



STATE OF NEW JERSEY

In the Matter of Brian Harkins
North Wildwood, Police Department

CSC DKT. NOS. 2018-1841 & 2018-
1876
OAL DKT. NOS. CSV 007333-18 &
00734-18

(Consolidated)

**DECISION OF THE
CIVIL SERVICE COMMISSION**

ISSUED: MAY 9, 2019

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The appeals of Brian Harkins, Police Sergeant, North Wildwood, Police Department, of his 10 and 20 working day suspensions, on charges, were heard by Administrative Law Judge Jeffrey R. Wilson, who rendered his initial decision on April 9, 2019 reversing the 10 and 20 working day suspensions. Exceptions were filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on May 9, 2019, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Since the penalties have been reversed, the appellant is entitled to 30 days of back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10. Further, since the appellant has prevailed, he is entitled to counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. North Wildwood, Police Department*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay or counsel fees are finally resolved.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was not justified. The Commission therefore reverses those actions and grants the appeals of Brian Harkins. The Commission further orders that appellant be granted 30 days 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 shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

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

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 9TH DAY OF MAY, 2019



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

and
Correspondence

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

attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. CSV 00733-18
AND CSV 00734-18 (CONSOLIDATED)
AGENCY DKT. NOS. 2018-1841 AND
2018-1876

**IN THE MATTER OF BRIAN HARKINS,
NORTH WILDWOOD POLICE
DEPARTMENT.**

Michael L. Testa, Esq., for appellant, Brian Harkins (Testa, Heck, Testa & White,
P.A., attorneys)

William G. Blaney Jr., Esq., for respondent, North Wildwood Police Department
(Blaney & Karavan, P.A., attorneys)

Record Closed: February 26, 2019

Decided: April 9, 2019

BEFORE JEFFREY R. WILSON, ALJ:

STATEMENT OF THE CASE

In these consolidated matters, the appellant, Brian Harkins (Harkins/appellant), a sergeant with the respondent, North Wildwood Police Department, appeals a ten-working-day suspension and a twenty-working-day suspension.

PROCEDURAL HISTORY

The Preliminary Notices of Disciplinary Action (PNDA) were filed on August 1, 2017. The Final Notices of Disciplinary Action (FNDA) were filed on December 21, 2017. These matters were consolidated by Order, dated June 11, 2018. Both matters were transmitted to the Office of Administrative Law (OAL) where they were filed on January 16, 2018. These consolidated matters were heard on December 10, 2018 and December 12, 2018, and the record remained open for the receipt of written summations and briefs from the parties and the record closed.

FACTUAL DISCUSSION AND FINDINGS

Based on the testimony of the witnesses and examination of the documentary evidence, I **FIND** the following as **FACTS**:

At all relevant times, Harkins was a sergeant with the North Wildwood Police Department. He was the target of two separate Internal Affairs Complaints/Investigations that gave rise to the within matters. As a result of those Complaints/Investigations, Harkins was ultimately issued two FNDA on December 21, 2017. (R-1 and R-2.)

The earlier charges were relative to allegations that arose in March 2017. (Internal Affairs Case 17-03.) The respondent imposed a ten-working-day suspension for the following sustained charges:

- N.J.A.C. 4A:2-2.3(a)(6) – Conduct unbecoming a public employee
- N.J.A.C. 4A:2-2.3(a)(9) - Discrimination that affects equal employment opportunity (as defined in N.J.A.C. 4A:7-1.1), including sexual harassment)
- N.J.A.C. 4A:2-2.3(a)(12) – Other sufficient cause
- 3:1.3 – Cooperation
- 3:1.9 – Performance of duty
- 3:1.12 - Conduct towards superior and subordinate officers and associates

- 3:7.3 – Disparaging remarks

The FNDA issued relative to these charges reads:

During roll call a couple of weeks before March 28, 2017, Sgt. Harkins made mention to a female officer in front of others on the squad that she gets treated differently in the Department because she is a female.

