



STATE OF NEW JERSEY

In the Matter of Keisha Allen
Township of Hillside Police
Department

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC DKT. NOS. 2014-1966 and 2014-
2618
OAL DKT. NOS. CSR 05767-14 and
CSV 02286-14
(Consolidated)

ISSUED: NOVEMBER 2, 2018 BW

The appeals of Keisha Allen, Police Officer, Township of Hillside Police Department, 10 working day suspension and removal effective April 28, 2014, on charges, were heard by Administrative Law Judge Michael Antoniewicz, who rendered his initial decision on September 21, 2018. Exceptions were filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's (ALJ) initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of October 31, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision. The Commission also acknowledged the appellant's withdrawal of her appeal of the 10 working day suspension as noted by the ALJ.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending and removing the appellant was justified. The Commission therefore affirms those actions and dismisses the appeals of Keisha Allen.

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 31ST DAY OF OCTOBER, 2018



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
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Christopher S. Myers
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

(CONSOLIDATED)

OAL DKT. NOS. CSV 02286-14

and CSR 05767-14

AGENCY DKT. NO. 2014-1966

**IN THE MATTER OF KEISHA ALLEN,
TOWNSHIP OF HILLSIDE POLICE
DEPARTMENT.**

Salvatore Bellomo, Esq., for appellant Keisha Allen (Law Offices of Salvatore Bellomo, attorneys)

Edward J. Kologi, Esq., for respondent Township of Hillside (Kologi & Simitz, attorneys)

Record Closed: September 5, 2018

Decided: September 21, 2018

BEFORE MICHAEL ANTONIEWICZ, ALJ:

STATEMENT OF THE CASE

Appellant Keisha Allen, a former police officer for the Township of Hillside Police Department (Hillside), appeals her removal for: 1) conduct unbecoming a public employee; 2) insubordination; 3) neglect of duty; 4) failure to perform duties; and 5) other sufficient cause. The Hillside Rules of Conduct: 3:1.3, cooperation; 3:1.8,

performance of duty; 3:1.9, fitness for duty; 3:1.13, insubordination; 3:1.16, conduct toward superior and subordinate officers and associates; 3:1.22, criticism of official acts or orders; 3:1.33, withholding information—false reporting; 3:2.1, alcoholic beverages and legal drugs. The parties stipulated to the fact that this hearing did not concern suspensions imposed in the case docketed CSV 02286-14, as Allen did not appeal that action, and the only issue addressed in this hearing was Allen's termination contained in the Final Notice of Disciplinary Action (FNDA) dated April 28, 2014, in the case docketed CSR 05767-14.

PROCEDURAL HISTORY

Appellant waived her departmental hearing, and respondent issued a Preliminary Notice of Disciplinary Action (PNDA) on January 26, 2014, sustaining the charges for a ten-day suspension (under CSV 02286-14). On February 11, 2014, the respondent issued an FNDA seeking appellant's termination and her removal from her position as a police officer for the Township of Hillside.

The appellant requested a hearing, and the appeal was transmitted to the Office of Administrative Law (OAL) on February 25, 2014, as to CSV 02286-14. The hearing was held on March 20, 2017 and March 29, 2017. Subsequently, a second appeal was filed with the OAL on May 8, 2014, as to CSR 05767-14. I issued an order consolidating both matters on June 27, 2014. After numerous adjournment requests by both sides on many scheduled hearing dates for various reasons, including placing the matters on the inactive list, settlement discussions and unavailability of the attorneys and/or witnesses, the hearing was held on September 5, 2018, and the record closed on that date.

TESTIMONY

For Respondent

Police Chief Louis Panarese (Panarese) was the police chief for the Township of Hillside for about four years. Panarese worked for Hillside for thirty-four years and

was a detective supervisor for more than twenty years. Panarese also handled administrative discipline for the Hillside Police Department. Panarese identified J-1 as the ten-day PNDA suspension for Allen and J-2 as an FNDA for the termination of Allen.

Panarese recalled that Allen was involved in a minor car accident on March 19, 2013, when patrolling a car dealership while on duty. Panarese saw the written accident report, and the report noted that there was no one injured and basically no damage to the motor vehicles. Panarese identified the police report dated March 19, 2013, and written by Sgt. Paul White. Panarese described the accident as minor, with both cars being driven away. Panarese stated that Allen was a passenger in the police vehicle. Allen stated to the responding officer that she had no pain and no injury.

Panarese testified that the next day, March 20, 2013, Allen stated that she was experiencing extreme back pain, and she went to the emergency room at Overlook Hospital. Panarese identified the picture of the minor damage of the police vehicle in which Allen was a passenger. (R-2.) Panarese described the damage as a dent in the front bumper.

Thereafter, Allen submitted a doctor's note regarding her injuries. Panarese received information which stated that Allen could return to work on April 20, 2013. Allen did not return to work on that date. Allen was referred to Concentra Medical Center for a review and examination. As the chief of police, Panarese receives all medical paperwork for the Hillside Police Department.

Allen advised Panarese that she was in a lot of pain, with a lumbar strain, and Allen remained out of work. Allen was then instructed to report to Concentra once again. On March 28, 2013, Allen went back to Concentra, which found that the pain could be controlled with heat. The diagnosis by Concentra was a lumbar thoracic strain. On March 28, 2013, Allen still did not return to work. Allen remained out of work and used sick time. In April 2013, Allen returned to Dr. Lester. Allen advised Lester that she had pain in the lower lumbar area. Allen stated that her movements were extremely limited. Lester considered such statements as subjective in nature. On April 18, 2013,

Allen went back to Concentra for the third time. Concentra determined that Allen had a soft-tissue injury, with subjective pain and behavioral overlay.

An MRI was taken of Allen by Millburn Medical Imaging, and the MRI showed no herniated discs, with a normal examination. (R-3.) The report was dated April 26, 2013, and further confirmed no disc protrusion, and the impression was normal. Both Concentra and Overlook Hospital cleared Allen to return to work on April 20, 2013, full duty, without restriction. (R-4.) Despite this, Panarese stated that Allen did not return to full duty on April 20, 2013.

Allen did light duty. She worked the police desk in Hillside and answered the telephone. In this capacity, Allen worked for three days. On April 24, 2013, Dr. Lester discharged Allen to full duty. On April 29, 2013, Allen was sent back to Dr. Lester. Dr. Lester found that there was a normal MRI and that the subjective complaints were out of line with the findings. On this day, Dr. Lester cleared Allen for full duty.

Thereafter, Allen submitted a note from the Codella Family Practice that Allen needed to be out from May 2, 2013, until May 15, 2013, and that she could return to duty on May 16, 2013. Allen was once again sent to Concentra for a functional capacity evaluation (FCE). On May 7, 2013, Lester conducted an FCE. The FCE resulted in no report of any injury or re-injury. Allen reiterated that she was in pain. On May 14, 2013, Allen was placed on administrative leave with pay, pending an investigation. Thereafter, Allen went to the Codella Family Practice, which recommended her out from duty from May 15, 2013, until May 27, 2013.

An Internal Affairs (IA) investigation commenced to review Allen's conduct. The IA investigation was conducted by Captain Floyd. The IA investigation took approximately one month. Floyd provided Panarese his findings in a report. Thereafter, Allen was ordered back to work. There was a supplemental investigation after this order was given to Allen. As a result of this order to return to work and her failure to return to work, charges were brought against Allen, and those charges were sustained. The sustained charges were: 1) failure to perform duties; 2) insubordination; 3) conduct

unbecoming a public employee; 4) neglect of duty; and 5) other sufficient cause. (J-2.) There were also eight other violations of regulations.

Allen was out of work until June 14, 2013. Respondent ordered Allen to go for an IME with Dr. Aragona (Aragona), an orthopedist. (R-5.) This exam took place on June 18, 2013. Aragona found pain patterns on the left sacroiliac. There was pain on Allen's right side and a complaint of pain on the left side.

Aragona supplied the respondent with a complete report (R-8) dated June 18, 2013. Aragona found that Allen had one painful or achy spot in the region of the left buttocks. There is no radiating pain and no numbness or weakness to the lower extremities. The pain is constant, but is worse with sitting more than two to three hours. It is somewhat improved by walking, stretching, massage, and use of a TENS unit. Aragona provided an opinion within orthopedic medical probability. Aragona noted that Allen advised him that the only remaining area of pain is at the left pelvic area, which corresponds to the sacroiliac joint. Aragona stated in his report that Allen's pain patterns were entirely subjective, without objective evidence. There is no evidence of restricted motion, spasm, or weakness. It was Aragona's opinion that Allen can return to full duties at work.

