

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Malikah Spencer. The Commission further orders that appellant be granted back pay, benefits, and seniority from the date of separation to the actual date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. The appellant is also entitled to reasonable counsel fees pursuant to *N.J.A.C. 4A:2-2.12*. Proof of income earned, an affidavit of mitigation and a certification of services 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:2-2.12*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay or counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

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 27TH DAY OF OCTOBER, 2021

Deirdre' L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 00724-21

AGENCY DKT. NO. N/A

2021-677

**IN THE MATTER OF MALIKAH SPENCER,
ESSEX COUNTY DEPT. OF CORRECTIONS
APPOINTING AUTHORITY.**

Luretha Stribling, Esq., for appellant Malika Spencer

Jill Caffrey, Asst. Essex County Counsel, for respondent Essex County
Department of Corrections (Essex County Counsel, attorneys)

Record closed: August 20, 2021,

Decided: September 17, 2021

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE

Appellant, Malika Spencer (Spencer), was employed as an Essex County Correctional Police Officer, with respondent, Essex County Department of Corrections (Department of Corrections). Spencer appeals her termination on November 25, 2020, for allegedly wrongfully utilizing the Family Medical Leave Act (FMLA), while on vacation in Mexico in August 2019.

PROCEDURAL HISTORY

On December 18, 2019, the Department of Corrections issued Spencer a Preliminary Notice of Disciplinary Action ("PNDA") (R-1), that charged Spencer with violations of:

1. N.J.A.C. 4A:2-2.3(a)(6) Conduct unbecoming a public employee;
2. N.J.A.C. 4A:2-2.3(a)(12) Other sufficient cause:
3. Violation of Department Rules and Regulations:
 - 3:1.13 Obedience to Laws and Regulations;
 - 3:1.23 Knowledge of the Laws and Regulations;
 - 3:10.5 Truthfulness, and
 - 3:1.1 Standard of Conduct.

The PNDA further specified that:

Spencer wrongfully utilized the Family Medical Leave Act (FMLA) while in Mexico on vacation in August 2019. Specifically, on August 17, 2019, Spencer was involved in a domestic violence incident, which she failed to report to the shift commander, [and] [T]his failure to report led to an investigation by Investigator Pomponio of the Internal Affairs. On August 19, 2019, Officer Spencer called Investigator Pomponio [...] and stated that she was out of the country and would not be back until Sunday August 25, 2019.

[O]n August 22, 2019, Spencer was absent without leave (AWOL) from work. At that time, Lt. Pires contacted Spencer to find out why she wasn't at work and Spencer stated that she was in Mexico and forgot to call out. Spencer then called out of work on August 23, 24, 25, and 26 stating she was taking FMLA leave. Spencer's use of FMLA was clearly fraudulent as she notified [...] Lt. Pires that she was in fact out of the country until August 25, 2019.

On November 25, 2020, the Department of Corrections issued a Final Notice of Disciplinary Action ("FNDA"). The FNDA sustained all the charges within the PNDA and removed Spencer from employment effective November 25, 2020.

Thereafter, on January 7, 2021, Spencer filed an appeal with the Office of Administrative Law (OAL), pursuant to N.J.S.A. 40A:14-202(d), contesting the substantiated charges and termination contained in the FNDA issued by the Department of Corrections.

Telephonic prehearing conferences were held on February 17, 2021, and April 5, 2021. A hearing was scheduled for May 19, 2021. On May 18, 2021, counsel for Spencer requested an adjournment of the hearing, with the consent of the Department of Corrections, and the hearing was adjourned to July 22, 2021.¹

On July 22, 2021, a remote hearing was held, and the parties were given until August 20, 2021, to file their respective summations. At the conclusion of the hearing, Spencer requested leave to file a motion to request that Spencer be placed back on the payroll at the Department of Corrections pursuant to N.J.S.A. 40A:14-201(2) and N.J.A.C. 4A:2-2.4(a). Said request was granted, and Spencer filed her motion on July 29, 2021, and the Department of Corrections filed its opposition on August 5, 2021.

