications. That is what fitness for duty determinations are all about. This is important to the officer's health and safety as well as that of the public and fellow officers. With regard to the disclosure of personal matters, "[d]isclosure may be required if the government interest in disclosure outweighs the individual's privacy interest." Fraternal Order of Police No. 5 v. City of Philadelphia, 812 F.2d 105, 110 (3d Cir. 1987). That concern was satisfied by Candelo in a better fashion than if she had given the names of the medications directly to Sergeant Rodriguez. Sergeant Rodriguez admitted that the identities of the medication would have had no meaning to him without an explanation by a doctor as to possible effects. Candelo was ordered to a fitness for duty examination before a doctor designated by the Department, and she so complied. She disclosed the medications to Dr. Luke along with all related medical records. He, rather than Sergeant Rodriguez, was in a position to determine if these medications would warrant any limitations on Candelo's duties, and he did, indeed, impose restrictions on her duties. Accordingly, given the unique set of circumstances here, namely, the coincidence of a fitness for duty examination preceding the request for medication disclosure to supervisors, there was no reasonable basis to compel Officer Candelo to also disclose her medications to a layperson who already had access to a medical professional to insure that the dangers discussed above would be addressed. Moreover, Detective Botbyl had independently ascertained from Dr. Conte that the medications he had prescribed could act as a sedative and could make her feel fatigued. Thus, the Department already had two sources of medical opinion to guide it with regard to appropriate assignments to Candelo without requiring more disclosure by Candelo.

HIPAA, 42 U.S.C.A. § 1320(d) et seq., was established to protect the security and privacy of individually identifiable health information, regulating its use and disclosure. All reasonable efforts must be made to disclose the minimum health information necessary to achieve the purpose for which the information is disclosed.

Smith v. Am. Home Products Corp. Wyeth-Averst Pharmaceutical, 372 N.J. Super. 105, 112 (Law Div. 2003). This principle was honored by the way Candelo's medications were made known to the Department's doctor and actually used by him to determine limitations on Candelo's activities.

In these circumstances, Officer Candelo complied with the medication reporting obligation and was not insubordinate.

ORDER

It is **ORDERED** that the charges by the Police Department of the City of Paterson and the 180-day suspension of Maribel Candelo be **REVERSED**.

It is further **ORDERED** that Maribel Candelo be awarded back pay in accordance with the guidelines set forth in N.J.A.C. 4A:2-2.10.

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.

May 15, 2015
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Date Received at Agency:

Date Mailed to Parties: **MAY 18 2015**

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

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APPENDIX

LIST OF WITNESSES

For Candelo:

Mirabel Candelo

For the Department:

Manuel Hernandez

LIST OF EXHIBITS IN EVIDENCE

For Candelo:

- A-1 Note, Conte "To Whom it May Concern," September 3, 2013
- A-2 Non-Injury Work Status Report, September 4, 2013

For the Department:

- R-1 Preliminary Notice of Disciplinary Action, September 19, 2013
- R-2 Final Notice of Disciplinary Action, April 23, 2014
- R-3 Paterson Police Department Rules and Regulations
- R-4 Paterson Police Department Internal Affairs Report, September 13, 2013
- R-5 Paterson Police Department Official Report, September 13, 2013
- R-6 Paterson Police Department Official Report, September 16, 2013