B-47

STATE OF NEW JERSEY

In the Matter of Rodney Wells, Hudson County	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket Nos. 2016-3177 and 2016-3178	Requests for Reconsideration

ISSUED: MAY 22 2017 (DASV)

Hudson County, represented by John A. Smith, III, Assistant County Counsel, requests reconsideration of the attached initial decision of the Administrative Law Judge (ALJ), which was deemed adopted as a final decision on February 22, 2016, modifying the suspensions of Rodney Wells, a County Correction Officer with Hudson County, from a 45 working day suspension to a 20 working day suspension and a six working day suspension to a one working day suspension.[1]

Initially, it is noted that the Civil Service Commission (Commission) did not have a quorum at the time of the ALJ's initial decision. Wells did not consent to an additional extension of time for the Commission to render its decision. As such, the ALJ's recommended decision was deemed adopted as the final decision pursuant to *N.J.S.A.* 52:14B-10(c).

By way of background, Wells was served with a Final Notice of Disciplinary Action (FNDA), dated March 26, 2014, suspending him for 45 working days on charges of insubordination, conduct unbecoming a public employee, neglect of duty, and chronic or excessive absenteeism. Specifically, the appointing authority asserted that Wells called out sick on June 7, 2013, thereby exhausting his sick time for the 2013 calendar year. Wells also called out sick on June 15, 18, and 27, 2013 and was thus in violation of the department's sick leave policy. Wells was

[1] Additionally, the appointing authority requests a stay in the matters pending the Commission's determination. However, in simultaneously requesting reconsideration, a stay request is moot as the Commission is rendering a determination on the merits of the case. *See N.J.A.C.* 4A:2-1.2(c)1.

served with a second FNDA, dated March 26, 2014, suspending him for six working days on charges of insubordination, conduct unbecoming a public employee, neglect of duty, chronic or excessive absenteeism, and other sufficient cause. The appointing authority asserted that, on November 2, 2013, Wells refused to work mandatory overtime and failed to provide appropriate documentation. Upon Wells' appeal of his suspensions to the Commission, the matters were transmitted to the Office of Administrative Law (OAL) for a hearing and were consolidated.

As set forth in the initial decision, the ALJ found the appointing authority's witnesses to be credible and that the evidence presented at the OAL cast doubt on the accuracy and believability of Wells' version of when he requested leave under the Family and Medical Leave Act (FMLA). In that regard, although Wells testified that he obtained the FMLA paperwork on June 7, 2013, documentation reflected that he called out sick that day and no record was presented that he requested FMLA in June. Rather, there was credible testimony and documentary evidence that Wells went to the personnel office on July 16, 2013. His doctor's certification was dated July 22, 2013, which was the effective date of Wells' FMLA leave. The doctor treated Wells on June 13, 2013 and authorized him off duty intermittently from July 22, 2013 to October 22, 2013. There was no evidence that Wells requested an extension of this leave after it expired. Thus, the ALJ determined that Wells' request for FMLA leave occurred after his absences on June 15, 18, and 27, 2013. Moreover, the ALJ indicated that there was no proof that Wells was notified of the approval of FMLA leave. Wells testified credibly that he was unaware of its approval until he called out sick on August 19, 2013. As for the mandatory overtime on November 2, 2013, Wells testified that he did not work as ordered because he was ill and he did not submit a doctor's note to excuse him from the overtime. The ALJ noted that Wells previously received a written warning, a one-day fine, and a three-day fine on July 26, 2013, July 27, 2013, and November 1, 2013, respectively, for failing to comply with the mandatory overtime policy.

Based on the foregoing findings, the ALJ concluded that the appointing authority met its burden of proving that Wells' failure to report to work on June 15, 18, and 27, 2013 constituted chronic or excessive absenteeism, neglect of duty, and conduct unbecoming a public employee. The record did not reflect that Wells' took "diligent and meaningful steps" to ascertain the amount of his available sick leave or to address his medical condition through the pursuit of approved leave prior to that time. However, the ALJ determined that the facts in the case did not fit the charge of insubordination. As for the mandatory overtime, the ALJ concluded that Wells' refusal to work amounted to insubordination, neglect of duty, and other sufficient cause, namely the failure to comply with the mandatory overtime policy. Wells did not present the required doctor's note to excuse his refusal to comply with his supervisor's direct and lawful order for him to work. However, the ALJ

indicated that Wells' actions did not rise to unbecoming conduct or incompetence or inefficiency, and the charge of failure to perform duties was duplicative.[2]

Regarding the penalty with respect to Wells' attendance, the ALJ initially stated that Wells was given ample notice to improve his attendance, having been counseled in 2012 and disciplined in 2013. Wells received a one-day fine and a three-day fine for his absences on January 22, 2013 and January 23, 2013 respectively. He also received a five-day fine on July 24, 2013 for being absent on June 8, 11, 12, 13, and 14, 2013. Nevertheless, the ALJ did not find the 45 working day suspension reasonable. The appointing authority relied on an "additional discipline" schedule in its sick leave policy to support the suspension. As set forth by the ALJ, the appointing authority's sick leave policy provides for the "additional discipline" in cases where employees are absent or call out sick without legitimate reasons after being issued a written warning. The penalty schedule reflects the following:

# of Days of Sick Leave Taken or Days Absent in a Calendar Year	Penalty/Fine/Suspension
16	1 Day
17	3 Days
18	5 Days
19	10 Days
20	Termination

However, the ALJ found no evidence that the appointing authority issued Wells a verbal warning or written warning for being absent for more than 15 days in three consecutive years as required by the "additional discipline" schedule which was only "a suggested disciplinary schedule." The record also did not show that Wells was absent for more than 15 days in three consecutive years. Therefore, the ALJ found that a 20 working day suspension was a more reasonable suspension and consistent with progressive discipline principles.

As to the mandatory overtime, the ALJ indicated that Wells was informed of his obligation to work and disciplined for his infractions prior to the November 2, 2013 incident. However, the written warning and the one-day fine was issued for failing to work mandatory overtime on July 26, 2013 and July 27, 2013, which fell within the period of Wells' FMLA leave, which was approved retroactively to July 22, 2013. Wells submitted doctor's notes for those days. Thus, based on this mitigating circumstance and the appointing authority's disciplinary schedule, the

[2] The charge of incompetency, inefficiency or failure to perform duties was listed in the Preliminary Notice of Disciplinary Action (PNDA), dated January 29, 2014, regarding Wells' refusal to work mandatory overtime on November 2, 2013. It was not listed or sustained on the March 26, 2014 FNDA.

ALJ concluded that Wells' infraction should only be considered a second offense, warranting a one working day suspension.[3]

In its request, the appointing authority maintains that a clear material error occurred in that a final decision was issued when the Commission lacked a quorum of members. Thus, the ALJ's decision could not be deemed adopted. The appointing authority argues that the "deemed adopted" statute, *N.J.S.A.* 52:14B-10(c), is not applicable when the Commission cannot render a final decision due to a lack of quorum. It submits that rendering final administrative decisions is the Commission's first power and duty, among other responsibilities. *See N.J.S.A.* 11A:2-6(a). Further, the appointing authority contends that *N.J.S.A.* 52:14B-10(c) should not be automatically applied but rather applied with caution. In this case, the Commission has not failed to act, but could not act because it lacked a quorum. Therefore, the appointing authority requests that the Commission render the appropriate final decision and review the exceptions that were filed.

