

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20th DAY OF MAY, 2020

Deirdre L. Webster Cobb

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Chairperson
Civil Service Commission

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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 11206-19

AGENCY DKT. NO. 2019-2475

**IN THE MATTER OF SELWYN CORLEY,
CAMDEN COUNTY DEPARTMENT OF
CORRECTIONS**

Frank C. Cioffi, Esq., for appellant, Selwyn Corley (Sciarra & Catrambone, LLC,
attorneys)

Antonieta P. Rinaldi, Assistant County Counsel, for respondent, Camden County
Department of Corrections (Chris Orlando, County Counsel)

Record Closed: February 21, 2020

Decided: April 7, 2020

BEFORE KATHLEEN M. CALEMMO, ALJ:

STATEMENT OF THE CASE

The respondent, Camden County Department of Corrections (Department), suspended the appellant, Selwyn Corley (Corley), for six working days. The suspension was issued because Corley failed to respond to a telephone check after calling out sick on May 6, 2017. The Department charged Corley with conduct unbecoming a public employee, neglect of duty, and other sufficient cause, including violations of the Department's Rules of Conduct and General Order #028. Corley appealed these charges

and the suspension on the grounds that he was home and asleep during his tour of duty on May 6, 2017.

PROCEDURAL HISTORY

On May 18, 2017, the Department issued a Preliminary Notice of Disciplinary Action (PNDA) setting forth the charges and specifications against Corley. After a departmental hearing, which was held on May 8, 2018, the Department issued a Final Notice of Disciplinary Action (FNDA) on February 26, 2019, sustaining the charges in the PNDA and suspending Corley from employment for six working days. The appellant filed a timely appeal. The matter was transmitted by the Civil Service Commission Division of Appeals and Regulatory Affairs to the Office of Administrative Law (OAL) where it was filed on April 3, 2019, as a contested case. N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52: 14F-1 to 13. Corley failed to appear at the hearing scheduled for July 9, 2019, and the case was returned to the transmitting agency on July 11, 2019. On August 14, 2019, the Civil Service Commission reinstated Corley's appeal because the failure to appear was due to an inadvertent mistake, not attributable to Corley. Per the decision, the appeal was refiled with the OAL on August 15, 2019. The case was heard on February 21, 2020, and the record closed that day.

THE SPECIFICATIONS

The County's charges all arise from the following factual allegations found in the FNDA (R-5):

On 06 May 2017, you called out sick on the 1900-0700 hrs. P1shift. At 2218 hours Sgt. Egan conducted a phone check on the phone number you provided when you called out sick. After conducting the check, you failed to answer that phone and a voicemail was left instructing you contact the facility. At 2300 hrs., no return call was received. General Order #28 states, "Employees can leave their place of confinement during shift hours only for purposes of seeking medical attention, securing a prescription, or for emergencies including family emergencies. They will make notification to the shift commander or his/her designee as they leave with

the address and phone number of their destination. If the employee must go to another destination, ex., x-ray; pharmacy; hospital, he/she must contact the shift commander or his/her designee again with the address and phone number of their next destination." The department considers coming to work on a consistent basis an essential function of the job. The department will also enforce strict procedures with regard to home visitations/checks.

FACTUAL DISCUSSION AND FINDINGS

Testimony

For Respondent:

Lieutenant Josue Ortolaza (Ortolaza) was a seventeen year veteran with the Department, who was the shift commander on May 6, 2017. As recorded in the Absentee & Lateness Report Log, Corley notified the Department on May 6, 2017, at 4:32 p.m. that he would be using his FMLA¹ sick time and not reporting for his 7:00 p.m. to 7:00 a.m. shift that evening. (R-1.) After reviewing the Log for May 6, 2017, Ortolaza determined that a phone check for Corley's absence was warranted because this was his sixteenth day of FMLA/sick time. (R-2.)

The Department's policy was to conduct home checks or phone checks on an employee who calls out sick after having exhausted his or her annual allotted sick leave. (R-8.) Whether the Department conducted a home or phone check was based on staffing issues during that shift. After making the determination that a phone check was warranted, Ortolaza ordered Sergeant Egan (Egan) to conduct a phone check. On May 6, 2017, at 10:18 p.m., Egan called Corley, but there was no answer. (R-3.) Egan stated in his report that after conducting the phone check and receiving no answer, he left a voice mail instructing Corley to return his call. After waiting approximately forty minutes with no return call, Egan recommended that disciplinary action be instituted against

¹The Family Medical Leave Act (FMLA) entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons. Found at: www.dol.gov/agencies/wha/fmla

Corley. (R-4.) As stated on the report, on May 11, 2017, Corley received a copy of the report and checked the box that he would not be submitting a rebuttal. Id.