Based on the results of Allen's IMEs, deputy chief of police John Robertson forwarded a letter to Allen ordering her to return to work for her next regularly scheduled shift on July 24, 2013. (R-9.) Allen's eight-hour shift was to start at 8:30 p.m. on July 24, 2013. Allen did not work that day, nor did she work on July 26 or July 27, 2013, as she called out sick on both days.

Respondent then received a note from Overlook Hospital stating that Allen could return to work on August 2, 2013. (R-10.) They also received a doctor's note from Premier Healthcare stating that Allen had piriformis syndrome on the left side and could return to work on August 20, 2013. On August 15, 2013, Allen was sent to Concentra to see Dr. Lester. Dr. Lester examined Allen once again and concluded that Allen had a lumbar flexion, but could not explain Allen's other complaints. Lester found that Allen had significant behavior overlay. Lester found that Allen's injury was to soft tissue, and

she could return to full-duty work. In his report dated August 15, 2013, Dr. Lester wrote that he could not explain this patient's subjective complaints. (R-6.) Lester explained that Allen's complaints had been completely nonspecific, generalized throughout the lumbar area, and now "all of a sudden are localized to the left buttock." It seemed unusual to Dr. Lester. "As she had a significant left SI joint injury or hip injury, I believe she would have been focusing our attention to the area much earlier in the injury treatment process."

Premier Healthcare determined that Allen could return to work on September 3, 2013. However, Allen did not return on September 3, 2013, and her suggested sick leave was extended until September 17, 2013. Panarese stated that Allen only came back to work for one half day. Respondent wrote to Aragona requesting a supplemental medical opinion. On September 6, 2013, respondent sent a letter to Aragona advising the doctor that they conducted an investigation into Allen and obtained footage of her daily activities. They further advised Aragona that they had received several doctor's notes that stated that Allen was in extreme pain as a result of left piriformis syndrome and sciatica and had been placed on sick leave through September 17, 2013. They requested from Aragona a supplemental medical opinion addressing the footage of Allen and the medical documents.

On September 10, 2013, Aragona provided Panarese with his report. (R-13.) Aragona found Allen to be miserable and very emotional. Aragona also referred to the video footage of Allen. Aragona describes the video as showing Allen exiting a motor vehicle and going up and down steps into a building. Allen is seen carrying objects in her hands without supporting herself on the handrails. In addition, on the video Allen is seen holding a cell phone and leaning over a rail, turning her body, and then re-entering the building. In another video, Allen exits a building holding a purse in one arm and locking the door with a key in her other hand. Allen uses the steps without the handrail and enters a vehicle smoothly. Allen is not walking with any limp. On one video, Allen is seen carrying trash to a disposal. Allen uses her left hand and closes the gate behind her. In another video, Allen walks with no limp and with objects in both hands. Allen also is seen pushing a shopping cart with both hands, with a few items in the cart, and Allen has no limp. Based on these reviews, Aragona gives his opinion within orthopedic

medical probability that Allen had reached maximum medical improvement and could return to full duties at work. Aragona again stated that Allen has subjective complaints. Aragona found that Allen's neurology status was normal and her lumbar examination showed complete motion. Allen did report pain on palpation and lumbar motion on the left side. Aragona stated that piriformis syndrome is characterized by sciatica symptoms, which do not originate from the spinal roots or spinal disc compression.

It was Aragona's position that based on his past examination and the video footage, he did not find medical evidence of physical findings consistent with extreme pain from piriformis syndrome with sciatica. Aragona stated that patients with these clinical complaints have pain-avoidance behavior and show signs of limping, supported ambulation, and difficulty with activities such as entering and exiting a vehicle. Allen did not show such behaviors in the video. (R-13.)

On September 20, 2013, Allen went to Manhattan Physical Medicine. It was Allen's fourth treating facility. Manhattan stated that Allen should be out of work for four weeks.

Respondent, based on Aragona's most recent report, ordered Allen back to work on October 12, 2013. Panarese wrote a letter to Allen dated October 10, 2013, ordering her back to work on Saturday, October 12, 2013. (R-14). On October 11, 2013, Allen came into the police department while taking prescription medication. Allen did not come to work on October 12, 2013. Aragona stated that Allen is fit for full duty, including the wearing of her duty belt. (R-18.)

On October 11, 2013, the acting chief of police, Nicola Lamonte, sent a letter to Allen ordering her to submit a doctor's note to provide information regarding Allen's prescription drugs in nine separate categories. Pending receipt of this note, there was no need to appear for her October 12, 2013, shift. (R-15.) On October 14, 2013, Dr. Wilkins drafted a note with the breakdown of Allen's drugs. (R-17.) Aragona reviewed Wilkins's note, and it was his opinion that Allen could not be on regular police duty while on those medications. (R-20.) On October 28, 2013, Aragona wrote a letter stating that it was his opinion that the only medication that Allen was required to be on

was an anti-inflammatory, such as diclofenac, and that he would not prescribe Percocet or Lorzone. Allen could still work as a police officer on an anti-inflammatory. (R-22.)

On October 18, 2013, Allen submitted a note from Manhattan for muscle spasms and lower-back pain. It stated that Allen could not stand, and should be out of work until November 18, 2013. On October 31, 2013, Allen was ordered to return to work on November 1, 2013, and not to take medication like Percocet. (R-23.) On November 1, 2013, Allen appeared for work and notified the lieutenant that she could not bend or kneel. On October 31, 2013, the respondent made a list for Allen to disclose her medications. On November 1, 2013, Allen took the drug Percocet. (R-24.) Based on taking this medication, Allen was not permitted to work that day and was required to take a sick day.

On November 2, 2013, Chief Panarese issued a letter with a Direct Order to return to work and not to take narcotic drugs. (R-25.) If Allen disobeyed this order she would be subject to progressive discipline. On November 2, 2013, Allen appeared at work after taking Percocet, even though she knew she was coming to work and was ordered not to take such drugs. (R-26.) Allen also took Skelaxin on that date. Allen stated that she gave this statement involuntarily, and that she was forced into giving this information.

On November 3, 2013, Allen called headquarters and called out sick. On November 4, 2013, the respondent sent a letter for Allen to provide an opinion as to Allen's need to take Skelaxin. It was Aragona's opinion that this medication was not necessary for Allen. Allen is only required to take an anti-inflammatory. (R-28.)

On November 11, 2013, Allen appeared for work under the influence of Percocet. (R-29.) Allen refused to fill out the Statement of Medications. Allen refused to sign the statement, and it was only signed by her lieutenant. Thereafter, Allen provided a note from Manhattan stating that Allen could not perform her duties, due to severe pain, until December 18, 2013.

On November 12, 2013, the respondent (Panarese) sent a letter to Allen ordering Allen to appear for work not under the influence of Percocet. The previous orders of October 31 and November 2, 2013, remained in effect. (R-30.) This was the third order issued to Allen by the respondent. This order further stated that if Allen continued to take Percocet, Lorzone, and Skelaxin, which would impair her ability to function, it would be considered an "unexcused" absence. An unexcused absence is like being absent without leave, explained Panarese. On November 12 and 13, 2013, Allen called out sick, and those absences were recorded as unexcused.

Accordingly, an Internal Affairs complaint form was filed against Allen. Allen was told to be compliant and forthcoming at the interview. Allen was interviewed on November 27, 2013, and the interview was recorded with the knowledge of Allen.

From November 21 through 25, 2013, December 1 through 5, 2013, and December 11 through 15, 2013, Allen called out sick. These were unexcused absences. On December 16, 2013, a note from Manhattan was submitted by Allen. The note stated that Allen was in severe pain and should be out of work until January 20, 2014. From December 15, 2013, until January 28, 2014, Allen did not appear for work, and those absences were noted as unexcused. Allen went on medical leave until February 17, 2014, and those absences were further unexcused absences.

On January 28, 2014, Allen was served with minor discipline, a ten-day suspension. In addition, on January 28, 2014, Allen was served with a Final Direct Order to Report to Work. (R-32.) This order stated that Allen must report to work on January 30, 2014. Allen was advised of possible termination if she disobeyed the order. Allen appeared to work on January 30, 2014, and completed the medical form. Allen stated that the answers on the form were given under duress. Allen had to requalify with firearms. Allen was required to kneel, and she stated that she could not kneel four times. Allen was unable to fire a round off. Allen grabbed her right side with pain. Allen refused medical attention, and she was taken home.