In that regard, the appointing authority emphasized in its exceptions that Wells had been counseled in 2012 and disciplined in 2013 for his attendance and for failing to comply with the mandatory overtime policy. It maintained that the reduction of the 45 working day suspension "rewards" Wells in spite of his prior infractions. The appointing authority took exception to the ALJ's conclusion that a 20 working day suspension is consistent with progressive discipline principles. It noted that had it strictly followed its sick leave policy, Wells would have been terminated. Thus, the appointing authority maintained that it considered the totality of the circumstances and was "lenient" by only imposing a 45 working day suspension on Wells, which was reasonable and not arbitrary given that Wells was absent for 33 days as of June14, 2013. Regarding the suspension for refusal to work mandatory overtime on November 2, 2013, the appointing authority asserted that it was Wells' fourth offense and under its written policy, a six working day suspension or fine was mandated. It argued that Wells did not grieve the written warning or one-day fine for failing to work mandatory overtime on July 26, 2013 and July 27, 2013. Thus, the ALJ should not have "simply erase[d]" these two minor disciplines,[4]"as the ALJ did not have jurisdiction to review them and found Wells' testimony not credible. Further, the appointing authority submitted that the ALJ did not consider the applicable law under the FMLA when it reduced the penalty from a six working day suspension to a one working day suspension.

In response, Wells, represented by James D. Addis, Esq., asserts that *N.J.S.A.* 52:14B-10(c) does not require "positive action" by an agency for a decision to be deemed adopted. Rather, the statute suggests that the lack of action by an

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[3] Agency records also indicate that Wells received a five working day suspension on October 13, 2011 on charges of incompetency, inefficiency or failure to perform duties, insubordination, inability to perform duties, conduct unbecoming a public employee, neglect of duty, and other sufficient cause.

[4] A written warning is not a disciplinary action. *See N.J.A.C.* 4A:2-3.1(a).

agency is the triggering condition for adopting an ALJ's decision. In other words, so long as the Commission takes no action within the specified period of review, the ALJ's initial decision will be deemed adopted regardless of the presence of a quorum. Therefore, Wells submits that no clear material error has occurred and the appointing authority's request for reconsideration should be denied. It is noted that in Wells' reply to the appointing authority's exceptions, he maintained that the ALJ's recommendation to reduce the 45 working day suspension was reasonable based on the appointing authority's failure to comply with its own sick leave policy and disciplinary schedule. Wells also stated that the June 2013 violations resulted in his "*first major discipline in a corrections career spanning 17 years*" [emphasis in original].[5]" Further, he noted that the ALJ found no reason to doubt his medical condition. As for the reduction of the penalty in the mandatory overtime case, Wells argued that the ALJ based her decision on considerations of fundamental fairness. Wells only discovered that he was approved for retroactive FMLA leave on August 19, 2013. Thus, although he may not have grieved the July 2013 overtime infractions, Wells asserted that the appointing authority ignored the facts surrounding the matter and the ALJ's determination was appropriate.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which the Commission may reconsider a prior decision. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding.

Initially, "[u]nless the head of the agency modifies or rejects the report within such period, the decision of the [ALJ] shall be deemed adopted as the final decision of the head of the agency." *See N.J.S.A.* 52:14B-10(c). Thus, the appointing authority's contention that the deemed adopted decision in this case is invalid is without merit. Nonetheless, it is undisputed that the Commission at the time of the ALJ's initial decision was without a quorum and did not have an opportunity to review the record or the ALJ's assessment of the charges against Wells and the appropriate penalty to be imposed. Therefore, it is appropriate for the Commission to now review the matter on reconsideration.

Upon review, the Commission agrees with the ALJ's credibility determinations. In that regard, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149

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[5] Agency records indicate that Wells was appointed provisionally as a County Correction Officer with Hudson County on June 5, 2000. He received a permanent appointment effective December 4, 2000. Prior to these appointments, Wells had served provisionally as a Juvenile Detention Officer beginning on April 24, 1997.

N.J. 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 *N.J.* 644 (1999) (quoting *State v. Locurto*, 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by the credible evidence. *See N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). Nevertheless, upon its review of the entire record, the Commission finds that there is sufficient evidence in the record to support the ALJ's determination that the testimony of the appointing authority's witnesses was credible as to when Wells requested FMLA leave. Documentary evidence also corroborated the testimony of the witnesses.

Based on the foregoing, the evidence clearly supports the charges against the appellant, namely that Wells failed to report to work on June 15, 18, and 27, 2013 and had not yet obtained FMLA leave at the time. He had exhausted his sick leave as of June 7, 2013. Accordingly, his absences constitute chronic or excessive absenteeism, neglect of duty, and conduct unbecoming a public employee. Further, the Commission agrees with the ALJ that the charge of insubordination was not sustained. In that regard, while the Commission utilizes a more expansive definition of insubordination, the Commission does not find Wells' behavior to be insubordinate. The sustained charges more appropriately describe his offenses. As for the mandatory overtime, Wells admitted that he refused to work because he was ill and did not present a doctor's note to excuse his absence. Therefore, he was insubordinate, neglected his duty, and failed to comply with the mandatory overtime policy thereby being guilty of other sufficient cause. Further, contrary to the ALJ's determination, refusing mandatory overtime without substantiated proof of illness or other acceptable excuse renders a public employee's conduct as unbecoming. Accordingly, those charges, as well as chronic or excessive absenteeism as listed in the March 26, 2014 FNDA, have been sustained.

With regard to the penalty, the Commission's review is *de novo*. In addition to considering the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). Although the Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway State Prison*, 81 *N.J.* 571, 580 (1980). It is settled that the principle of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate

notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007). With respect to the 45 working day suspension, the ALJ dismissed the charge of insubordination and found that a 20 working day suspension was a more reasonable penalty given the appointing authority's failure to comply with its own sick leave policy and Wells' prior disciplinary history. Initially, it is noted that the Commission is not bound by the appointing authority's penalty schedule in determining the proper penalty. *See In the Matter of Gregory McDaniel*, Docket No. A-5583-02T2 (App. Div. May 24, 2004); *In the Matter of Leonard Wilson* (MSB, decided April 6, 2005); *In the Matter of Patricia Everingham* (MSB, decided March 13, 2003); *In the Matter of George Roskilly* (MSB, decided November 20, 2002). Rather, the Commission is guided by *In the Matter of Anthony Stallworth*, 208 *N.J.* 182, 199 (2011). In *Stallworth*, the Supreme Court stated that:

> ...the contextual nature of the prior offenses is a relevant consideration when analyzing an employee's disciplinary record . . . As already noted, progressive discipline is a flexible concept, and its application depends on the totality and remoteness of the individual instances of misconduct that compromise the disciplinary record. The number and remoteness or timing of the offenses and their comparative seriousness, together with an analysis of the present conduct, must inform the evaluation of the appropriate penalty. Even where the present conduct alone would not warrant termination, a history of discipline in the reasonably recent past may justify a greater penalty; the number, timing, or seriousness of the previous offenses may make termination the appropriate penalty.