Additionally, on or about March 18, 2017, Sgt. Harkins made an “sick” flag entry into the Guardian Tracking System (GTS) related to an absenteeism response regarding the above female officer. The female officer questioned Sgt. Harkins about the GTS entry. During said conversation, Sgt. Harkins stated, “she could speak to the Lt. and he was sure it would be changed within five minutes for you”, or words to that effect.

(R-2.)

The latter charges were relative to allegations that arose in June 2017. (Internal Affairs Case 17-04.) The respondent imposed a twenty-working-day suspension for the following sustained charges:

- N.J.A.C. 4A:2-2.3(a)(1) – Incompetency, inefficiency or failure to perform duties
- N.J.A.C. 4A:2-2.3(a)(6) – Conduct unbecoming a public employee
- N.J.A.C. 4A:2-2.3(a)(12) – Other sufficient cause including, but not limited to, violations of the following General Rules and Regulations:
 - 3:1.9 – Performance of duty
 - 3:1.12 – Conduct towards superior and subordinate officers and associates
 - 5:6.3(D) & (Q) – Responsibilities of a supervisory officer (sergeant)

The FNDA issued relative to these charges reads:

Sgt. Harkins was not satisfied with the way incident #17-19683, dated 6/16/17 was handled by an officer, who was shift supervisor the night of the incident; however, he failed to get

clarification from the officer involved during their 12 hour shift together on 3/19/17. Instead, Sgt. Harkins used poor judgment in bringing up incident #17-19683 during roll call on 6/20/17 in an accusatory manner in which he did in front of subordinates.

Moreover, Sgt. Harkins did not make any entry into the Guardian Tracking System (GTS) with regard to the officers alleged mishandling of incident #17-19683. The lack of entry into the GTS indicates Sgt. Harkins was not concerned about the officer's job performance as much as he was concerned with publicly putting them on the spot, in front of other subordinates, when in fact the judgment call made by the officer was appropriate considering the totality of the circumstances.

(R-1.)

Internal Affairs Case 17-03

On March 30, 2017, Captain John Stevenson (Stevenson) was assigned this Internal Affairs Case that involved allegations of inappropriate comments made by Harkins and Sergeant Adam McGraw (McGraw) to Officer Laura Loftus (Loftus) during various dates in 2017. (R-3.) It was Sergeant Katherine Madden (Madden) that notified Chief Matthew Gallagher (Gallagher) and then Captain, Kevin Tolan (Tolan), of these allegations made to her by Loftus.

Stevenson first interviewed Madden on April 5, 2017. She reported that a few weeks earlier, Loftus told her that Harkins said, "We (Madden and Loftus) get everything we want because we have vaginas." Madden further stated that Loftus relayed other incidents in March 2017, including one where Harkins made disparaging remarks about the two of them in front of their squad at roll call.

Stevenson then interviewed Loftus. She stated that Harkins never used the word "vagina" in any of his comments. She stated that she was speaking with Madden a few weeks earlier in casual conversation when she mentioned that Harkins stated at their squad's roll call that the two of them are treated differently because they are female. She indicated that Officer Joseph Kopetsky (Kopetsky) and Officer Jerald Garriott (Garriott) were both present at the roll call. Kopetsky and Garriott were both interviewed by

Stevenson. Neither officer ever heard Harkins make any comments about Loftus being treated differently because she is a female.

After reviewing Stevenson's report, Tolan issued a separate Internal Affairs Report to clarify conflicting information in Stevenson's report. (R-4.) He re-interviewed Madden, who remained steadfast in her recollection that Loftus claimed that Harkins said that the female officers get whatever they want because they have vaginas. Loftus was also re-interviewed and clarified that it was not Harkins, but McGraw, that made that comment. McGraw was candid that he did utter those words and he was formally disciplined.