On or about August 20, 2021, the parties filed their respective summations, at which time the record closed.

ISSUES

The issue in this case is whether the Department of Corrections' determination that sustained charges in the FNDA dated November 25, 2020, was proper, and if properly sustained, whether the charges warrant termination of Spencer?

¹ At the request of the undersigned, on May 19, 2021, counsel for Spencer submitted a letter acknowledging that her request of the adjournment of the hearing of May 19, 2021, to July 22, 2021, would toll the days that would accrue between May 19, 2021 and July 22, 2021, under N.J.S.A. 40A:14-201b(4), for purposes of calculating the date upon which Spencer could be entitled to receive her base salary pending a final determination of her appeal filed herein.

FACTUAL DISCUSSION AND FINDINGS

Summary of Testimony

At the hearing, the Department of Corrections presented testimony from Associate Warden Antonio Pires. Spencer testified and called her mother, Shirley Smith (Smith) to testify. Below is a brief description of the testimony provided.

Associate Warden Antonio Pires

Associate Warden, Antonio Pires (Pires) testified that in August 2019, he was a Lieutenant and was responsible for overseeing all Correction Officers, including Spencer. Pires testified that Spencer did not report to her shift on August 19, 2019, and August 23, 2019. Pires stated that on August 19, 2019, Spencer called in to the Department of Corrections "master control" number at 2:47AM to report that she would not be in for her scheduled shift that started that morning, and that Spencer would be using an "FMLA No Pay" for August 19. Pires testified further that Spencer called the master control number on August 22, 2019, at 8:17PM, to report that she would not be in for her shift on August 23, 2019, and that she would be using an "FMLA Vacation Pay" for August 23.

Pires testified that Spencer properly called in to report that she would not be in at work prior to her two scheduled shifts on August 19 and 23, 2019, but that it was her stated use of FMLA time that was violated. Pires stated that Spencer specifically violated the rules and regulations number 3:10.5, truthfulness, because at the time she called in on August 19 and August 22, to report her absence from work, and use of FMLA time, she failed to report that she was in Mexico, and not at her home, as indicated in the Department of Corrections, Sick Call Form (R-3 and R-4).

Pires stated that a Department of Corrections employee can use pre-approved FMLA for compensation time (vacation or sick time) or non-pay time. Pires testified that an employee cannot be denied using vacation time for use of their FMLA time, but an employee can be denied FMLA for a "non FMLA vacation". Pires stated that there was no

allegation that Spencer was not approved for FMLA. Pires testified that it was how Spencer used her time on August 19 and August 23 as FMLA time that was inappropriate, as she was on vacation in Cancun, which was not related to her FMLA request. Pires admitted that he did not have any information regarding Spencer's FMLA approval, and that he had not reviewed her FMLA file. Pires testified about how he had personally used FMLA time but lacked specific information regarding the Department of Corrections approval of Spencer's FMLA.

On cross examination, Pires testified that he was not personally aware that Spencer was a victim of domestic violence in August 2019, but there were "rumors" about the same discussed in the Department of Corrections. Pires also stated that when he spoke with Spencer on August 21, 2019, following her call of August 19, he did not recall if he knew of the domestic violence rumors at that time. Pires testified that he requested copies of Spencer's flight itinerary to Mexico when the Department of Corrections was investigating the alleged misuse by Spencer of her FMLA time on August 19 and August 23.

On further cross examination, Pires stated that he was not directly involved in the decision to terminate Spencer but that he was instructed to investigate her use of her FMLA time when it was initially thought that Spencer was "AWOL" from her post after calling in on August 19 and not reporting to work until August 26. Pires testified that the alleged AWOL investigation then led to the investigation resulting in the underlying termination of Spencer for misuse of her FMLA time.

Malikah Spencer

Malikah Spencer (Spencer) was hired as an Essex County Correctional Police Officer on February 22, 2016. Spencer testified that in August 2019, she was working the first shift from 6:00 A.M. to 2:00 P.M. and worked routinely in a unit where inmates with mental health diagnoses were housed. Spencer testified that during her four years of employment she received annual reviews of "excellent" or "outstanding." Spencer testified further that she had been suspended from work once, for being fifteen minutes late three times in one year in 2018 or 2019.