On cross-examination, Ortolaza stated that Corley was charged with failure to be at home, after calling out sick. Corley provided the number for the call. When Corley did not answer his phone or return the call, he was presumed not to be home. No one from the Department went to Corley's home to check if he was there. Ortolaza had no knowledge of Corley's medical condition or the reason for his FMLA.

On re-direct examination, Ortolaza stated that he has no direct knowledge whether Corley was home or not.

Captain Rebecca Franceschina (Franceschina) is a nineteen year veteran with the Department. As part of her regular duties, she makes recommendations to the Warden regarding disciplinary issues that affect the safety and security of the facility. Before recommending discipline against Corley, Franceschina reviewed the Incident Report (R-2) and noted the lack of a rebuttal from Corley. She also reviewed the Rules of Conduct (R-6), General Order #028 on sick leave, and the Agreement (R-8) pertaining to home checks and phone checks when an employee has exhausted their annual allotted sick leave.

In reviewing the General Rules of Conduct, Franceschina determined that Corley was a discredit to himself by not presenting himself to Egan and answering his phone or returning the call. Corley's conduct supported the charges set forth in Rule 1:1 for failing "to comply with regulations, orders, directives, or practices" of the Department; and Rule 1:2 for conduct unbecoming an employee. (R-6.) She also determined that by neglecting to answer his phone and ignoring the instruction to return the call, Corley's conduct supported the charges set forth in Rule 1.3 for neglect of duty and 2.4 for failing to be at home when he reported off sick. Id.

Home sick visitations were instituted under General Order #028 in limited circumstances to ensure that an employee who called out of work sick remained at home. (R-7.) The Department could make contact either by home visitation or by telephone. In

this case, Corley did not answer his phone when the check was made, did not return the call as directed by the voice message, and did not file a rebuttal. (R-3 and R-4.) Because Corley did not follow procedure, the Department had no information to determine that Corley was physically at home on May 6, 2017. The discipline had nothing to do with Corley being on FMLA, it was solely based on Corley's failure to answer the phone check or failure to respond to the voicemail. The phone check was made in Corley's case because he had exhausted his sick time.

For the appellant:

Selwyn Corley, the appellant, is an eight year veteran of the Department. At the time of the incident he was working the 7:00 p.m. until 7:00 a.m. shift. Corley is a diabetic; his condition is controlled with medication and monitoring his blood sugar.

On May 6, 2017, Corley's blood sugar was high, he was experiencing fatigue, and he had a headache. As he was scheduled to work at 7:00 p.m. that evening, he called out sick. Corley was aware that he had exhausted his sick time. At approximately 8:30 p.m. after taking his medication, he went to bed and fell asleep. As was his habit, he put his cell phone on his nightstand next to his bed. He never heard the phone ring. When he went to bed, Corley's wife and two children were still awake in a separate part of the house.

The next day was a scheduled day off from work, so he did not check his messages. When he returned to work on May 11, 2017, Corley received the report written by Egan. (R-4.) He never submitted a rebuttal, but he talked to Ortolaza and the Warden and told them he was sleeping. He never left his home during his shift of May 6, 2017.

On cross-examination, Corley stated that his house does not have a land line, he only uses his cellphone. He acknowledged that he was aware of the Department's policy regarding phone checks. Corley could not recall if he ever told Ortolaza why he did not answer his phone.

Our courts have held that “credibility findings . . . are often influenced by matters such as observations of the character and demeanor of witnesses . . . that are not transmitted by the record.” State v. Lourito, 157 N.J. 463, 474 (1998). A credibility determination requires an overall assessment of the witness' 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 (9th Cir. 1963). As a witness, Corley was soft spoken and non-confrontational. Corley truthfully answered that he was aware of the phone check policy and procedure. Yet, he offered a flimsy response that he did not hear the phone ring or check his phone for messages. His failure to submit a rebuttal to the report showed indifference to the consequences of his actions. Corley's attempt to shift the blame for this incident to the Department for not physically determining his whereabouts is unavailing. It was his responsibility to be present for the phone check.

Having considered the testimony and documentary evidence, and the credibility of the witnesses, I **FIND as FACT** that when Corley called out sick for his shift on May 6, 2017, he was subject to a phone check. I also **FIND as FACT** that Corley did not answer his phone when the phone check call was placed and did not return the call as instructed by the voicemail.

LEGAL ANALYSIS AND CONCLUSION

The appellant's rights and duties are governed by laws including the Civil Service Act and the regulations promulgated thereunder. A civil service employee who commits a wrongful act related to his or her employment, or provides other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6, -20; N.J.A.C. 4A2-2.2, -2.3. Major discipline includes removal, or suspension for more than five working days. N.J.A.C. 4A:2-2.2. Employees may be disciplined for insubordination, neglect of duty, conduct unbecoming a public employee, failure or inability to perform duties, chronic or excessive absenteeism or lateness; and other sufficient cause, among other things. N.J.A.C. 4A:2-2.3. An employee may be removed for egregious conduct without regard to progressive discipline. In re Carter, 191 N.J. 474 (2007). Otherwise, progressive discipline would be applied. West New York v. Bock, 38 N.J. 500 (1962).