Loftus also reported that on March 27, 2017, she tried to speak to Harkins about a sick flag entry in the Guardian Tracking System (GTS)¹ on March 18, 2017. The GTS automatically raises an early warning flag after a certain amount of late days or sick days are entered. Upon receiving the warning flag, Harkins reviewed Loftus' sick time for the prior twelve months and noted seventeen occasions that sick time was used. Based upon the number of call-outs, Harkins filed an Absenteeism Response that noted Loftus was required to provide a doctor's note for each new call-out. (R-6.) Harkins relied upon the North Wildwood Police Department's Policy / General Order #63 (R-11) regarding verification of sickness when making this determination. The relevant policy reads:

4.2.2

Members or employees absent from duty after six (6) separate instances will be required to provide written verification from a physician for each subsequent sickness or injury incident regardless of the number of days absent.

Loftus disagreed with the flag and felt that the requirement to produce a doctor's note was unfair. Harkins directed her to speak to Lieutenant William Etsell (Estell) if she had any disagreement and was sure that Etsell would alleviate the requirement for her. Harkins stated that the only reason he said that was because Loftus has had things changed for her in the past. Furthermore, Harkins did not have the authority to make

¹ GTS is an employee performance management tool used to record observations, events, conversations, incidents of good and bad performance, evaluations and other work-related happenings.

such changes. Any changes or amendments could only be made by his superior officer – in this case, Etsell.

Loftus did report her disagreement to Etsell and he amended Harkins' report to include:

After further review of Officer Loftus' sick time use, there is no need to provide a sick note at this time for every callout but this will be monitored.
(R-6.)

Soon afterwards, the Department's Policy relative to sick leave was amended in direct response to Loftus' complaints.

Internal Affairs Case 17-04

The incidents giving rise to this Internal Affairs Case occurred between June 16, 2017 and June 20, 2017. Harkins was off until June 19, 2017, so Loftus was designated as the officer in charge until his return. On June 16, 2017, a 9-1-1 call came in from a North Wildwood resident claiming that he overheard a group of teenage boys on bicycles talking about stolen bicycles. North Wildwood officers responded and located a group of boys in Wildwood and several bicycles in an alleyway in Wildwood. The officers seized all of the bicycles from Wildwood and placed them in the breezeway/sally-port of the North Wildwood Police Department. Only one of the bicycles was actually stolen and one boy was charged accordingly.

Upon returning to work on June 19, 2017, Harkins questioned Loftus as to why the bicycles were seized in Wildwood but stored in North Wildwood and why they were still in the breezeway/sally-port when they should have been processed and properly stored. Loftus responded that the bicycles had not been cleared from the breezeway/sally-port because there were errors in the police reports and they had to be revised. Harkins was still unclear after his conversation with Loftus. There were no allegations of inappropriate language during this conversation, but Loftus contacted Tolan to see if she had done anything wrong. Without the benefit of reading any reports or conducting any interviews, Tolan assured her that she had done nothing wrong.

On June 20, 2017, the officers gathered for roll call. Harkins sought further clarification about the bicycles that were still in the breezeway/sally-port. Harkins asked, three times, why they were brought back to the North Wildwood Police Department. Loftus felt as though he was questioning her directly and grew more and more agitated and argumentative, to the point where she raised her voice and shouted, "I asked the Captain and he said I did nothing wrong!" With that, Loftus walked out of the roll call without being dismissed and contacted Tolan via a text message to his personal phone. Loftus then went into a room with Officer Mark Elliott (Elliott). She was very upset and stated to Elliot that Harkins better watch out or he will have a law suit against him. Tolan then came into the room and signaled Loftus to speak to him privately.

Then a Class II Officer, John Bartosiewicz was present at the June 20, 2017 roll call. He testified that Harkins first addressed the room and asked why the bicycles that were seized in Wildwood were still stored in the breezeway/sally-port at the North Wildwood Police Department. Harkins posed this question three times. Loftus responded and started to get angry and raised her voice. She then walked out of the roll call without being dismissed.

Then a Class I Officer, Alex Corwonski was present at the June 20, 2017 roll call. He testified that Harkins asked Loftus why the bicycles were taken from Wildwood. Loftus responded and Harkins asked again. Loftus responded again, but she was agitated and angry and raised her voice. Harkins questioned her a third time and Loftus responded raising her voice even more and left roll call without being dismissed. At no time did Harkins raise his voice. Harkins' demeanor remained even tempered as though it was a normal roll call.