Spencer testified that she has two children who were aged nine-years old and seven-months old on August 2019. Spencer testified that she is a single parent and her mother, Smith, lives near her and assists her with childcare.

Spencer testified that she was approved for New Jersey Family Leave Act (NJFLA) on May 16, 2019, and she was also re-approved for FMLA on September 19, 2019. Spencer testified that her FMLA had been initially approved when she had her second child, but she could not recall the date of approval.

Spencer admitted that she called the Department of Corrections on August 19, 2019, to request FMLA time as “no pay” for said date, and that she also called on August 22, 2019, to request FMLA time as “vacation day” for said date. Spencer also admitted that she went to Cancun, Mexico with her mother and family on August 19, 2019, and returned to Newark on August 23, 2019. Spencer testified, that she went to Cancun with her mother and father, to be away from the father of her two children, Dasheek Touchstone (Touchstone), who has a history of domestic violence with Spencer.

Spencer stated that on August 17, 2019, there was a domestic violence incident at her home involving Touchstone. Spencer testified that she called the police, but Touchstone was not arrested as he left before the police arrived. Spencer testified that she filed aggravated assault charges against Touchstone and obtained a Temporary Restraining Order (“TRO”). Spencer testified that following the August 17 incident, she took her children with her and went to stay with her mother, Smith.

Spencer stated that on August 19, Touchstone appeared at her mother’s home demanding to see his children, and that another domestic violence incident occurred. Spencer testified that Touchstone said he would “kill” everyone at Smith’s home if he could not see his children. Spencer stated that the police were again called, and this time Touchstone was placed under arrest, because of the outstanding TRO, and was charged with aggravated assault. Spencer testified that Touchstone was then taken to the Essex County Correction Center (“Correction Center”) where Spencer worked. Spencer testified

that she was very upset that Touchstone would be housed in the same prison where she worked, and that she feared for her safety because of the same.

Spencer stated that she informed the Police Officers at the scene on August 17, that she was a Corrections Officer, and the police officer called the Department of Corrections regarding the domestic violence incidents in her presence.

Spencer testified that because of the two domestic violence incidents her mother did not want Spencer and the children to remain alone in Newark, while Smith and her family were away on vacation in Cancun. Spencer stated that she did not want to remain in Newark alone with her two children in case Touchstone was released from the Correction Center. Spencer stated that her mother wanted Spencer and the children to go with them to Cancun. Spencer stated that because her two children did not have passports, they could not go. She stated that her mother purchased an airplane ticket for Spencer only, departing for Cancun on August 19, 2021. Spencer testified that the two children remained in Newark with her "best friend" while Spencer was in Cancun with her family.

Spencer stated that on August 19, while she was in Cancun, she called Internal Affairs and spoke with Lieutenant Bologne, who informed her to speak with Officer Pomponio. Spencer testified she informed Officer Pomponio of the domestic violence incidents and that she was in Cancun to be away from Touchstone. She stated that Officer Pomponio did not remark regarding her being in Cancun.

Spencer stated that on August 22, she spoke to her friend who was taking care of the two children and was told that one of the children was sick with a fever, and that because of the same, on August 23, she left Cancun on a morning flight and arrived in Newark around 10pm. Spencer testified that upon arriving in Newark, she took her sick child to Beth Israel Medical Center ("Beth Israel"), where he was admitted on August 23 and discharged August 24.

Spencer testified that upon her child's discharge from Beth Israel, she had to remain with him at home from August 24 through August 26. She called work on August

23, 24, 25, and 26, 2019, to report that she would be out on said dates due to her child being sick. She testified that she used FMLA sick days for her days out from August 24 through August 26. Spencer produced a medical note to corroborate her testimony that she had to remain home to tend to her child (A-4 and A-5).