In this case, the Commission disagrees with the ALJ's reduction of the penalty. Wells' recent history of seven minor suspensions since 2011 does not mitigate his current offense. His prior fines and suspensions total 20 days, and he also received counseling and warnings for his attendance. He most recently received a five-day fine prior to the subject suspension for absences on June 8, 11, 12, 13, and 14, 2013. Moreover, as of June 14, 2013, Wells was absent for 33 days in the calendar year. Thus, despite whether the appointing authority followed its own policy or not, the Commission finds that a 45 working day suspension was not harsh considering Wells' overall disciplinary history, his recent infractions, and the seriousness of the subject offense. Had Wells filed a timely request for FMLA leave, he may not have found himself in this situation. The Commission emphasizes that attendance at work is the most basic duty of an employee, especially in the area of public safety, and employees who cannot maintain an acceptable attendance record can expect to be subject to disciplinary action, up to and including removal. A 45 working day suspension appropriately serves as an admonishment to Wells of his actions, or inaction to pursue the proper leave, and a warning to him that future offenses may result in a more severe penalty. Therefore, the Commission finds that the penalty imposed by the appointing authority was consistent with progressive discipline

principles. Accordingly, based on the totality of the record, the Commission upholds the 45 working day suspension.

Regarding the mandatory overtime on November 2, 2013, Wells testified that he did not work as ordered because he was ill and did not submit a doctor's note to excuse him from the overtime. The ALJ reduced the penalty to a one working day suspension mainly on the basis that Wells had been approved for FMLA leave retroactively to July 22, 2013 and would have reasonably used FMLA leave had he known that he was approved for such leave. However, even considering the foregoing, the fact remains that Wells received a three-day fine for failing to comply with the mandatory overtime policy on November 1, 2013. At that point, Wells' FMLA leave had expired and there is no indication that he challenged this fine or the previous written warning and one-day fine for the July 26 and 27, 2013 offenses. Under these circumstances, the six working day suspension was reasonable considering Wells' prior history of noncompliance and his overall disciplinary history, which includes at that point a five-day fine and a five working day suspension. Thus, based on the totality of the record, the Commission upholds the six working day suspension.

ORDER

It is ordered that the requests for reconsideration of the appointing authority be granted, and the action of the appointing authority in imposing a 45 working day and a six working day suspension be upheld. Therefore, the Commission affirms those actions and dismisses the appeal of Rodney Wells.

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
THE 17TH DAY OF MAY, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
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Attachment

c: Elinor M. Gibney
John A. Smith, III, Assistant County Counsel
Rodney Wells
James D. Addis, Esq.
Kelly Glenn
Records Center

CHRIS CHRISTIE
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ROBERT M. CZECH
Chair/Chief Executive Officer

February 23, 2016

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Re: *In the Matter of Rodney Wells, Hudson County, Department of Corrections* (CSC Docket Nos. 2014-2445 and 2446; OAL Docket Nos. CSV 4690-14 and 4692-14)

Dear Messrs Addis and Smith:

The appeals of Rodney Wells, a County Correction Officer with the Hudson County Department of Corrections, of his six working day and 45 working day suspensions, were before Administrative Law Judge Margaret M. Monaco, (ALJ), who rendered her consolidated initial decision on November 23, 2015, recommending modifying the six working day suspension to a one working day suspension and the 45 working day suspension to a 20 working day suspension. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

The time frame for the Civil Service Commission (Commission) to make its final decision was to initially expire on January 7, 2016. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that time the Commission secured a 45 day extension of time to render its final decision no later than February 21, 2016.[1] *See N.J.A.C.* 1:1-18.8. Since the Commission does not currently have a quorum, it sought consent from the parties, as required, to secure a second 45 day extension. However, the appellant declined to consent to an additional extension. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter per *N.J.S.A.* 52:14B-10(c).

[1] While the extension order indicates the expiration date as February 21, 2016, since that date was a Sunday, the expiration date was actually February 22, 2016 pursuant to *N.J.A.C.* 1:1-1.4.

Since the appellant's suspensions have been modified, he is entitled to 30 days of back pay, benefits and seniority. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned should be submitted to the appointing authority within 30 days of receipt of this letter. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay.

Sincerely,

Henry Maurer
Director

Attachment

c: The Honorable Margaret M. Monaco, ALJ
Kenneth Connolly
Joseph Gambino

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
CONSOLIDATED
OAL DKT. NOS. CSV 04690-14
and CSV 04692-14
AGENCY DKT. NOS. 2014-2445
and 2014-2446

IN THE MATTER OF RODNEY WELLS,
HUDSON COUNTY DEPARTMENT
OF CORRECTIONS.

James D. Addis, Esq., for appellant Rodney Wells

John A. Smith III, Assistant County Counsel, for respondent Hudson County (Donato J. Battista, County Counsel)

Record Closed: August 25, 2015 Decided: November 23, 2015

BEFORE **MARGARET M. MONACO**, ALJ:

STATEMENT OF THE CASE

This consolidated matter involves disciplinary charges against appellant Rodney Wells, who is employed as a correction officer with respondent Hudson County Department of Corrections (the Department). Appellant appeals from a six-day and a

forty-five-day suspension that were imposed stemming from his alleged refusal to work mandatory overtime and use of sick time.

PROCEDURAL HISTORY

The Department issued a Preliminary Notice of Disciplinary Action (PNDA) dated September 26, 2013, informing appellant of the charges of insubordination, chronic or excessive absenteeism, conduct unbecoming a public employee, and neglect of duty issued against him. N.J.A.C. 4A:2-2.3(a)(2), (4), (6) and (7). Specifically, the PNDA states:

> Be advised that on Friday June 07, 2013 Officer Wells called out sick exhausting his sick time allotment for the calendar year 2013 inclusive of any and all accrued sick leave entitlement, making him subject to discipline. Further during the pay period of 06-15-13 thru 06-28-13 Officer Wells called out sick on June 15, 18, 27, 2013, putting him in direct violation of Hudson County Rules & Regulations 4.2 Absence from duty and the Hudson County Sick Leave Abuse/Absenteeism 4th edition policy. Accordingly he was docked 24 hours pay and this request for disciplinary action [is] filed.

After a departmental hearing, the Department issued a Final Notice of Disciplinary Action (FNDA) dated March 26, 2014, sustaining the charges and providing for appellant's suspension for forty-five days. Appellant filed an appeal and the Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL), where it was filed on April 17, 2014, under OAL docket number CSV 04692-14.

The Department issued a separate PNDA dated January 29, 2014, informing appellant of the charges of incompetency, inefficiency or failure to perform duties, insubordination, conduct unbecoming a public employee, neglect of duty, and other sufficient cause issued against him. See N.J.A.C. 4A:2-2.3(a)(1), (2), (6), (7) and (12). Specifically, the PNDA states:

> On Nov. 02, 2013, Officer R. Wells did refuse to work mandatory Overtime and failed to provide appropriate

> documentation. As a result, Officer R. Wells violated Hudson County Corrections (ADM. 18) Policy Title: Mandatory Overtime (effective 12-11-12) III. Procedures C.4 (pg. 3 of 5) as well as failed to comply with the departmental policy regarding mandatory Overtime as described on the Employee Performance Warning Notice placing him on step 4 which requires a sanction of 6 days fine.

After a departmental hearing, the Department issued an FNDA dated March 26, 2014, sustaining the charges and providing for appellant's suspension for six days. Appellant filed an appeal and the Civil Service Commission transmitted the matter to the OAL, where it was filed on April 17, 2014, under OAL docket number CSV 04690-14.