From January 31, 2014, until February 3, 2014, Allen was absent from work without excuse. On February 4, 2014, Allen waived the disciplinary hearing on the ten-

day suspension. On February 10, 2014, a second IA complaint was issued against Allen. On February 11, 2014, the FNDA was served, and she was served with a second IA complaint. From February 9, 2014, until February 12, 2014, Allen refused to appear for duty, and those absences were recorded as unexcused. Allen submitted another note from Manhattan, which stated that she should be out of work until March 17, 2014. Allen just did not come in from February 17 until February 23, 2014. Allen also did not come in from March 1 through March 5, 2014, and those absences were cited as unexcused absences.

On March 10, 2014, Allen appeared for an IA interview. Allen had an attorney as her representative and was not on any medication. On March 12, 2014, the charges against Allen were sustained. Floyd found that Allen was absent without authorization. Floyd issued a report in April 2014. Allen did not report to work in March and April 2014.

The discipline issued against Allen was removal, with the specifications for the termination. It was stated that Allen did not follow the rules, and not following rules can result in chaos in the police department. The video of the IA interview shows Allen limping into the interview room. The interview lasted seventeen minutes and twenty-nine seconds.

There was also surveillance conducted of Allen by Creative Solutions (CS). Based on this surveillance, CS created a report. (R-35.) The report described in words what was seen on the videotapes of Allen.

On cross-examination, Panarese confirmed the date of the accident. Panarese stated that Allen complained of pain the next day. Panarese also confirmed that Allen went to the ER at Overlook the next day. Panarese said that Allen went to Concentra for a medical review. At that time Allen was reviewed and diagnosed with a lumbar strain. Panarese also stated that an MRI was done on Allen which showed no herniated discs. (R-3). In addition, Lester provided a report regarding his evaluation. Lester stated that the pain could be well controlled with heating pads. Lester believed that the

pain in the lower back was subjective. Overlook also cleared Allen for work as of April 20, 2013.

Panarese admitted that he accepted the note from Codella. Concentra did an FCE and found no objective injury. Allen was excused from work from May 15 to May 27, 2013, by a note from Codella. Allen was further excused from work after May 30, 2013. Respondent ordered an IME by Aragona which resulted in a report of June 18, 2013. The report was submitted to Panarese. (R-8.) Panarese confirmed that Allen went to Overlook Hospital with complaints of lower-back pain.

Panarese admitted that the job of a police officer required the officer to sit for long periods of time. The officer had no weapon at the desk when sitting at the front desk. When Allen appeared at work she complained of pain, and was taken away in an ambulance; Allen walked to the ambulance.

Dr. Lester's report notes non-specific pain in the lumbar area. Panarese also stated that he contacted Aragona in order to obtain a supplemental report. Panarese confirmed that Manhattan treated Allen for lower-back pain and excused her from work for four weeks. On October 12, 2013, Allen was ordered back to work. On October 11, 2013, Allen returned to work, but she was on medication at that time.

Panarese described the police officer's belt as having a gun, handcuffs, two magazines, and other things. The belt can be cumbersome, and the officer can be in the car for hours at a time. Panarese did not find the belt to be uncomfortable. Captain Lamonte documented what happened when Allen said she could not wear the belt. On October 11, 2013, Chief Lamonte sent a letter to Aragona about the ability of Allen to wear her police belt. (P-1.) There were IA investigations in November 2013 and March 2014, and videos were taken of Allen.

The form regarding disclosure of medicines was created by counsel and is now a part of the general forms presently used at the department. Failure to complete the form will subject the officer to possible discipline. It is not voluntary, because the officer is required to fill it out.

Panarese stated that Aragona is paid by Hillside, as he is a township physician. Wilkins, on the other hand, was paid by Allen. The shooting exam was conducted by the firearms instructor. Allen was required to kneel on her left knee. Allen grabbed the right side of her back.

The order to require Allen back to work was based on Aragona's information. From January 2014 and after, the last doctor's note received by respondent was on March 11, 2014.

On redirect examination, Panarese stated that Allen received order after order, and that Allen did not obey the orders. Allen was free to take appropriate legal action to address these orders, but she did not. Concentra is also Hillside's medical facility. Panarese did not know about Aragona. Panarese also stated that it was not unusual to take nine months to do an IA investigation.

David Coleman (Coleman) has been employed by and is the owner of Creative Solutions Investigative Services. Coleman is licensed in both New York and New Jersey and has been doing investigations for more than four years. Coleman was asked to do an investigation of Allen. He took pictures of her and used social media. The investigation was done from August 2013 through December 2013. Coleman used both cameras and videos.

Coleman stated that he did not edit the video in any manner. Based on the surveillance, Coleman created a report, which was provided to Hillside. (R-35.) Coleman also provided a copy of the video on disc. (R-37.)

On cross-examination, Coleman stated that he was hired prior to August 3, 2013, and the first date of surveillance was August 3, 2013. The dates of surveillance were: August 3, 2013; August 5, 2013; August 6, 2013; October 10, 2013; October 31, 2013; and November 1, 2013. Coleman witnessed Allen carrying her purse and carrying other items. He also saw Allen going up and down steps. Coleman had been informed of Allen's complained-of symptoms by the attorneys representing Hillside.

On re-direct examination, Coleman said that he was a detective and a private investigator. Coleman was a county detective for the Morris County Prosecutor's Office. Each file had a date and used military time.

Dr. Michael Bercik (Bercik) was a doctor who did an examination of Allen. Bercik reviewed Dr. Aragona's reports. Bercik took a history from Allen and found that Allen was in a motor-vehicle accident, which was minor. The damage to Allen's vehicle, where she was a passenger, was not bad. Allen sought no medical treatment at the time and directly after the accident. Bercik also reviewed the surveillance videos of Allen.

After the accident, Allen went to the emergency room at Overlook Hospital. Hillside then referred Allen to Concentra for treatment and evaluation. Bercik also looked at the police report for the automobile accident. Bercik found that the police report noted a statement by Allen of no pain and no injury. Bercik stated that it was not a common sequence of events to go from no pain to extreme pain. A person can feel worse after the accident, just not that extreme. Bercik also found that Allen made inconsistent statements; first she said there was no pain, and then she stated that she had pain at the accident. As Allen was a passenger in a car, the pain should be on the right side, if there is any pain at all.

Bercik completed a physical exam on Allen and took a history. Allen referred Bercik to upper-back, lower-back and left-hip pain. X-rays were taken of the lumbar spine and other areas, which were normal. In addition, an MRI was taken of Allen, which also was normal. Bercik stated that if there were problems, there would be swelling.

It was Bercik's opinion that the complaints were subjective in nature, which is based on the patient's statements, and not objective, which cannot be controlled by the patient. Allen went to Concentra in September 2013 and the MRI was conducted on April 26, 2013.

In addition, an FCE was conducted and showed that Allen had difficulties not associated with her back. On August 15, 2013, Dr. Lester determined that Allen could continue with full-capacity work. An EMG was conducted, which checked Allen's nerves. The results of the EMG showed right and left piriformis syndrome. This syndrome is usually associated with a herniated or bulging disc.

Bercik described piriformis syndrome as a controversial position. The muscle is found in both legs, but Allen only had symptoms in the left leg. Such a diagnosis draws into question the EMG test. Bercik stated that even assuming piriformis syndrome, one does not need to suffer an injury or an accident to have such a syndrome occur. If a person has piriformis syndrome, it affects the person's hip, and thus the way the person walks.

Bercik reviewed the surveillance discs and videos of Allen. Bercik noted that upon reviewing those discs, he found that Allen bent and walked without any sign of distress. The videos were not consistent with piriformis syndrome or other ailments. Bercik noted that in one video he saw Allen carrying bags, with good balance. Bercik stated that this video was not consistent with any injury. Allen stated that she had pain in her left lumbar spine in the buttock, and that she had increased pain when walking.

Bercik compared those videos to the video during the IA investigation. This video, unlike the other videos, showed Allen walking unevenly and favoring the right leg. Bercik noted that this was not the leg she complained about. On the way out of the room, Allen favored her left leg. This showed inconsistent walking by Allen. Bercik noted that Allen demonstrated behavioral overlay based on subjective statements which were not based on objective evidence. This generally means that people think they are injured when in fact they are not. Bercik noted that Allen had no complaints regarding her neck or upper back. In the end, Bercik's exam was normal. There was no swelling or spasms in the lower back.

Bercik found that Allen had full range of motion. Bercik found normal muscle tone and strength and normal muscle power. Bercik found the left hip to be unrestricted and pain free. Bercik also reviewed Aragona's reports of June 18, 2013, September 10,

2013, and October 17, 2013, and agreed with the assessment that Allen could return to full duties. Allen had reached maximum medical improvement, as opined in Aragon's report dated October 17, 2013.