Spencer testified that upon returning to work she was contacted by Officer Conti from Internal Affairs and was asked to produce a copy of her flight itinerary to Cancun. Spencer testified that she provided the itinerary in early September 2019 and did not hear from Internal Affairs until December 19, 2019, when she was informed that she was being terminated from her position because she wrongfully used her FMLA time from August 23 through August 26, 2019.

On cross-examination, Spencer testified that she had NJFLA and FMLA because she has two children and there were situations when she "had to take care of her kid and stay at home." Spencer stated that her FMLA was approved prior to August 2019, and it was continued on September 20, 2019. Spencer stated that her mother had purchased the airplane tickets to Cancun on August 19, 2019, that left Newark at 6:00am. Spencer confirmed that she called in FMLA on August 19, 2019, because of the domestic violence incidents that had occurred.

On redirect, Spencer testified that she had been approved for FMLA in 2018 and 2019, along with NJFLA. She restated that she went to Cancun with her family because she "feared for her safety" from Touchstone. Spencer reiterated that she returned to Newark on August 23, 2019, and went directly to the hospital with her son.

Spencer testified that the first time she was aware Internal Affairs was looking into her absence was in September 2019, when Officer Conti asked for her flight itinerary. She testified that Internal Affairs never questioned her. Spencer testified that she thought she was in "trouble" because of the domestic violence due to Touchstone being incarcerated in the Correction Center, while she was employed at the same facility and not because of her trip to Cancun. She stated that she became aware of her termination when she was served with the PNDA on December 19, 2019.

Sherley Smith

Shirley Smith (Smith) is Spencer's mother. She testified that she lives ten-fifteen minutes' drive from Spencer. Smith testified that Spencer called her on August 19 that she was in a "domestic dispute" with Touchstone, and she needed her to pick her and the children up from her home. Smith testified that when she arrived at Spencer's home, Touchstone was not there, and she found Spencer hiding in the closet and the children crying. Smith testified that Spencer's home was a "mess" with furniture turned over and some broken furniture. Smith testified that she took Spencer and the two children to her home the evening of August 19.

Smith testified that she had a trip planned to Cancun with her husband and two other daughters, and that she wanted to take Spencer and the two children because she was afraid Touchstone would hurt them. Smith stated that on August 19, Touchstone came to her house and started yelling for Spencer and the children to come outside her home. She testified that Touchstone tried to come into her home and that he made threats to "kill" anyone if he could not see his children. Smith stated that she called the Newark Police Department, and the police arrived at her home and found Touchstone hiding nearby and he was placed under arrest for domestic violence.

Smith testified that on August 22, Spencer called the babysitter and was told the "baby" was very ill and Spencer needed to come home to take care of her son. Smith stated that Spencer flew home on August 23, and when she arrived, she took her son to the hospital. Smith and her family remained in Cancun.

I **FIND** the testimony of all of the witnesses to be credible. I **FIND** that it is not disputed that Spencer took an FMLA day on August 19 and August 23 and was away on vacation with her family in Cancun during said time. What is in dispute is the appropriateness of Spencer being in Cancun while requesting an FMLA day.

Most of the facts in this matter are not in dispute, and the parties have consented to the introduction and admission of evidence presented. I therefore **FIND** the following to be the **FACTS** herein:

Spencer has been employed as a Corrections Officer with the Corrections Department from 2016 to her effective termination on November 25, 2020 (R-1 and R-2). Spencer has received positive evaluations during her time of employment with the Corrections Department and was suspended once without pay for five-days for being consistently tardy to work over a period of time. Spencer resides in Newark, is a single parent and has two minor age children. Spencer relies upon her mother, Smith, to assist her in taking care of her children.

On August 19, 2019, and August 22, 2019, Spencer called her employer and reported that she would not be in to work on said dates as she was using an FMLA day as follows: August 19 use of FMLA No Pay and August 22 use of FMLA vacation day (R-3 and R-4). Spencer was approved by the Department of Corrections for FMLA and NJFLA for 2018 and 2019 (A-1 and A-2).