Elliott was present at the June 20, 2017 roll call. He testified that Harkins questioned why the bicycles remained stored in the breezeway/sally-port. Everyone present was interjecting and Loftus became visibly offended. At one point, Loftus left the roll call without being dismissed and went with Elliott to his office. While there, Loftus alluded that Harkins should be careful or he would have a law suit filed against him.

Elliott felt as though Harkins attempted to get clarification as to the bicycles and that Loftus failed to provide sufficient answers to the questions posed by Harkins in the roll call. He had never seen a subordinate officer respond to a sergeant the way Loftus did to Harkins.

Officer Patrick Flynn (Flynn) was present at the June 20, 2017 roll call. He testified that Harkins asked all officers present why the bicycles were at the North Wildwood Police Department. Flynn responded as to the one bike that he seized because it had actually been stolen and the person responsible was charged. Harkins then asked the group again as to why the other bicycles were there. Loftus responded that she had already spoken to Tolan and that he told her she was right. Her demeanor was agitated and her voice was raised. At no time did Harkins raise his voice. Harkins' questioning was consistent with what happens at roll call. Flynn had never seen a subordinate officer respond to a sergeant the way Loftus did to Harkins.

Several officers testified as to their experience with Harkins. All of them indicated that they never heard Harkins say that females or Loftus received preferential treatment from the North Wildwood Police Department.

Credibility is best described as that quality of testimony or evidence which makes it worthy of belief. The Supreme Court of New Jersey considered the issue of credibility in In-re Estate of Perrone, 5 N.J. 514 (1950). The Court pronounced:

Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances.
[5 N.J. at 522.]

In order to assess credibility, the witness' interest in the outcome, motive or bias should be considered. Furthermore, a trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common

experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Having considered the testimonial and documentary evidence presented, I accept the testimony offered by all of the witnesses except Loftus to be very credible. Stevenson merely conducted interviews and authored an Internal Affairs Report for Case #17-03. He was not present for any of the behaviors alleged by Loftus and presented no testimony that he was personally aware of any mistreatment directed to Loftus.

Tolan conducted follow up interviews and authored a supplemental report based upon Stevenson's report. Furthermore, he conducted interviews and authored Internal Affairs Reports for Case #17-04. He was not present for any of the behaviors alleged by Loftus and presented no testimony that he was personally aware of any mistreatment directed to Loftus. Despite hearing from every officer interviewed that they never heard Harkins say that females or Loftus received preferential treatment from the North Wildwood Police Department, he relied upon the uncorroborated statements made by Loftus and the misstatements made by Madden in recommending that Harkins be disciplined.

Likewise, Gallagher was not present for any of the behaviors alleged by Loftus and presented no testimony that he was personally aware of any mistreatment directed to Loftus. He merely relied upon the reports placed before him in support of his decision to discipline Harkins.

As to Internal Affairs Case #17-03, I **FIND** that during roll call a couple of weeks before March 28, 2017, that Harkins did not mention to a female officer, in front of others on the squad, that she gets treated differently in the Department because she is a female.

I also **FIND** that on or about March 18, 2017, that Harkins was justified by North Wildwood Police Department's Policy/General Order #63 in creating an Absenteeism Response based upon a "sick" flag automatically generated by the GTS. Furthermore, I **FIND** that Harkins did indicate to Loftus that the Absenteeism Response would be changed if she spoke to the Lieutenant; however, I **FIND** that his comment was not based

upon any form of discrimination, but merely a fact as he did not have the authority to make the requested change. Such changes could only be made by his superior officer. Eventually Loftus did go to the Lieutenant and not only was the Absenteeism Response amended but the Department's Policy was changed based directly upon Loftus' complaints.

As to Internal Affairs Case #17-04, I FIND that on June 20, 2017, Harkins did not act inappropriately during roll call. All officers present at the roll call testified that Harkins was seeking clarification as to why items seized from another city were being stored at the North Wildwood Police Department and why after several days the bicycles had not been cleared from the breezeway/sally-port and properly entered and stored in evidence. All officers present at the roll call testified that Harkins remained calm during his questioning and that it was Loftus who became agitated, raised her voice and exited the roll call without being dismissed.