Bercik's opinion was that Allen had a diagnosis of post-lumbar sprain. Allen had no active injury, after the above injury had healed. Bercik determined that Allen had subjective complaints of pain without any supporting objective findings. Bercik found that Allen had a good prognosis. He had no difference of opinion with Aragon's findings. Bercik did not believe that any medical prescriptions were needed. Any pain could be adequately addressed with Advil, Tylenol, or Aleve, all of which are safe to take. Taking these medicines would permit Allen to continue her regular activities without restriction.

Bercik stated that he had taken care of many police officers in the past. Bercik was fully aware of the job requirements for police officers. Bercik was of the opinion that there was a definite way to confirm piriformis. He did not believe that Allen had piriformis.

On cross-examination, Bercik stated that Allen had a sprain in her back. Allen was hit on her right side. Allen would then move to the right and front. Allen complained of lower-back pain. In the Lester report of August 16, 2013, there was a complaint of left-buttock pain. Neither the MRI nor the x-rays would show a sprain or strain. However, one could see swelling. The MRI would not show piriformis. Piriformis is located where the thigh meets the buttock. Piriformis is very rare.

Bercik also stated that an FCE is based on subjective information. It does not show whether a person can or cannot lift a box, but rather whether the person will not lift a box. Bercik does not put a lot of stock in an FCE. It would not show Allen's ability to return to the police department.

Bercik saw a video that showed Allen carrying two bags, but Bercik did not know the weight of the bags. Bercik saw that Allen had objects in both hands. Bercik did not see any sign of pain, although Bercik admitted that she could have been in pain. Bercik

stated that it is unusual for pain to be constant. Bercik stated that the video could have been taken when Allen was having a good day. However, Bercik stated that he did not see Allen in any pain, ever. Allen had stated that she had constant pain. Bercik stated that duty belts can be heavy (about ten pounds). It was Bercik's opinion that the belt would not have put pressure on her piriformis muscle. On examination, Allen's pain was not near her piriformis.

On redirect, Allen stated to Bercik that she had pain in her lower spine and buttocks. Allen stated that the pain was constant. Allen told Bercik that the pain was a lot during the day. Any serious injury would show in the MRI. Lester said that Allen was able to go back to work.

On recross-examination, Bercik stated that pain is a symptom, and Allen told him that the pain was constant. On another redirect, Bercik referred to the report of Dr. Nehmer. (P-2.) The medical records reviewed were the same as those reviewed by Bercik. Both doctors did a physical exam. Allen had the same subjective complaints to consider, but came to different conclusions. It was Bercik's opinion that there was piriformis syndrome. Allen has full range of motion. Bercik found that Allen walked unevenly but had no limp. Bercik found that Nehmer relied on Allen's complaints. Nehmer gave no weight to the lack of objective evidence found. On another recross, Bercik stated that there was no contusion of Allen's buttocks and the MRI was normal.

For Appellant

Dr. Steven Nehmer (Nehmer) testified as an expert in the field of orthopedics. Nehmer completed an exam on March 23, 2016, and issued a report dated March 24, 2016. (P-2.) Nehmer took a history from Allen and heard her complaints of back pain and pain in the left buttocks. Nehmer reviewed the records as set forth in his report. Nehmer also reviewed the MRI and EMG tests that were done. The EMG measures the function of nerves. Nehmer also reviewed Dr. Fishman's records. Dr. Fishman diagnosed Allen as having piriformis syndrome, and performed pain-relief injections at left S1-S2 and the left sacroiliac joint. These blocks help in stopping the feelings of pain

and assist function. Nehmer found that there was a lumbar strain and a left-buttock contusion.

Nehmer explained that piriformis syndrome is a nerve that is irritated by the muscle. The muscle becomes injured, and thus is less flexible. An x-ray does not show a piriformis. The MRI would not show piriformis. The diagnosis is left piriformis syndrome, lumbar strain, and the left gluteal contusion. Nehmer calls such injuries permanent with a loss of function. At the time of the exam, it was three years post-injury. The prognosis was guarded, as Allen did not make a full recovery.

On cross-examination, Nehmer confirmed the list of records reviewed. Nehmer admitted that he did not review the police report, but read the narrative on page two. Nehmer stated that experiencing no pain at the time of the accident is not uncommon in a motor-vehicle accident. Nehmer referred to appellant's accident as a minor accident. Nehmer did not review the photo of the accident damage to the car. In addition, Nehmer did not review the surveillance video. Nehmer called it another piece of information, and it was important to review. Nehmer also reviewed the records and report of Aragona, Lester, and Hutter.

Nehmer called the accident a factor, but not a key factor. It was not unusual to not feel a contusion until the next day. Nehmer understood that Allen went to Overlook Hospital in the emergency room. The contusion could be caused by the motor-vehicle accident, which can be caused by blunt trauma. Nehmer is aware that Allen complained of back pain. Nehmer made no mention at first of buttocks pain. The primary complaint by Allen was low-back pain.

Nehmer stated that Allen went to Concentra on March 25, 2013. Allen spoke of intermittent tingling. This was mentioned in the ER. Nehmer confirmed that she spoke of tingling and not pain. When Allen returned to Overlook, Allen stated that her pain was in her back. Nehmer testified that medical records do not always reflect everything about the patient.

Nehmer stated that piriformis is principally located in the buttocks. Nehmer admitted that there is a difference between buttock pain and back pain. Nehmer stated that Lester made an inaccurate conclusion. Allen made the first mention of left-buttock pain well after the accident, and thereafter there is complaint of pain in left buttock. There was behavioral overlay as reported in the records and reports. Lester stated that Allen had complaints tied to her emotional state. Nehmer did not review Dr. Hutter's records. Hutter found that Allen's complaints were out of proportion to the objective findings. Nehmer did not agree with Hutter.

There was an EMG by Dr. Wilkins and a finding of bilateral piriformis syndrome in both buttocks. It was only symptomatic on the left side. Nehmer stated that piriformis can be caused by trauma, but there does not have to be a significant impact. Nehmer stated that he had seen six cases of piriformis in the past. Nehmer could not recall if there was significant trauma. The nerve is irritated. It can be asymptomatic, and then symptomatic after an accident. This condition can also be caused by overuse or exercise.

On redirect examination, Nehmer stated that an EMG is an objective test, and it showed bilateral piriformis. Nehmer again testified that records are never complete. Allen had thoracic pain in Concentra but not in Overlook. The police stated that Allen's gait was unsteady two days after the accident. This is consistent with piriformis. Allen may have full range of motion, but painful.

On recross examination, Hutter stated that spasms can cause piriformis. In Exhibit P-1 it stated, "She can no longer run, gym or roller skate."

Keisha Allen (Allen) testified on her own behalf. Allen stated that she was a police officer in Hillside. She went to the Academy in Union County. Allen became an employee in Hillside in January 2006. After the motor-vehicle accident, Allen filed for disability. Allen was terminated from the department in April 2014.

At the time of the accident at work, she was working the night shift from 8:30 p.m. to 7:15 a.m. The shifts were five days on and five days off. The accident occurred on

March 18, 2013. Allen was a passenger in a police car, with her seat belt on. The police car was in the parking lot of a car dealership. It was nearly midnight when the accident happened. Allen described the accident as another vehicle backing up at a slow speed and coming in contact with the vehicle she was in. At the point of impact, she grabbed the hand rail. After the accident, she radioed headquarters and advised them of the motor-vehicle accident. Allen stated that she felt no pain at that time. Allen declined the use of an ambulance or the aid of an EMT. Sergeant White from the Hillside Police Department made out the accident report. Allen continued her tour of duty on that date and worked until 7:15 a.m. on March 19, 2013.

Allen went home after work, and while at home she felt no pain or discomfort. While at home Allen took a shower and sent her daughter off to school, and then went to bed. Later that day, Allen began to feel tight and could not get comfortable. Thereafter, Allen started to experience pain in her back. Accordingly, Allen went to Overlook Hospital because of this tightness on the sides of her back and top of her buttocks. Her pain began to get worse.

Allen did not call police headquarters on March 20, 2013, because she was not scheduled to work on that day. While at Overlook, they took her vitals, and she explained the motor-vehicle accident to the medical personnel. X-rays were then taken. The medical personnel advised her to see her primary-care doctor upon discharge. Allen was prescribed Motrin and a muscle relaxer. Allen was told that she would probably feel worse after discharge. When Allen went home she was able to sleep with the medications. When the medications ran out, the pain returned. There were times she could not get out of bed.

At this point in time, the pain was on and off. Allen then went to Concentra, while she was still on her days off. Captain Lamonte advised Allen to go to Concentra. Allen advised Lamonte that she was injured and had a note from the Overlook emergency room. Allen went to Concentra and saw a female doctor and a male doctor. Allen advised the doctors that she had pain on her side and the top of the buttocks. Thereafter, Allen went to Concentra for physical therapy (PT). PT went on for five days.