Following the adjournment of hearing dates at the parties' request, the hearing was held on September 16, 2014, and March 16, 23 and 25, 2015 (as to CSV 04692-14) and on March 25, 2015 (as to CSV 04690-14). After the conclusion of the testimony, the record remained open for the receipt of post-hearing submissions. The matters were later consolidated, and the parties filed briefs in support of their respective positions, along with an Amended Stipulation regarding appellant's prior disciplinary history.[1] The record closed upon receipt of the last submission on August 25, 2015.

FACTUAL DISCUSSION

Appellant has been employed as a correction officer at the Hudson County Correctional Center (HCCC) since approximately 2000 and previously worked at the juvenile detention center for approximately four years. Lt. Luis Oyola (Oyola) and Lt. Chris Yurecko (Yurecko) served as appellant's supervisors during the pertinent period.

1. ABSENTEEISM INFRACTION (CSV 04692-14)

At the hearing, the Department presented testimony by Oyola and Patricia Joyce, and appellant testified on his own behalf. Based upon a review of the testimony and the documentary evidence presented, I **FIND** the following preliminary **FACTS**.

[1] The Amended Stipulation is listed as J-3 in the Appendix to this Initial Decision.

This matter concerns appellant's absence from work on June 15, 18 and 27, 2013. There is no dispute that appellant called out sick on those dates and, at the time, had previously exhausted his accumulated sick time. On July 24, 2013, Oyola recommended disciplinary action against appellant predicated on his absences, and a forty-five-day suspension was ultimately imposed. (R-1; J-2.)

According to appellant's yearly schedule from the Correction Officers Scheduling System (COSS), as of June 15, 2013, appellant had been absent without pay or sick on approximately thirty-three days. He also used sick time on other days after working the majority of his shift and refusing mandatory overtime due to illness (i.e., May 10, 17, 18, 24, 25, 30, 31, 2013). (A-1; see also R-5.)

Prior to the within infraction, appellant had been previously disciplined in 2013 with regard to his absenteeism from work. By Notices of Minor Disciplinary Action dated February 13, 2013, the Department imposed a one-day fine and a three-day fine as a result of appellant's absences on January 22 and 23, 2013, respectively, for which he had requested emergency personal days and did not provide documentation that met the criteria of an emergency. (R-4a; R-4b; J-3.) As of June 7, 2013, appellant exhausted his sick-time allotment for 2013 inclusive of all accrued sick-leave entitlement, and he was marked "absent no pay" (ANP) from 13:12 to 14:00. (See R-4c; R-5; R-7; A-1.) Appellant was also absent from work for the entire tour on June 8, 11, 12, 13 and 14, 2013, for which the Department imposed a five-day fine by Notice of Minor Disciplinary Action dated July 24, 2013. (See R-4c; J-3.)

Patricia Joyce is employed by the Personnel Unit and responsible for processing documentation regarding an employee's request for a leave of absence. Appellant applied for a leave of absence under the Family and Medical Leave Act (FMLA). The record includes a leave-request form signed by appellant and dated July 17, 2013. (R-13.) It also includes memoranda dated July 16, 2013, which Joyce credibly testified she gave to appellant on that date, and appellant signed and dated July 17, 2013. (Ibid.) One memorandum, captioned "Pending request for Unpaid Leave of Absence (FMLA/FLA/ADA)," stated, "This is to inform you that the Hudson County Department of

Corrections, Personnel Unit has received your request for an unpaid leave of absence, to include FLMA[sic]/FLA/ADA leave request," and advised that "[f]or Leaves taken because of the employee's or a covered family member's serious health condition the employee must submit a completed 'Physician or Practitioner Certification' form . . . and return the certification to the Personnel Unit." It further informed appellant that the "[m]edical certification must be provided . . . within (15) days after the request by (7-30-13) or as soon as reasonably possible," and appellant's "leave will be pending from 7-22-13 and may begin on or about if approved by the county's Personnel Director." (Ibid.) By separate memorandum captioned "Initial/Ext. Unpaid Leave of Absence" dated July 16, 2013, appellant was informed that "[i]f [his] Leave of Absence is approved, it will expire on 10-22-2013," and "[i]f [appellant] wish[ed] to apply for an extension of [his] leave, [he] must do so in writing," which "must have the written approval of the county Medical Director" and "must be submitted to [his] Department Director at least ten working days prior to the expiration of [his] leave," and that the "[f]ailure to do so may result in denial of the requested extension." (Ibid.)

Subsequently, Joyce received a "Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act)" completed and signed by appellant's doctor (Dr. Kahn) dated July 22, 2013. (R-13.) That certification lists June 7, 2013, as the approximate date on which appellant's condition commenced; indicates that the doctor treated appellant for the condition on June 13 and 17, 2013; and states that it is medically necessary for appellant to be absent from work during flare-ups once every two weeks with a duration of two to three days per episode. It also lists August 3 to October 3, 2013, as the estimated beginning and ending dates for the period of incapacity.

After receiving this certification, Joyce sent an e-mail to Oyola and others on August 8, 2013, advising that appellant "has supplied medical documentation for an FMLA from 07-22-13 thru 10-22-13 on an intermittent basis, and is now pending approval/denial from personnel." (R-14.) Ultimately, appellant's intermittent FMLA leave was approved effective July 22, 2013, through October 22, 2013. (See R-12; R-14.) Joyce informed Oyola and others of this approval via e-mail dated August 16,

2013. (R-14.) Appellant took intermittent leave time on each of his scheduled work days beginning August 20, 2013, and ending on October 3, 2013. (R-5.)

The record reveals that appellant had received a Written Warning in August/September and in November/December 2006, and a Verbal Warning in January 2009, regarding his use of sick time. (R-10.) Calendars were also introduced reflecting that appellant had used sick time on approximately forty days in 2012, five days in 2011, five days in 2010 and two days in 2009. (R-6; A-18; A-19.) It cannot be ascertained from these calendars whether appellant had called out sick for the entire day or whether the sick time represented an hour or so due to appellant refusing mandatory overtime. The offered documentation further indicates that appellant had taken various leaves of absence prior to 2008. (See R-8; A-13.)

Section 4.2 of the Department's Custody Staff Rules and Regulations Manual, entitled "Absence from Duty," instructs that "[e]very employee, who fails to appear for duty at the date, time and place specified and without consent or proper authorization, is 'Absent No Pay' (A.N.P.) or 'Did not Report' (D.N.R.)." (R-2.) The County also has a Sick Leave Abuse/Absentee policy, which includes a progressive guideline for the imposition of discipline relative to the use of excessive sick leave. (R-3.) That policy provides for the issuance of a verbal warning in cases where an employee has been absent or sick for more than fifteen days in two out of three consecutive calendar years with no "legitimate reasons" and no accrued sick leave. It further provides for the issuance of a written warning, along with a fine/suspension, under the following conditions:

> WRITTEN WARNINGS
> (MORE THAN 15 DAYS ABSENT THREE CONSECUTIVE YEARS)
>
> Employees who have been absent or sick more than 15 days each year in two consecutive calendar years MUST be given a Written Warning if they are absent or sick 15 days in the next calendar year where no legitimate reasons are found following an investigatory interview . . . . This Written Warning should be issued on the 15th absence and

is in addition to the Verbal Warning which should have been issued prior to January 1st.

ADDITIONAL DISCIPLINE

Employees who continue to be absent or call in sick without legitimate reasons after being issued a Written Warning may be subject to additional discipline. The following is a suggested disciplinary schedule to guide supervisors/hearing officers in the imposition of discipline in cases where discipline is warranted by the facts in each case.