LEGAL ANALYSIS AND CONCLUSIONS

The appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The respondent shoulders the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). 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). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Based upon my findings, I **CONCLUDE** that the respondent failed to meet its burden as to any of the charges brought against Harkins relative to Internal Affairs Case # 17-03 and Internal Affairs Case #17-04.

DISCIPLINARY ACTION

In appeals concerning major disciplinary actions brought against classified employees, the burden of proof is on the appointing authority. N.J.A.C. 4A:2-1.4(a). The standard of proof in administrative proceedings is by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A2-1.4(a); In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

The 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. New Jersey's Civil Service Act is construed liberally in order to protect employees from arbitrary discipline. Mastrobattista v. Essex Cty. Park Comm'n, 46 N.J. 138, 147 (1965); Prosecutors, Detectives and Investigators Ass'n v. Hudson County Bd. of Freeholders, 130 N.J. Super. 30, 41 (App. Div. 1974); Scancarella v. Dep't of Civil Serv., 24 N.J. Super. 65, 70 (App. Div. 1952).

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. Grounds for discipline include, among other things, insubordination, chronic or excessive absenteeism or lateness, conduct unbecoming a public employee, and other sufficient cause. See N.J.A.C. 4A:2-2.3(a)(2), (4), (6), and (12).

Here, the respondent failed to meet its burden as to any of the charges brought against Harkins relative to Internal Affairs Case # 17-03 and Internal Affairs Case #17-04. I, therefore, **CONCLUDE** that no penalty shall be assessed.

ORDER

It is hereby **ORDERED** that the twenty-working-day suspension recommended by the respondent under CSV 00733-18 / 2018-1841 is **REVERSED**.

Furthermore, it is hereby **ORDERED** that the ten-working-days suspension recommended by the respondent under CSV 00734-18 / 2018-1876 is **REVERSED**.

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.



April 9, 2019
DATE

JEFFREY R. WILSON, ALJ

Date Received at Agency:

April 9, 2019

Date Mailed to Parties:

April 9, 2019

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APPENDIX

WITNESSES

For Appellant:

Lieutenant William Etsell
Officer Patrick Flynn
Officer Jerald Garriott
Sergeant Adam McGraw
Officer Joseph Kopetsky

For Respondent:

Captain John Stevenson
Deputy Chief Kevin Tolan
Officer Laura Loftus
Chief Matthew Gallagher
John Bartosiewicz, Jr.
Alex Corwonski
Officer Mark Elliott

EXHIBITS

For Appellant:

- P-1 North Wildwood Police Department Incident Report, dated August 31, 2016
- P-2 North Wildwood Police Department Incident Report, dated January 3, 2017

For Respondent:

- R-1 Preliminary Notice of Disciplinary Action, dated August 1, 2017 and Final Notice of Disciplinary Action, dated December 1, 2017 (CSV 00733-18)

- R-2 Preliminary Notice of Disciplinary Action, dated August 1, 2017 and Final Notice of Disciplinary Action, dated December 1, 2017 (CSV 00734-18)
- R-3 North Wildwood Police Department Internal Affairs Investigation Report, dated June 6, 2017
- R-4 North Wildwood Police Department Internal Affairs Report, dated July 19, 2017
- R-5 North Wildwood Police Department Internal Affairs Report, dated October 30, 2016
- R-6 North Wildwood Police Department Internal Affairs Report, dated March 18, 2017
- R-7 North Wildwood Police Department Internal Affairs Investigation Report, dated July 18, 2017
- R-8 North Wildwood Police Department Internal Affairs Report, dated July 18, 2017
- R-9 City of North Wildwood Memorandum, dated June 4, 2015 and North Wildwood Police Department Rules and Regulations
- R-10 Prior Disciplinary History of Sergeant Brian Harkins (SEALED DECEMBER 12, 2018 – NOT TO BE UNSEALED AS NO PENALTY IS ASSESSED)
- R-11 North Wildwood Police Department Sick / Injury Leave Policy – General Order #63