At some point, her workers' compensation case was closed. Allen did not go back to work. Allen then went to see her primary-care doctor, Vincent Codella, D.O. Allen told Codella about the motor-vehicle accident and her pain. Codella then began to treat her. Codella treated Allen for several months, and Allen had PT in Woodbridge. Allen's pain continued, although the pain was less at times, and worse at times. The pain on the left side was greater.

Allen was still employed by Hillside, and she was ordered into work. Allen went back to work and did some light duty for some days. Allen stated that because of her pain she could not sit to urinate or defecate. In addition, Allen stated that she could not run, and could not sleep or have sex. Allen had problems with sitting and wore a back brace.

When Allen went to work, she left work three or four times to go to the emergency room. She would get doctors' notes and give them to her supervisor in order to be out of work. Chief Panarese advised Allen that there was no light duty available. The medication she was prescribed was Percocet. Allen was ordered back to full duty, but she had a doctor's note to stay out of work. In addition, Chief Panarese and Captain Lamonte ordered her to stop taking narcotics; however, Allen kept on taking the narcotics. The Hillside Police Department required Allen to fill out a medication-disclosure form. Allen was ordered not to take Percocet at least twenty-four hours before work. Allen stated that she continued to take these medications because she was in pain.

In February 2014, Allen applied for accidental disability. In order to obtain such a benefit, Allen was required to see a State of New Jersey doctor. Allen went to two such doctors and was denied accidental disability, but was granted ordinary disability. In December 2014, Allen's ordinary disability stopped. Allen still cannot work and has no income. Allen testified that she is still in pain. Allen stated that she cannot lift objects because this causes the pain to increase. Allen stated that she can get in and out of a car, but steep stairs are difficult. Between five and six steps are no good. Allen stated that she can bend.

Allen stated that she has pain in her left buttocks area, and there is no pain on her right side. Allen still treats with Dr. Fishman, who had previously provided her with pain-relief injections.

On cross-examination, Allen stated that she has no employment at this time. Allen tried to get employment with NJ Transit, but she knew that she would not pass the drug test. Allen understood that corporate America would generally not hire her because of her use of medications. She got this information from speaking with other people and not from the employers themselves. She did not use a headhunter, nor did she follow up with those companies. Recently she lived on her savings to pay her bills.

Allen admitted that the damages to her car were minor, and she did not want any medical attention because she had no pain. Thereafter, the symptoms gradually increased. The pain started late on March 19 and into March 20 in 2013. Allen admitted that at first, right after the accident, she did not mention the pain in the buttocks, but only mentioned the lower-back pain. The records from Overlook Hospital referenced lower-back pain and nothing in the buttocks.

While Allen was at Concentra, she first mentioned discomfort in the buttocks by mentioning a tingling in that area. Allen also confirmed that as per Nehmer's report, she could not run, go to the gym, or roller skate. Allen would only go to the gym with someone else. She had no paid membership to a gym. She would go about three times a month to the gym. Allen stated that she was not an avid runner, and would only roller blade once a week. Allen would do yoga at home. Allen stated that she had to stay in shape in order to be a police officer.

Allen confirmed that the medical records did not show any pain into her leg. When she felt "electricity" in her leg, she went for PT in Woodbridge. Allen also saw Codella for treatment. Allen also confirmed that she had an FCE.

She recalled that she was ordered not to take narcotic medication, but Allen decided to take her medication anyway because of her pain. Allen admitted that she did not comply with the order not to take narcotic medication. Allen stated that orders must

be followed unless they are illegal or will cause harm. Allen did not cite any rule, regulation, or case law to support her actions. Allen stated that she got an order again not to take medication, and she admitted that she did not follow this order. Allen said that she felt the order was going to harm her. She said that she sought out other medications, but they did not help.

Allen filed a claim for accidental disability after being on the job for eight years. In April 2014, Hillside filed a charge against her, seeking her termination. In September 2014 there was a decision from the Public Employees' Retirement System denying her application for accidental disability, but granting ordinary disability. Allen appealed the denial of accidental disability.

In a letter drafted by Allen, dated May 3, 2018, with copies to a large number of other people, Allen set forth a complaint for discrimination in the Hillside Police Department. The complaint focused mainly on Captain Lamonte and his actions. There was a proposed meeting about Lamonte to attempt to work out the issues, but that was unsuccessful, and Lamonte continued his comments to Allen, she alleged. Allen stated that his comments made her feel uncomfortable. Allen believed that Lamonte's motivation was to get Allen out of the police force.

Allen denied telling Lester that pain went up her back. Allen reviewed the specifications contained in the FNDA and admitted the following specifications: 8; 9; 10; 11; 12; 13; 14; 15; 16; 17; 19; 20; 22; 23; 24; 25; 30; 32; 41; and 58.

On redirect examination, Allen admitted that the chief was a superior officer, and she went to him in order to complain. Allen also complained to the mayor several times. These complaints were not acted upon. Allen kept supplying doctors' notes to the respondent to support her claims. Aragona believed that Allen could return to work. Allen stated that Aragona did not do an examination, but asked her to walk for him. She only went to Aragona one time. Allen denied that she told anyone that she had pain only in the right side. Allen stated that she told doctors that she had pain across the top of the buttocks.

Allen stated that she did not file any complaints with the police department regarding harassment. Allen believed she could have sued, but was unsure she should do that. Allen wanted to continue to work as a police officer. Allen would rather go back to work if she felt better. For every day she was out of work, she had a doctor's note. The police department found her absences to be unexcused. Allen was sure that the respondent was notified of her application for disability in February 2014.

FINDINGS OF FACT/CREDIBILITY

In view of the contradictory testimony presented by appellant's and respondent's witnesses for medical testimony, the resolution of the charges against appellant requires that I make a credibility determination with regard to the critical facts. The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (1963).

A fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, 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. In re Perrone, 5 N.J. 514, 521-22 (1950); see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to carefully observe the demeanor of the witnesses, I deem Dr. Michael Bercik credible. His testimony was consistent with the evidence and his opinions were based on a greater depth of information relevant to the basis for his opinion. With respect to appellant's medical witness, Dr. Steven Nehmer, he did not

review the motor-vehicle-accident report, nor did he review the videos taken of Allen, which upon review by the undersigned were in conflict with Nehmer's opinions as well as the subjective complaints of Allen. Nehmer, although an experienced and well-intended doctor, testified in a vague and inconsistent manner.

I also question the credibility of Allen's testimony. I find Allen's testimony to be evasive, contradictory, and without detail. Her testimony seemed well rehearsed, which made it seem not credible. It would appear that her testimony was based on factors beyond an objective injury, and seemed to be motivated by hostility against some members of the Hillside Police Department and a general hostility against the police department as a whole.

Accordingly, I FIND AS FACT:

- 1) Allen was a police officer for the Township of Hillside.
- 2) On March 18, 2013, Allen was involved in a low-speed, low-impact motor-vehicle accident while on duty.
- 3) Allen, directly after the accident, advised the responding officer that she had no pain and no injury as a result of the accident.
- 4) The motor-vehicle accident report confirmed such a statement by Allen.
- 5) On March 20, 2013, Allen reported intense back pain and went to Overlook Hospital Emergency Room.
- 6) At the request of the Hillside Police Department, Allen was evaluated by Concentra Medical Center, where she reported that her back was painful.
- 7) Allen was diagnosed with a lumbar strain, with some symptom magnification, and a thoracic strain.

- 8) On March 28, 2013, Allen visited Concentra with reports of pain being well controlled and that heating her back gave her temporary pain relief. The diagnosis for Allen was a thoracic strain and a lumbar strain with some symptom magnification.
- 9) On April 18, 2013, Allen visited Dr. Jonathan P. Lester, M.D., of Concentra, a physiatrist, who evaluated Allen's complaints of pain. Allen described pain that started in the lower lumbar area and radiated up. Lester concluded that Allen's lumbar movements were profoundly self-limited and her reported complaints of severe low-back pain were subjective, and that his examination was suggestive of some degree of behavioral overlay.
- 10) On April 23, 2013, Overlook Hospital advised Hillside via a note that Allen was cleared to full duty without restrictions, effective April 20, 2013.
- 11) On April 24, 2013, Concentra advised Hillside that Lester would be discharging Allen to full duty.
- 12) On April 29, 2013, Allen visited Concentra for an additional evaluation by Lester. Lester certified that Allen's lumbar flexion in the standing position was markedly self-limited.
- 13) In addition, Lester noted that the patient now has a normal MRI and that her subjective complaint continued to be out of proportion to objective findings.
- 14) On April 29, 2013, Lester released Allen from care and noted that she may return to regular duty on April 29, 2013. Lester certified further that Allen had achieved maximum medical improvement effective April 29, 2013.