# of Days of Sick Leave Taken or Days Absent in a Calendar Year	Penalty/Fine/Suspension
16	01 Day
17	03 Days
18	05 Days
19	10 Days
20	TERMINATION

In addition to the evidence that forms the foundation of the above preliminary facts, a summary of other pertinent testimony follows.

The Testimony

Oyola testified that appellant's sick time was not an issue when he took over in 2009, and appellant then had accrued sick time. He described that appellant's absences later became more chronic and excessive, and included a pattern of absences in conjunction with days off. Oyola indicated that he counseled appellant and discussed his attendance in 2012 and between January and June 2013. He also had several discussions with appellant regarding the FMLA, including before appellant's January 22, 2013, infraction and when he served the three disciplinary actions in 2013. Oyola explained that, although appellant had accrued sick time until June 7, 2013, when he observed excessive use of sick time by appellant, he recommended to appellant that he apply for FMLA leave time so that his absenteeism would not later hurt him. He apprised appellant of whom he should see and what was required, and he gave

appellant a copy of the policy. Oyola testified that he recommended only a five-day fine for appellant's absences in early June 2013, rather than counting each day as a separate violation for purposes of applying the "additional discipline" set forth in the Sick Leave Abuse/Absentee policy, in an effort to show leniency to appellant and because he felt it involved one payroll.

Joyce testified that she maintains a log regarding requests for leaves of absence, which includes the date and how she was notified of the leave request. She began maintaining this log around the time that she took over the work in 2012. According to her log, appellant personally came to her office on July 16, 2013, requesting the FMLA paperwork, which he was to return by July 30, 2013. (R-12.) Joyce described that this was the first time appellant contacted her concerning an FMLA leave, explaining that had she given appellant paperwork before July 16, 2013, it would be noted on the forms provided and she had no documentation for appellant before July 16, 2013. She did not recall speaking to appellant's doctor or appellant reporting that his doctor's office had lost his initial application. Joyce denied that she informed the doctor that he had to put August 3, 2013, on appellant's form or that she highlights areas on the doctor's certification, other than the section regarding frequency, but noted that the individual who did the work before her used to highlight other portions on the form.

Appellant testified about his medical history, including unpredictable bouts of abdominal pain that he experiences. He stated that prior to 2013 he had never requested leave under the FMLA and had only applied for medical leave during which he received disability benefits. According to appellant, he discussed intermittent FMLA leave with Oyola for the first time at the end of May 2013 and this was the first time appellant heard he could apply for it. He described that Oyola suggested that he apply for it because appellant was running out of sick time and it would allow him to take time off as needed, and Oyola informed appellant that he needed to go to Joyce in Personnel for the FMLA paperwork. According to appellant, he did not know at that time how many sick days or sick hours he had left to use, and he estimated that he learned in June 2013 that he had no more available sick time. Appellant testified that he worked on June 7, 2013, punched out at 13:12, after refusing to work mandatory overtime, and went to Joyce to apply for intermittent leave after he was released. He described that

Joyce took out papers, told appellant to sign certain things, and informed appellant that his doctor had to complete the certification, which must be returned in fifteen days. Appellant testified that he took the certification to Dr. Kahn's office on June 7, 2013, and relayed that it had to be completed in ten days so that it would not be late. He returned to the doctor's office on June 12, 2013, to ascertain whether the certification was completed, but was told that it was not ready and to return at end of the week. According to appellant, he informed Oyola when he returned to work on or about June 19, 2013, that the form was not ready; Oyola advised appellant to convey the information to Joyce, which he did; and Joyce told appellant that he needed to get it back as soon as possible. Appellant testified that he returned to the doctor's office on June 21, 2013, and he was then told that the secretary who took the form went on vacation and the document could not be located. He described that he relayed this information to Oyola, who directed him to inform Joyce. Appellant testified that he went to Joyce and advised her that the doctor's office could not locate his paperwork, and she gave him a second certification and highlighted areas on the form that needed to be completed. Appellant offered a blank certification form containing highlighting, which he testified was the second certification that Joyce had given him. (A-4.) Although appellant estimated that this occurred maybe in the last week of June or the beginning of July, he did not dispute that the memoranda Joyce gave to him to sign were dated July 16, 2013, and he signed and dated them July 17, 2013. He further described telling Joyce that the date should go back to the date of his earlier application, and being informed that the forms must include the date that he was there. According to appellant, he had previously signed similar forms on June 7, 2013.

Appellant testified that he gave the doctor the new certification, and Dr. Kahn informed appellant when he returned to pick it up that he had located the original certification form, which the doctor signed on July 22, 2013. Appellant offered a certification completed by his doctor dated July 22, 2013, which he stated is a copy of the certification that he received on that date. (A-2.) Appellant noted that the certification refers to June 7, 2013, as the approximate date his condition commenced, and stated that he brought the certification form to the doctor's office on that date and was not examined. Appellant described that he returned the certification to Joyce on either July 22, 2013, or another day that week. Joyce later informed appellant that the

certification was not filled out enough, and she put a sticker on the form with her name and telephone number and told appellant to have the doctor call her so she could explain what was wrong. According to appellant, Dr. Kahn called Joyce that day in appellant's presence and appellant heard Joyce tell Dr. Kahn to put August 3 to October 3 in the section regarding the estimated period of incapacity (which the doctor had left blank on the earlier form) and that it would not be approved unless he put August 3. (See A-2; A-3.) The doctor also listed symptoms on the form. Appellant testified that he returned the certification to Joyce that day and also went to Joyce's office around the second week of August because he had not heard anything about the intermittent leave being approved, but Joyce was then dealing with another individual. Appellant did not receive written notice, or notice from Oyola or Personnel, that his leave request had been approved as of July 22, 2013. Rather, appellant stated that he did not learn that it was approved until he called on August 19 regarding being out sick on August 20 and was then told that he had intermittent leave time.

Appellant articulated that he expected that his leave would go into effect from the day he requested the paperwork and/or got sick on June 7, 2013, stating that his past medical leaves were always retroactive regardless of when the paperwork was returned. Appellant admitted that no one told him that his leave started in June, and that he could have asked Oyola or Personnel how much sick time he had available. Although appellant acknowledged being counselled by Oyola in 2012 because of an attendance issue, he stated that it concerned bringing in a doctor's note if he called in sick. He disputed the accuracy of the COSS calendar, which he had produced, which not only states that appellant was "ANP 1312-1400" on June 7, 2013, but also "SICK 0600-1312." (A-1.)