The Department has 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). 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).

As a law enforcement officer, Corley is held to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997). Adherence to this high standard of conduct is an obligation that a law enforcement officer voluntarily assumes when he or she enters public service. In re Emmons, 63 N.J. Super. 136, 142 (App. Div. 1960).

In the instant case, Corley was charged with "conduct unbecoming a public employee" in violation of N.J.A.C. 4A:2-2.3(a)(6). This charge encompasses conduct that adversely affects the morale or efficiency of a governmental unit or tends 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)).

Corley's defense that he was home and asleep was an attempt to avoid responsibility for failing to respond to a valid phone check. The mechanism for the Department to verify that Corley was home was the phone check. For the verification to be successful, the recipient must answer the call. While it is certainly understandable for Corley to take his medication and go to bed early, that does not relieve him of his obligation to verify that he was at home by responding to the phone check. Corley's indifference impaired the operation or efficiency of the Department to achieve its stated goal in ensuring that certain employees subjected to a phone check present themselves to the investigator. Accordingly, I **CONCLUDE** Corley's conduct constituted conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6).

Corley was also charged with neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7). There is no definition in the New Jersey Administrative Code for neglect of duty, but the charge has been interpreted to mean that an employee has failed to perform an act required by the description of their job title. Neglect of duty can arise from an omission or failure to perform a duty and includes official misconduct or misdoing, as well as negligence. Generally, the term 'negligent' connotes a deviation from normal standards of conduct. As stated in In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977), neglect of duty implies nonperformance of some official duty imposed upon a public employee, not merely commission of an imprudent act. Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee breached a duty owed to the performance of the job.

Here, Corley failed to answer his phone during a phone check and failed to respond to the voicemail requiring a call back. When a phone check is substituted for a home visit, the employee has the duty to present himself to the caller; Corley neglected this duty. For the reasons cited herein and above, I **CONCLUDE** that the respondent has met its burden as it relates to charge N.J.A.C. 4A:2-2.3(a)(7).

Corley was also charged with violating N.J.A.C. 4A:2-2.3(a)(12) – other sufficient cause. This charge is for conduct that violates the implicit standard of good behavior that

devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. The 'other sufficient cause' set forth in the preliminary and final notices of discipline are the violations of various Department Rules of Conduct and Order #028. These Rules of Conduct violations arise from the same facts and are subsumed in the charges of conduct unbecoming and neglect of duty. Accordingly, I **CONCLUDE** that the charges for violations in general (1.1), conduct unbecoming (1.2), neglect of duty (1.3), reporting off sick (failure to be at home) (2.4), and General Order #028 are sustained for the reasons set forth above. Therefore, I **CONCLUDE** that the Department has met its burden as it relates to charge N.J.A.C. 4A:2-2.3(a)(12), concerning Corley's violation of the above Rules of Conduct and Order #028.

PENALTY

A civil service employee who commits a wrongful act related to his duties may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). This requires a de novo review of Corley's disciplinary action. In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523-24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). The question to be resolved is whether the discipline imposed in this case is appropriate.

The Department seeks to uphold its suspension of six working days. This is Corley's first major discipline. Significantly, on April 13, 2017, just weeks before this action, Corley received minor discipline of a three-day suspension for abuse of sick leave, chronic or excessive absenteeism, conduct unbecoming, and neglect of duty. (R-9.)

After having considered the proofs offered in this matter and the impact of the Corley's behavior upon the Department, and after having given due deference to the principal of progressive discipline, I **CONCLUDE** that Corley's violations are significant

enough to warrant a penalty, which, in part, is meant to impress upon him the seriousness of his failure to comply with Department mandates. The Department's response to Corley's failure to present himself for a phone check without offering any rebuttal was measured and appropriate. I **CONCLUDE** that the action of the Department in suspending Corley for six days is reasonable and consistent with progressive discipline and should be affirmed.

ORDER

I hereby order that the charges of conduct unbecoming a public employee, neglect of duty, and other sufficient cause are sustained. I order that the action of the Department imposing a six working day suspension is **AFFIRMED**, and 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. 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 7, 2020
DATE

KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

APPENDIX

LIST OF WITNESSES

For appellant:

Officer Selwyn Corley

For respondent:

Lieutenant Josue Ortolaza

Captain Rebeca Franceschina

LIST OF EXHIBITS

For appellant:

None

For respondent:

- R-1 Absentee & Lateness Report
- R-2 General Incident Report
- R-3 Sick Visitation Report
- R-4 Complaint Report
- R-5 PNDA and FNDA
- R-6 Rules of Conduct
- R-7 General Order #028
- R-8 Agreement with contract clause for home checks
- R-9 Chronology of Discipline