- 15) Allen submitted a physician's note from Codella Family Practice to Hillside stating that Allen must be excused from work from May 2, 2013, to May 15, 2013, and may return to work on May 16, 2013.
- 16) On May 7, 2013, Hillside ordered Allen to report to Concentra for a functional capacity evaluation (FCE) on May 14, 2013.
- 17) The FCE report concluded that there was no report or observation of injury or re-injury during or at the conclusion of the FCE.
- 18) Allen reported that she was in pain and was limited in certain movements, and thus she did not demonstrate the ability to work as a police officer.
- 19) Allen then submitted additional doctor's notes from Codella saying that Allen must be excused from work from May 15, 2013, to May 27, 2013, and that she may return to work on May 28, 2013, pending reexamination.
- 20) Thereafter, Allen submitted an additional doctor's note from Codella stating that Allen must be excused from work from May 30, 2013, to June 6, 2013, and may return to work on June 14, 2013.
- 21) On June 14, 2013, Hillside ordered Allen to attend an independent medical examination (IME) with Dr. James Aragona, an orthopedist, on June 18, 2013.
- 22) The IME was ordered because the FCE did not address whether Allen had any orthopedic impairments or conditions that would preclude Allen from performing as a police officer.
- 23) On June 18, 2013, Aragona sent his IME report to Hillside finding that Allen's reported pain focused on her left sacroiliac joint, even though her prior medical records discussed lumbar pain and right-sided piriformis pain.

- 24) In addition, Aragona found that Allen's pain patterns are entirely subjective, without objective evidence of musculoskeletal or related neurologic impairment. Aragona found that there was no evidence of restricted motion, spasm, or weakness, and that Allen could return to work without restriction.
- 25) Hillside, relying on Aragona's report, ordered Allen on July 23, 2013, to return to work for her next scheduled shift on July 24, 2013.
- 26) Allen did report for her next scheduled shift; however, she stated that she was in pain and required an ambulance. Allen walked to the ambulance and was transported to Overlook Hospital.
- 27) Allen called out sick on July 26, 2013, and submitted a doctor's note from Overlook that stated that she may return to work on August 2, 2013.
- 28) On August 5, 2013, Allen submitted a doctor's note from a new healthcare provider, Premier Healthcare Center, LLC, which provided that she was receiving care for left piriformis syndrome and sciatica and that she may return to work on August 20, 2013.
- 29) August 5, 2013, was the first date that Allen advised Hillside that she had piriformis syndrome.
- 30) On August 15, 2013, Allen visited Concentra, and Lester noted that Allen's lumbar MRI was normal. Lester found that the lumbar flexion was markedly self-limited.
- 31) Lester noted that Allen's complaints for more than five months had been completely nonspecific, generalized throughout the lumbar area, and now "all of a sudden" are localized to the left buttock. It seemed unusual to Lester.

- 32) Lester also found that there continued to be significant behavioral overlay. Lester also stated that he felt that Allen could continue full-duty work, to which Allen responded, in very emotional terms, that she could not do this.
- 33) On August 19, 2013, Allen submitted a physician's note from Premier Healthcare Center which stated that she was receiving care for left piriformis syndrome/sciatica and that she may return to work on September 3, 2013.
- 34) On September 3, 2013, Allen submitted a doctor's note from Premier which stated that she was under its care for a musculoskeletal condition and that she may return to work on September 17, 2013.
- 35) On September 6, 2013, Hillside wrote to Aragona and requested that he provide a supplemental medical opinion regarding whether Allen exhibited symptoms of left piriformis syndrome and sciatica during the IME and whether she made complaints to this effect.
- 36) On September 10, 2013, Aragona supplemented the results of the IME report by stating that he did not find medical evidence of physical findings consistent with extreme pain from a piriformis syndrome with sciatica.
- 37) Aragona further felt that Allen had reached maximum medical improvement and may return to work.
- 38) On September 20, 2013, Allen submitted a doctor's note from a new healthcare provider, Manhattan Physical Medicine and Rehabilitation (Manhattan), which stated that Allen was receiving care for low-back pain and piriformis syndrome. Manhattan stated that Allen had difficulty walking and sitting and standing for longer periods of time.

- 39) Manhattan further stated that Allen should rest and be excused from work for a period of four weeks.
- 40) Based on Aragona's reports, Hillside ordered Allen, on October 10, 2013, back to work for her regular shift starting on October 12, 2013, at 8:30 p.m.
- 41) On October 11, 2013, Allen visited the Hillside Police Department and stated that she would not return to work because she was taking prescription medications.
- 42) In addition, Allen confirmed with Hillside that she was not receiving workers' compensation benefits and that she would return to work, but could not wear her duty belt.
- 43) On October 11, 2013, Hillside wrote to Aragona and asked whether Allen may return to work as a patrol officer and complete all of her essential job functions while wearing her full-duty belt, which weighs about ten pounds.
- 44) On October 11, 2013, Hillside wrote to Allen and ordered her to submit a doctor's note by October 15, 2013, with the following information: 1) name of drugs prescribed; 2) date first prescribed each drug; 3) date each prescription was filled; 4) date she began taking drug; 5) the dosage of the drug and amount of times each day she was required or permitted to take drug; 6) dosage of the drug and amount of times each day actually taking the drug; 7) the side effects experienced while taking the drugs and the duration of any side effect; 8) whether the drug was prescribed for left piriformis syndrome/sciatica; and 9) how long she expected to be prescribed the medications.
- 45) Hillside then advised Allen not to appear for her next scheduled shift.

- 46) On October 14, 2013, Allen submitted a doctor's note from Manhattan which stated that Allen was prescribed Percocet, diclofenac, and Lorzone for left piriformis syndrome and sciatica and that the only side effect was vomiting.
- 47) On October 15, 2013, Aragona informed Hillside that Allen is fit for full duties, including wearing her duty belt.
- 48) On October 16, 2013, Hillside wrote to Aragona and asked whether Allen was required to take Percocet, diclofenac, and Lorzone for the reasons stated by Manhattan. Hillside also asked Aragona whether Allen is able to perform her duties while taking these medications.
- 49) On October 17, 2013, and October 28, 2013, Aragona wrote to Hillside and stated that Allen did not need to take Percocet and Lorzone for the reasons stated by Manhattan and that Allen could not be on regular police duty while taking Percocet or Lorzone, but Allen could work while taking diclofenac. Aragona also said that Allen would need to stop taking Percocet and Lorzone twenty-four hours prior to her shift.
- 50) On October 18, 2013, Allen submitted a note from Manhattan which stated that Allen was being treated for muscle spasms, piriformis syndrome, and lower-extremity pain. Further, it stated that Allen should be out on medical leave until November 18, 2013.
- 51) On October 31, 2013, based on Aragona's medical opinions, Hillside ordered Allen to return to work, setting forth Aragona's medical basis for this finding, including no medical impairment precluding her from work; that she can wear her duty belt; that it was not necessary to take Percocet and Lorzone; that she must cease taking Percocet and Lorzone at least twenty-four hours prior to work; that Allen would need to complete a written document regarding medications taken that may impair her job performance; that she should return to work on November 1, 2013, without

taking Percocet and Lorzone in the previous twenty-four hours; and that she should be ready for full duty.

- 52) On November 1, 2013, Allen appeared for her shift and put on her duty belt. Allen advised Lieutenant Cureton that she could not bend or kneel. Allen also completed a Statement of Medications form and advised Cureton that she had taken Percocet earlier in the day and would be taking it every three to four hours. Hillside then transported Allen home and she did not work that day.
- 53) In addition, Allen amended the Statement of Medications form without authorization to state that the answers given were not voluntary and were given with coercion.
- 54) On November 2, 2013, Chief Panarese issued to Allen a "Direct Order" which set forth the following: 1) Aragona's conclusion that Allen did not need to take Percocet and Lorzone prior to her work schedule; 2) that Allen had no authorization to amend the Statement of Medications; 3) and that Allen's actions in taking her prescription medications, which Aragona found not to be medically necessary, were in direct violation of his order of October 31, 2013, thus disciplinary charges would be issued to Allen and she would be subject to a suspension without pay. By amending the Statement of Medications to say that the answers were not voluntary, Allen engaged in an act of insubordination that would subject her to a suspension without pay.
- 55) The November 2, 2013, Order required that Allen bring in, during her next shift, her prescription bottle of her "unknown" drug.
- 56) The November 2, 2013, Order provided that the October 31, 2013, Order remained in full force and effect, and that Allen may consider it a Direct Order that she return to work under the previous Order.