Analysis and Additional Findings of Fact

In view of the divergent testimony regarding certain matters, it is necessary for me to assess the credibility of the witnesses for purposes of making factual findings as to the disputed facts. Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality or 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). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may also reject testimony as "inherently incredible" and when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Further, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

In judging the strength of the evidence and evaluating the demeanor and credibility of the witnesses, I found Oyola and Joyce to be forthright and credible witnesses. They presented candid testimony as to pertinent facts that was, in part, corroborated by documentation introduced at the hearing. Their testimony was also, in my view, not significantly undermined or impaired on cross-examination. In short, a canvas of the totality of the evidence casts doubt on the accuracy, reliability and believability of appellant's version of the events. I found appellant's rendition as to the circumstances surrounding his leave request to be improbable and not "hanging together" with, and discredited and overborne by, other credible evidence in the record. For example, although appellant described obtaining the FMLA paperwork on June 7, 2013, after refusing mandatory overtime, the COSS calendar and other documentation reflect that he had called out sick on that day. (See R-1; R-4c; R-5; A-1.) The record is further bereft of any FMLA leave request or related documentation bearing a date in

June 2013 or any witness to corroborate appellant's testimony. Apart from this, Joyce offered credible testimony that appellant came to her office on July 16, 2013, with regard to his FMLA leave request, which is corroborated by her log and the memoranda regarding appellant's leave request. Those memoranda, along with appellant's Leave Request form, are signed by appellant and dated July 17, 2013. The required doctor's certification also states that the doctor treated appellant on June 13, 2013, and is dated July 22, 2013, which is the approved effective date of appellant's FMLA leave. I further found improbable that Joyce would have directed Dr. Kahn to put August 3 to October 3 on the certification in view of the July 16, 2013, memoranda listing July 22, 2013, and October 22, 2013, as the beginning and ending dates of appellant's leave. And, even if there was some confusion when the doctor was completing the form, this had no impact on appellant since his leave was ultimately approved for that three-month time period.

Based upon a review of the testimony and documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, I **FIND** the following additional pertinent **FACTS**:

Oyola had several counseling sessions with appellant regarding his absenteeism prior to the instant disciplinary action. Appellant also had previously received discipline regarding his attendance in 2013. Oyola had discussions with appellant regarding the FMLA and the possibility of him being eligible for an intermittent FMLA leave, including discussions before the end of May 2013. Appellant was required to be familiar with the Department's attendance policies and had the responsibility to take measures to ascertain how much sick time he had available to use to ensure his compliance with those policies. Appellant's action with respect to requesting and ultimately obtaining intermittent FMLA leave as of July 22, 2013, occurred after his absences on June 15, 18 and 27, 2013, which form the basis for the discipline in issue.

The "Initial/Ext. Unpaid Leave of Absence" memorandum dated July 16, 2013, which had been given to appellant states, "You will be notified in writing if your Leave of Absence request is granted or rejected." (R-13, emphasis added.) The Department offered no written notice that had been provided to appellant or evidence regarding how and when appellant was notified of the approval of his leave, and appellant offered

undisputed credible testimony that he was unaware of such approval until he called out sick on August 19, 2013. The record is bereft of evidence suggesting that appellant applied for an extension of his leave of absence.

2. MANDATORY-OVERTIME INFRACTION (CSV 04690-14)

At the hearing, the Department presented testimony by Oyola and Yurecko, and appellant testified on his own behalf. The pertinent facts surrounding this appeal are not disputed. Based upon a review of the testimony and the documentary evidence presented, I **FIND** the following pertinent **FACTS**.

On November 2, 2013, appellant worked the 6:00-a.m.-to-2:00-p.m. shift and was ordered to work mandatory overtime. (R-6.) The Department has an established overtime policy governing all sworn staff, including a policy for mandatory overtime. The Department's overtime policy is codified in Adm. 17 (R-1), which states:

> In order to ensure the safety and security of the [HCCC], overtime hours may sometimes be necessary to adequately staff the facility. Optimally, these overtime hours will be offered voluntarily, but the need may occasionally arise to mandatorily hold custody staff when no acceptable alternative can be found. It is the policy of the HCCC to follow the set guidelines relating to both voluntary and mandatory overtime to ensure that it is distributed fairly and properly entered into the COSS system in a timely manner.

Pursuant to that policy, "mandatory overtime" is defined as "[o]vertime which a custody staff member is ordered to work based on operational requirements." The policy further directs that "[a]ssignment of mandatory overtime constitutes a direct order; refusal of mandatory overtime is only acceptable for medical reasons and requires a doctor's note to be submitted on the next scheduled tour of duty." (Emphasis added.)

The Department has a separate policy addressing mandatory overtime (Adm. 18) that outlines "the procedures for mandating officers to work overtime when and where staffing needs demand." (R-2.) That policy states:

> The administration of Hudson County Department of Corrections (HCDOC) may, at times, require additional officers to adequately staff the facility, either to compensate for the absence of regularly scheduled officers or to meet operational demands above that which is generally necessitated. In these instances, the HCDOC reserves the right to mandate that certain officers remain on duty past the end of their normal shift for the determined length of time sufficient to meet staffing needs. To ensure quality, officers will be chosen on a rotating basis from a prearranged list.

The policy further sets forth procedures regarding mandatory overtime and provides that unit managers "shall follow the standards of progressive discipline to those officers who, absent proper medical documentation, refused mandatory overtime." The referenced standards of progressive discipline are set forth in the HCCC Employee Performance Warning Notice for Failure to Comply with Departmental Policy Regarding Mandatory Overtime. (R-3.) That notice states in pertinent part:

1st offense	Written Warning
2nd offense	One Day Fine
3rd offense	Three Day Fine
4th offense	Six Day Fine

Appellant admits that he refused to work mandatory overtime as ordered, which he credibly explained was due to illness. Appellant further admits that upon checking with his doctor he did not submit the required doctor's note and advised his supervisor, Yurecko, accordingly. Yurecko issued an Employee Performance Warning Notice related to appellant's refusal to do mandatory overtime on November 2, 2013, which appellant acknowledged receiving on November 15, 2013, and disciplinary action was initiated against appellant on November 20, 2013. (R-4; R-5.) According to the submitted documentation, appellant previously failed to comply with the mandatory-overtime policy on July 26, 2013, resulting in a written warning; on July 27, 2013, resulting in a one-day fine; and on November 1, 2013, resulting in a three-day fine. (See R-4; R-5; R-7; R-8; R-10; R-11; J-3.) Ultimately, a six-day suspension was imposed for appellant's refusal to do mandatory overtime on November 2, 2013, and failure to bring in the required doctor's note to excuse not being able to work. (R-5; J-3.)

LEGAL DISCUSSION AND CONCLUSIONS

The Civil Service Act and the regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1, et seq. 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. See N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the employee is guilty of the charges brought against him and, if so, the appropriate penalty, if any, that should be imposed. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

In this matter, the Department bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, and according to a reasonable probability of truth. Jackson v. Del., Lackawanna and W. R.R. Co., 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) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Precisely what is needed to satisfy this burden necessarily must be judged on a case-by-case basis.

An appointing authority may discipline an employee for various causes as set forth in N.J.A.C. 4A:2-2.3. With regard to appellant's absence from work on June 15, 18 and 27, 2013, the Department charged appellant with insubordination, chronic or excessive absenteeism, conduct unbecoming a public employee, and neglect of duty. N.J.A.C. 4A:2-2.3(a)(2), (4), (6) and (7). As to appellant's failure to work mandatory overtime, the Department charged him with incompetency, inefficiency or failure to perform duties, insubordination, conduct unbecoming a public employee, neglect of duty, and other sufficient cause. See N.J.A.C. 4A:2-2.3(a)(1), (2), (6), (7) and (12).