- 57) Allen was directed to report fit for work, and not under any influence of Percocet or Lorzone. Allen was required to complete a Statement of Medications form at her next scheduled shift.
- 58) In addition, the November 2, 2013, Order stated: if you refuse to obey this direct order, you will be subject to more progressive discipline. Hillside will consider each shift for which you fail to appear fit for duty as a separate violation warranting more severe discipline. Allen was reminded that no officer may be equipped with a service weapon under the influence of a narcotic that could impair them.
- 59) Allen was advised in writing that she would be subject to progressive discipline of increasing severity if she continued to disregard Hillside's Orders.
- 60) After receipt of this Direct Order, Allen reported to work for her next scheduled shift and Cureton presented her with the Statement of Medications form, and Allen certified that she had taken Percocet and Skelaxin the same day. Accordingly, Allen was deemed unfit for duty. Allen further stated that her answers were not given voluntarily, and they were given with coercion.
- 61) On November 3, 2013, Allen called police headquarters and stated that she would be out sick that evening. Hillside asked Allen whether she was ordered in that evening, and she said that she did not have anything in writing ordering her to report to work.
- 62) On November 4, 2013, Hillside wrote to Aragona and asked whether Allen was required to take Skelaxin for any orthopedic reason and whether Allen could perform her functions as a police officer on this medication.
- 63) In response, Aragona wrote to Hillside and stated that Allen was not required to take Skelaxin, and that the only medication an officer could

require would be an anti-inflammatory such as diclofenac, as prescribed by Dr. Wilkins. Aragona also said that Allen could not perform as a police officer while taking Skelaxin in combination with Percocet, diclofenac, or Lorzone.

- 64) On November 8, 2013, Chief Panarese wrote to Lieutenant Floyd, the IA investigator, to request an IA investigation regarding a complaint Hillside filed against Allen.
- 65) On November 11, 2013, Allen reported to work under the influence of Percocet. Allen also refused to sign the Statement of Medications form, and, instead, submitted a letter stating that she was ordered back to work and ordered not to take medications, but she was taking her medications prescribed by her treating doctor. Allen also submitted a letter from Manhattan which stated that she was being treated for left piriformis syndrome, muscle spasms, and lower-extremity pain, and that she has impaired sitting, standing, and transferring. It also stated that Allen was unable to assume her duties because of pain, and she should be on medical leave until December 18, 2013.
- 66) Because Allen reported to work on Percocet on November 11, 2013, on November 12, 2013, Chief Panarese wrote to Allen to clarify her duty to report to work. Panarese confirmed that his October 31 and November 2, 2013, Orders remained in full force and effect; Allen was "Ordered" that she may not appear for her shift under the influence of Percocet or any other medication that would impair her ability to perform her job as a police officer. Accordingly, if Allen should wish to take Percocet, Lorzone, Skelaxin, or any other medication impairing her ability to perform her job duties, her nonappearance at work would be considered "unexcused" and she would be subject to progressive discipline.
- 67) On November 12–15, 2013, Allen called out sick, and Hillside deemed these absences to be unexcused.

- 68) On November 18, 2013, Lieutenant Floyd of IA sent Allen an IA Complaint Notification form advising her of an IA complaint against her.
- 69) On November 21–25, 2013, Allen called out of work sick, and Hillside deemed these absences unexcused.
- 70) On November 27, 2013, Allen appeared at the Hillside for her IA Administrative Interview. During this interview Allen was represented by an attorney; she was not under the influence of any medication and could proceed with the interview. The interview proceeded as scheduled.
- 71) On December 1–5, 2013, Allen called out of work sick, and Hillside designated these absences as unexcused.
- 72) In addition, Allen called out of work sick on December 11–15, 2013, and these absences were deemed unexcused.
- 73) On December 16, 2013, Allen submitted a note from Manhattan stating that she was being treated for piriformis syndrome, muscle spasms, and lower-extremity pain. Manhattan stated that Allen should be on medical leave until January 20, 2014.
- 74) On December 17, 2013, Lieutenant Floyd of IA issued a detailed report in response to Hillside's complaint against Allen, and Lieutenant Floyd found sufficient cause for numerous charges to be filed against Allen.
- 75) From December 15, 2013, to January 28, 2014, Allen did not appear for work for any scheduled shifts, and Hillside deemed these absences unexcused.
- 76) On January 17, 2014, Allen submitted a note from Manhattan stating that she was being treated for left piriformis syndrome, muscle spasms, and

lower-extremity pain. It further stated that Allen was in severe pain and should be out of work until February 17, 2014.

- 77) On January 28, 2014, Hillside served Allen with a PNDA for a two-day suspension and a PNDA for a ten-day suspension with regard to her prior conduct. In addition, Hillside served Allen with a Final Direct Order to Report to Work, which stated: "the letter shall serve as my FINAL DIRECT ORDER for her to report to work on January 30, 2014, at 8:30 p.m. for duty in accordance with previous orders. Any additional disciplinary charges filed against you will seek TERMINATION of your employment."
- 78) On January 30, 2014, at 8:30 p.m., Allen reported to work for her shift and completed Hillside's Statement of Medications form, and she wrote that the answers were given under duress. Allen certified that she had not taken any medications within twenty-four hours of her shift. Allen then attempted to qualify her firearm; however, when it came time to kneel and fire her firearm, Allen was unable to kneel. On the fifth try to kneel, Allen was successful on her left knee, but was unable to fire any rounds and said she couldn't continue. Once Allen stood up, she grabbed her right lower back, at which point the firearm qualification was terminated. Allen refused medical attention that was offered to her, and Hillside escorted her home.
- 79) From January 31, 2014, to February 3, 2014, Allen was absent without authorization, and those absences were deemed unexcused.
- 80) On February 4, 2014, Allen waived her disciplinary hearing in connection with the ten-day PNDA and the two-day notice of minor disciplinary action.
- 81) On February 10, 2014, Hillside filed a second IA Complaint against Allen based on her continued failure to work her scheduled shifts and her modification of the Statement of Medications form on January 30, 2014.

- 82) On February 11, 2014, Hillside served an FNDA and a Final Notice of Minor Disciplinary Action. In addition, on February 11, 2014, Hillside served a second IA Complaint Notification Form informing Allen of new potential charges.
- 83) From February 9, 2014, to February 13, 2014, Allen was absent without authorization, and Hillside deemed these absences unexcused.
- 84) On February 17, 2014, Allen submitted a letter to Hillside from Manhattan recommending that Allen be on medical leave until March 17, 2014.
- 85) From February 21, 2014, to February 23, 2014, Allen was absent without authorization, and Hillside deemed these absences unexcused.
- 86) From March 1, 2014, to March 5, 2014, Allen was absent without authorization, and Hillside deemed these absences unexcused.
- 87) On March 10, 2014, Allen appeared at Hillside for her IA Administrative Interview, where she was represented by an attorney. Allen was not under any medication that would influence her ability to proceed. This interview proceeded as scheduled.
- 88) During Allen's IA interview, she stated that she had taken AMRIX and Valium on March 9, 2014.
- 89) On March 12, 2014, Lieutenant Floyd of IA issued a detailed report for the second IA complaint against Allen. Floyd sustained all of these charges and specifications against Allen.
- 90) Floyd noted that Allen was absent without authorization on January 31; February 1–3; February 9–13; February 21–23; March 1–5; and March 11,

2014, and that Hillside had sufficient cause to discipline her for these unauthorized absences from work.

- 91) Allen did not appear for any scheduled shifts in March 2014 and April 2014, and Hillside designated those absences as unexcused.
- 92) Allen's failure to perform her full duties on January 10, 2014, even though Allen had been issued an October 31, 2013, Order, a November 2, 2013, Direct Order, and a January 28, 2014, Final Direct Order compelling her to attend her regularly scheduled shifts fit for duty on a continuing basis, provided Hillside with sufficient cause to charge Allen with insubordination, failure to perform duties, and conduct unbecoming a public employee.

LEGAL DISCUSSION AND CONCLUSIONS

The Civil Service employees' rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to 12.6. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointment and broad tenure protection. See Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex Cty. Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this State is to provide public officials with appropriate appointment, supervisory, and other personnel authority in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

Conduct unbecoming a public employee is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)).

Such misconduct need not necessarily “be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.” Hartmann v. Police Dep’t of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep’t of Civil Serv., 17 N.J. 419, 429 (1955)). Unbecoming conduct has also been defined as any conduct which adversely affects the morale or efficiency of the department or which has a tendency to destroy public respect for employees and confidence in the operations of government services. Id. at 40.

The Merit System Board and its predecessor and now successor, the Civil Service Commission (CSC), and the courts have generally held that law-enforcement officers are held to a higher standard than other public employees. Police officers are law-enforcement officers to which this higher standard applies. “It must be recognized that a police officer is a special kind of public employee. His primary duty is to enforce and uphold the law. . . . He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public” Moorestown Twp. v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965).

This matter involves a major disciplinary action brought by the respondent appointing authority against appellant. An appeal to the CSC requires the OAL to conduct a de novo hearing to determine the employee’s guilt or innocence, as well as the appropriate penalty if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). The appointing authority has the burden of proof and must establish by a fair preponderance of the credible evidence that the employee was guilty of the charges. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk License Revocation, 90 N.J. 550 (1980). Evidence is found to preponderate if it establishes that the tendered hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. 487 (1962).

I **CONCLUDE** that Allen did not sustain an objective injury that would prevent her from fully doing her job as a police officer for Hillside. I further **CONCLUDE** that Allen

was fully aware of the numerous orders given to her to appear at work, fit for duty, and her decision to disobey those orders was without a sound basis.

As a result, this matter rests on the issue of whether or not appellant was insubordinate. 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 East, Inc., 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.), certif. denied, 59 N.J. 269 (1971).

Furthermore, on cross-examination of Allen, she for all intents and purposes admitted that she was aware that she was ordered to appear for work, fit for duty, and that her decision was to not obey that order. The reason for not obeying the order was her understanding that she could disobey an order that was "harmful." There was no definitive basis provided to support this understanding. Based upon the testimony provided, in addition to the findings set forth above, I **CONCLUDE** that appellant's conduct was insubordinate.

Respondent had more than sufficient evidence and information from numerous medical personnel and entities supporting the fact that Allen could fully and properly do her job as a police officer. This makes their orders enforceable, and the failure of Allen to obey those orders was insubordination. The respondent painstakingly addressed Allen's countless failures to appear for her job with the intent to participate fully as a police officer, without taking unnecessary medications. Her attempt to rely on self-serving medical notes which continually placed her on medical leave was not sufficient to support her numerous failures to obey those orders. I can only characterize Hillside's explanations to Allen as detailed, clear, and generous.

Applying the law to the facts in this case, I **CONCLUDE** that the respondent has proven all the charges by a preponderance of the credible evidence. I **CONCLUDE** that appellant engaged in conduct that constituted insubordination, failure to perform duties, and conduct unbecoming an employee. I further **CONCLUDE** that this same conduct also constituted a violation of rules regarding failure to perform duties, insubordination, and conduct unbecoming a public employee.

Appellant further argues that although she admitted in her testimony that she violated direct legal orders, she was permitted to not follow those orders because they would cause her harm. Nowhere in her testimony nor in her attorney's closing argument was there any reference to any rule or case law that supports this position. In addition, neither Allen nor her counsel specifically referenced the harm that would be caused by following those orders. Therefore, I **CONCLUDE** that Allen was aware that there was a legal order (on numerous dates) requiring Allen to appear for work, fit for duty, and Allen knowingly and purposefully disobeyed those orders.

PENALTY

In West New York v. Bock, 38 N.J. 500, 522 (1962), our Supreme Court first recognized the concept of progressive discipline, under which "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct." In re Herrmann, 192 N.J. 19, 29 (2007) (citing Bock, 38 N.J. at 522). The Court therein concluded that "consideration of past record is inherently relevant" in a disciplinary

proceeding, and held that an employee's "past record" includes "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously called to the attention of and admitted by the employee." Bock, 38 N.J. at 524.

As the Supreme Court explained in In re Herrmann, 192 N.J. at 30, "[s]ince Bock, the concept of progressive discipline has been utilized in two ways when determining the appropriate penalty for present misconduct." According to the Court:

First, principles of progressive discipline can support the imposition of a more severe penalty for a public employee who engages in habitual misconduct.

....

The second use to which the principle of progressive discipline has been put is to mitigate the penalty for a current offense . . . for an employee who has a substantial record of employment that is largely or totally unblemished by significant disciplinary infractions. . . .

[T]hat is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration . . . when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.

[In re Herrmann, 192 N.J. at 30–33 (citations omitted).]

In the case of In re Carter, 191 N.J. 474 (2007), the Court decided that the principle of progressive discipline did not apply to the sanction of a police officer for sleeping on duty and, notwithstanding his unblemished record, it reversed the lower court and reinstated a removal imposed by the Merit System Board. The Court noted the factor of public-safety concerns in matters involving the discipline of correction officers and police officers, who

must uphold the law and "present an image of personal integrity and dependability in order to have the respect of the public." In re Carter, 191 N.J. at 486 (citation omitted).

In the matter of In re Stallworth, 208 N.J. 182 (2011), a Camden County pump-station operator was charged with falsifying records and abusing work hours, and the administrative law judge imposed removal. The CSC modified the penalty to a four-month suspension and the appellate court reversed. The Court re-examined the principle of progressive discipline. Acknowledging that progressive discipline has been bypassed where the conduct is sufficiently egregious, the Court noted that "there must be fairness and generally proportionate discipline imposed for similar offenses." In re Stallworth, 208 N.J. at 193. Finding that the totality of an employee's work history, with emphasis on the "reasonably recent past," should be considered to assure proper progressive discipline, the Court modified and affirmed (as modified) the lower court and remanded the matter to the CSC for reconsideration.

I am satisfied that appellant's conduct in this case was egregious, such that progressive discipline need not be considered. The police department requires that legal and supportable orders be followed to the best of the officer's ability. Allen's conduct fell well short of that requirement. To expect otherwise is to invite disorder and confusion in responding to certain functions in the police department. Such behavior cannot be tolerated. Accordingly, I **CONCLUDE** that the respondent's action in removing the appellant from her position was justified.

ORDER

I **ORDER** that the action of the appointing authority removing Keisha Allen is **AFFIRMED** and the appeal is **DISMISSED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this

matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

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.

September 21, 2018
DATE


MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency:

September 25, 2018

Date Mailed to Parties:

September 25, 2018

jb

APPENDIX

WITNESSES

For Appellant:

Dr. Steven Nehmer
Keisha Allen

For Respondent:

Police Chief Louie Panarese
Daniel Coleman
Dr. Michael J. Bercik

EXHIBITS

Joint:

J-1 Preliminary Notice of Disciplinary Action, dated 4/23/2014
J-2 Final Notice of Disciplinary Action, dated 4/28/14

For Appellant:

P-1 Letter from Lamonte to Aragona, dated October 11, 2013
P-2 Medical report from Steven Nehmer, M.D., dated March 24, 2016
P-3 to P-15 Supporting background medical records for Allen

For Respondent:

R-1 Police Report
R-2 Photos of accident
R-3 MR, Millburn Medical Imaging
R-4 Overlook Medical Records
R-5 IME letter to Dr. Aragona
R-6 Dr. Lester records, 8/15/13
R-7 Not admitted

R-8 June 18, 2013, Dr. Aragona Report
R-9 July 23, 2013, letter to Allen
R-10 July 26, 2013, Return to Work authorization
R-11 Not admitted
R-12 September 6, 2013, letter to Dr. Aragona
R-13 September 10, 2013, Dr. Aragona Report
R-14 October 10, 2013, letter to Allen
R-15 October 11, 2013, letter to Allen
R-16 Not admitted
R-17 October 14, 2013, Statement of Medications from Manhattan
R-18 October 15, 2013, Dr. Aragona Work Authorization
R-19 October 16, 2013, letter to Dr. Aragona
R-20 October 17, 2013, Dr. Aragona Medication report
R-21 Not admitted
R-22 October 28, 2013, Aragona Supplemental Report
R-23 October 31, 2013, Order to Return to Work
R-24 November 1, 2013, Statement of Medications
R-25 November 2, 2013, Order to Return to Work
R-26 November 2, 2013, Statement of Medications
R-27 Not admitted
R-28 November 5, 2013, Dr. Aragona Supplemental Report
R-29 November 11, 2013, Statement of Medications
R-30 November 12, 2013, Order to Return to Work
R-31 Not admitted
R-32 January 28, 2014, Order to Return to Work
R-33 Not admitted
R-34 Not admitted
R-35 Creative Solutions August 6, 2013, Report
R-36 Not admitted
R-37 Surveillance video disc of Allen
R-38 Curriculum vitae of Dr. Michael Bercik
R-39 Letter from Allen to Chief Ricciardi, dated May 5, 2018