Insubordination encompasses an employee's failure or refusal to follow a directive, order or instruction of a supervisor. Eaddy v. Dep't of Transp., 208 N.J. Super. 156, 158–59 (App. Div.), certif. granted, 104 N.J. 392, order vacated, appeal dismissed, 105 N.J. 569 (1986); City of Newark v. Massey, 93 N.J. Super. 317, 322 (App. Div. 1967). 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 as well as negligence. Clyburn v. Twp. of Irvington, CSV 7597-97, Initial Decision (September 10, 2001), adopted, Merit System Board (December 27, 2001), <http://njlaw.rutgers.edu/collections/oal/>; see Steinel v. Jersey City, 193 N.J. Super. 629 (App. Div.), certif. granted, 97 N.J. 588 (1984), aff'd on other grounds, 99 N.J. 1 (1985). Conduct unbecoming a public employee has been described as an "elastic" phrase that includes "'conduct which adversely affects the morale or efficiency'" of the public entity or "'which has a tendency to destroy public respect for [public] employees and confidence in the operation of [public] 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). In general, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. Clark v. N.J. Dep't of Agric., 1 N.J.A.R. 315 (1980). Although the regulation does not define when absenteeism will rise to the level of chronic or excessive, it is generally understood that chronic conduct is conduct that continues over a long time or recurs frequently, Good v. N. State Prison, 97 N.J.A.R.2d (CSV) 529, 531, and "excessive" is defined as "exceeding a normal, usual, reasonable, or proper limit." American Heritage Dictionary 638 (3rd ed. 1992); see Rios v. Paterson Hous. Auth., CSV 3009-02, Initial Decision (August 1, 2005), adopted, Comm'r (September 13, 2005), <http://njlaw.rutgers.edu/collections/oal/>.

Based upon the aforesaid **FINDINGS of FACT**, I **CONCLUDE** that the Department has shouldered its burden of proving, by a preponderance of the credible evidence, that appellant's failure to report to work on June 15, 18 and 27, 2013, constitutes chronic or excessive absenteeism, neglect of duty and conduct unbecoming a public employee. In judging whether an employee's absenteeism is chronic or excessive, relevant factors include, among others, the number of absences, the time

span between the absences, and the negative impact on the work place. See Harris v. Woodbine Developmental Ctr., CSV 4885-02, Initial Decision (February 11, 2003), adopted, Comm'r (March 27, 2003), <http://njlaw.rutgers.edu/collections/oal/>; Hendrix v. City of Asbury, CSV 10042-99, Initial Decision (April 10, 2001), adopted, Comm'r (June 8, 2001), <http://njlaw.rutgers.edu/collections/oal/>; Morgan v. Union Cnty. Runnells Specialized Hosp., 97 N.J.A.R.2d (CSV) 295; Bellamy v. Twp. of Aberdeen, Dep't of Pub. Works, 96 N.J.A.R.2d (CSV) 770. It is further recognized that "numerous occurrences" of habitual tardiness or similar chronic conduct "over a reasonably short space of time, even though sporadic, may evidence an attitude of indifference amounting to neglect of duty." West New York, supra, 38 N.J. at 522. Equally recognized is that "excessive absenteeism is not necessarily limited to instances of bad faith or lack of justification on the part of the employee who was frequently away from [his or] her job." Terrell v. Newark Hous. Auth., 92 N.J.A.R.2d (CSV) 750, 752; see also Bellamy, supra, 96 N.J.A.R.2d at 772.

Succinctly stated, the record demonstrates that appellant did not report to work on approximately thirty-three days as of June 15, 2013, and had exhausted all of his sick time by June 7, 2013. Although I have no reason to doubt appellant's medical condition at the time, the record falls short of demonstrating that appellant took diligent and meaningful steps to ascertain the amount of sick time he had available to use and to address his medical condition through the pursuit of an FMLA or other leave of absence. An employer has a legitimate right to expect that its employees will attend work as scheduled. See Svarnas v. AT&T Comm'ns, 326 N.J. Super. 59, 78 (App. Div. 1999). ("[R]easonably regular, reliable, and predictable attendance is a necessary element of most jobs. An employee who does not come to work cannot perform any of [his or] her job functions, essential or otherwise.") Plainly, appellant's absences from work caused a disruption in the work place and created a hardship to the Department in that other correction officers had to absorb appellant's job duties. Appellant's repeated failure to work his assigned shifts is conduct that adversely affects the morale of other governmental employee correction officers who had to undertake appellant's work and adversely affects the efficient operations of the correctional facility. Although the Department also charges appellant with insubordination, I **CONCLUDE** that the facts

more appropriately fit the charges of chronic or excessive absenteeism, neglect of duty and conduct unbecoming a public employee.

Based upon the aforesaid **FINDINGS of FACT**, and with regard to appellant's refusal to work mandatory overtime, I **CONCLUDE** that the Department has shouldered its burden of proving, by a preponderance of the credible evidence, that appellant's dereliction amounts to insubordination, neglect of duty and other sufficient cause, namely, the failure to comply with the Department's overtime policy. The Department's overtime policy unambiguously instructs that "[a]ssignment of mandatory overtime constitutes a direct order" and that "refusal of mandatory overtime is only acceptable for medical reasons and requires a doctor's note to be submitted on the next scheduled tour of duty." It is undisputed that appellant was ordered to do mandatory overtime, and appellant refused to do that overtime and did not bring in the required doctor's note to justify his refusal to comply with the direct and lawful order given to him by his supervisor. Our courts have recognized the importance of maintaining strict discipline in paramilitary settings such as police departments and correctional facilities. See Henry, supra, 81 N.J. at 579; Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); Massey, supra, 93 N.J. Super. 317. In this type of setting, the "[r]efusal to obey orders . . . cannot be tolerated." Rivell, supra, 115 N.J. Super. at 72. Appellant's failure to perform his mandated duty of remaining for a second tour and failure to submit the required doctor's note to excuse his refusal to do so also constitutes neglect of his duties as a correction officer and violation of the governing overtime policies. I do not embrace appellant's contention that "Hudson County wrongly curtailed the number of leave days available to [appellant]" and, "[h]ad Hudson County properly administered [his] intermittent leave," appellant "would not have been charged with refusing mandatory overtime on November 2, 2013, as he would in all probability have had intermittent leave left to request at the time of the mandatory notice." As previously found in connection with appellant's attendance infraction, appellant had been approved for three months of leave time and he was explicitly placed on notice that "[i]f [his] Leave of Absence is approved, it will expire on 10-22-2013," and "[i]f [appellant] wish[ed] to apply for an extension of [his] leave, [he] must do so in writing" and it "must be submitted to [his] Department Director at least ten working days prior to the expiration of [his] leave." (R-13.) And, no evidence was

offered suggesting that appellant ever requested an extension of his leave of absence after it expired on October 22, 2013. I **CONCLUDE** that appellant's failure to provide the required doctor's note to justify his refusal to work mandatory overtime on November 2, 2013, which appellant credibly testified was due to illness, does not rise to such a nature to amount to conduct unbecoming an employee or incompetence or inefficiency, and that the charge of failure to perform duties is duplicative in light of the above-sustained charges.

The only remaining issue concerns the penalty that should be imposed. It is beyond debate that appellant's past disciplinary record may be considered for guidance in determining the appropriate penalty, and the principle of progressive discipline is applied in this state. See Bock, supra, 38 N.J. at 522. Although an employee's past record may not be considered for purposes of proving the present charge, past misconduct can be a factor in determining the appropriate penalty for the current misconduct. In re Herrmann, 192 N.J. 19, 29 (2007); In re Carter, 191 N.J. 474, 484 (2007); Bock, supra, 38 N.J. at 522–23. The underlying purpose of progressive discipline is to provide an employee with notice of his or her deficiencies and the opportunity to correct those deficiencies. In re Thomas, CSV 11069-97, Final Decision (November 17, 2000), <http://njlaw.rutgers.edu/collections/oal/>.

The record establishes that appellant was given ample notice and warning of the need to improve his attendance. He was counseled on various occasions in 2012 and 2013 by his supervisor about his attendance, and had been disciplined in the nature of one-day, three-day and five-day fines for his absences on January 22 and 23, 2013, and June 8, 11, 12, 13 and 14, 2013. He was also notified of his duty to work mandatory overtime when required and had been disciplined prior to November 2, 2013, for failing to adhere to the mandatory-overtime policy. In other words, appellant's current infractions are not an aberration in an otherwise unblemished career and appellant has been given fair warning that his behavior must change, the opportunity to correct his shortcomings, and notice of consequences that would result from a continuing failure to abide by the Department's policies.[2]

[2] Appellant's disciplinary record also includes a five-day suspension that was issued by Notice of Minor Disciplinary Action dated October 13, 2011, based on charges of incompetency, inefficiency or failure to

However, I am not persuaded that the nature of discipline that had been imposed is warranted based upon the totality of the circumstances. The Department relies upon the "additional discipline" schedule in the Sick Leave Abuse/Absentee policy in support of its stance that a forty-five-day suspension is reasonable and appropriate. That policy, by its terms, is only "a suggested disciplinary schedule . . . where discipline is warranted by the facts in each case" and is only implicated after an employee has been issued the required verbal warning and after the employee has been issued the required written warning for being absent or sick more than fifteen days in three consecutive years with no "legitimate reasons." In short, the Department offered no verbal or written warning that had been issued to appellant in 2013 and the submitted calendars do not support that appellant had been absent or sick more than fifteen days in three consecutive years. I **CONCLUDE** that a twenty-day suspension is reasonable and appropriate under the circumstances presented, and that such discipline is consistent with progressive discipline and sufficient to impress upon appellant the need to improve his attendance.

Turning to appellant's mandatory-overtime infraction, the Department urges that a six-day suspension is warranted under the progressive-discipline schedule since appellant's infraction on November 2, 2013, was his fourth offense. The circumstances of this case, however, necessitate mitigation of this penalty since two of appellant's earlier infractions related to failing to work mandatory overtime on July 26 and July 27, 2013, both of which fell within the period of appellant's approved FMLA leave. Appellant's intermittent FMLA leave was apparently approved in or around Joyce's August 16, 2013, e-mail and made retroactive to July 22, 2013. It is reasonable to conclude that appellant would have used intermittent leave time on July 26 and 27, 2013, had appellant known such time existed and, therefore, would not have been subject to discipline. Indeed, the record includes doctor's notes confirming appellant's illness on July 26 and 27, 2013, which Oyola admits he received on August 6, 2013. (A-1.) Based upon the facts of this case, including the retroactive nature of appellant's

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perform duties; insubordination; inability to perform duties; conduct unbecoming a public employee; neglect of duty; and other sufficient cause. (R-9; J-3.) The factual basis for that discipline cannot be ascertained from the record.

FMLA leave, I am not persuaded by the Department's stance that appellant should be foreclosed from challenging that this is his fourth offense since no appeal or grievance had been filed from the earlier discipline. I **CONCLUDE** that the November 2, 2013, infraction should be considered appellant's second offense, which under the discipline schedule warrants a one-day fine or suspension, and which shall be deemed to have already been served.

ORDER

I **ORDER** that with regard to appellant's appeal from the Final Notice of Disciplinary Action dated March 26, 2013, relating to appellant's absence from work on June 15, 18 and 27, 2013, the charges of chronic or excessive absenteeism, neglect of duty and conduct unbecoming a public employee be and hereby are **SUSTAINED** and the charge of insubordination be and hereby is **DISMISSED**. I further **ORDER** that, based upon the aforesaid sustained charges, appellant be and hereby is suspended for twenty days.

I **ORDER** that with regard to appellant's appeal from the Final Notice of Disciplinary Action dated March 26, 2013, relating to appellant's mandatory-overtime infraction, the charges of insubordination, neglect of duty and other sufficient cause be and hereby are **SUSTAINED** and the charges of conduct unbecoming a public employee and incompetency, inefficiency or failure to perform duties be and hereby are **DISMISSED**. I further **ORDER** that, based upon the aforesaid sustained charges, a one-day suspension is imposed, which appellant shall be deemed to have already served.

I further **ORDER** that back pay and other benefits be issued to appellant as may be dictated by 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, 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 23, 2015
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: November 23, 2015

Date Mailed to Parties: November 23, 2015

jb

APPENDIX

List of Witnesses

For Appellant:

Rodney Wells

For Respondent:

(As to CSV 04690-14)

Chris Yurecko

Luis Oyola

(As to CSV 04692-14)

Luis Oyola

Patricia Joyce

List of Exhibits in Evidence

CSV 04690-14

Joint:

J-1	Preliminary Notice of Disciplinary Action dated January 29, 2014
J-2	Final Notice of Disciplinary Action dated March 26, 2014
J-3	Amended Stipulation

For Appellant:

A-1	Return to Work or School Certification forms
A-2	Employee Scheduling and Time & Attendance Systems Monthly Calendars

For Respondent:

R-1	Hudson County Department of Corrections Overtime Policy
R-2	Hudson County Corrections Mandatory Overtime Policy

R-3	Employee Performance Warning Notice
R-4	Disciplinary Action dated November 20, 2013
R-5	Employee Performance Warning Notice dated November 15, 2013
R-6	Mandatory Overtime form dated November 2, 2013
R-7	Notice of Minor Disciplinary Action dated November 12, 2013
R-8	Mandatory Overtime form dated November 1, 2013
R-9	Reporting Off-Duty Sick or Family Emergency form
R-10	Employee Performance Warning Notice dated August 6, 2013
R-11	Notice of Minor Disciplinary Action dated August 6, 2013

CSV 04692-14

Joint:

J-1	Preliminary Notice of Disciplinary Action dated September 26, 2013
J-2	Final Notice of Disciplinary Action dated March 26, 2014
J-3	Amended Stipulation

For Appellant:

A-1	Employee Scheduling and Time & Attendance Systems Monthly Calendars
A-2	Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act)
A-3	Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act)
A-4	Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act)
A-5 to A-12	No exhibit admitted
A-13	List of Leaves
A-14 to A-17	No exhibit admitted
A-18	2010 and 2011 Schedules for Rodney Wells
A-19	2009 Schedule for Rodney Wells

For Respondent:

R-1 Disciplinary Action dated July 24, 2013

R-2 Excerpt of Custody Staff Rules and Regulations Manual

R-3 Memorandum regarding Sick Leave Abuse/Absenteeism–4th Revision dated June 27, 2001

R-4 Notices of Minor Disciplinary Action dated February 13 and July 24, 2013

R-5 2013 Schedule for Rodney Wells

R-6 2012 Schedule for Rodney Wells

R-7 View Activity Report

R-8 Employee Profile

R-9 Notice of Minor Disciplinary Action dated October 13, 2011

R-10 Verbal Warning dated January 2009 and Written Warnings dated August 2006 and November 22, 2006

R-11 Report

R-12 Log

R-13 Leaves, Separation and Transfers Form, Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act) and memoranda dated July 16, 2013

R-14 E-mail from Patricia Joyce to Luis Oyola dated August 8, 2013, and e-mail from Patricia Joyce to Luis Oyola and Ronald Edwards dated August 16, 2013