Spencer was a victim of an alleged domestic violence incident on August 17, 2019, and August 19, 2019 (A-2 and A-3), when Touchstone allegedly assaulted her on both dates; at her home on August 17 and at her mother's home on August 19 (Id.). The Newark Police department were called on both alleged domestic violence incidents. On August 17, the Newark Police called the Department of Corrections to report that Spencer was a victim of an alleged domestic violence. Additionally, on August 22, 2019, Spencer spoke with her supervisor Pires, who was a Lieutenant and her shift supervisor at the time, and advised him that she had forgotten to call out prior to the start of the shift and that she was in Mexico and Lieutenant Pires responded okay.

On August 19, while she was in Cancun, Spencer called Internal Affairs and spoke with Lieutenant Bologne, who informed her to speak with Officer Pomponio. Spencer informed Officer Pomponio of the alleged domestic violence incidents and that she was in Cancun to be away from Touchstone.

As a result of the alleged domestic violence of Spencer by Touchstone, Spencer was afraid for her safety and left Newark for Cancun with Smith and her family on August

19, on a planned family vacation. (R-5). Spencer's two children remained in Newark with a best friend, as they could not travel because they did not have passports.

Spencer would return to Newark from Cancun on August 23, 2019, because one of her two children was ill (R-5, and A-5). The child was hospitalized in Beth Israel Hospital on August 23 and discharged on August 24 (A-4). Spencer had to remain at home taking care of her child until August 26 (A-5). Spencer called the Department of Corrections on August 23, 24, 25, and 26, 2019, to report that she would be out on said dates due to her child being sick. Spencer used FMLA sick days for her days out from August 24 through August 26.

Upon her return to work after August 26, 2019, Spencer was asked by Internal Affairs to provide a copy of the flight itinerary to Cancun (R-5). Spencer was never questioned by Internal Affairs or her supervisor regarding her use of FMLA time on August 19 and August 22; the alleged domestic violence incidents that occurred on August 17 and August 19 and being AWOL from work between August 19 through August 26, 2019.

The first time that Spencer knew that her employment status was in jeopardy was when she received the PNDA on December 19, 2019 (R-1).

LEGAL ANALYSIS AND CONCLUSIONS

The Civil Service Act and the implementing regulations govern the rights and duties of public employees. N.J.S.A. 11A:1-1 to 12-6; N.J.A.C. 4A:1-1.1 to 4A:10-3.2. An employee who commits a wrongful act related to his or her duties or who gives other just cause may be subject to major discipline. N.J.S.A. 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). In a civil service disciplinary case, the employer bears the burden of sufficient, competent, and credible evidence of facts essential to the charge. N.J.S.A. 11A:2-6(a)(2), -21; N.J.S.A. 52:14B-10(c); N.J.A.C. 1:1-2.1, "burden of proof"; N.J.A.C. 4A:2-1.4. That burden is to establish by a preponderance of the competent, relevant, and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982).

An appointing authority may discipline an employee on various grounds, including conduct unbecoming a public employee, neglect of duty, and other sufficient cause. N.J.A.C. 4A:2-2.3(a). Such action is subject to review by the Civil Service Commission, which after a *de novo* hearing makes an independent determination as to both guilt and the “propriety of the penalty imposed below.” W. New York v. Bock, 38 N.J. 500, 519 (1962). In an administrative proceeding concerning a major disciplinary action, the appointing authority must prove its case by a “fair preponderance of the believable evidence.” Polk, 90 N.J. at 560 (citation omitted); N.J.A.C. 4A:2-1.4(a); Atkinson, 37 N.J. at 149.

The evidence must “be such as to lead a reasonably cautious mind to the given conclusion.” Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). The greater weight of credible evidence in the case—the preponderance—depends not only on the number of witnesses, but “the greater convincing power to our minds.” State v. Lewis, 67 N.J. 47, 49 (1975) (citation omitted). Similarly, credible testimony “must not only proceed from the mouth of a credible witness but must be credible in itself.” In re Estate of Perrone, 5 N.J. 514, 522 (1950).

The charges contained in the PNDA dated December 19, 2019, which were upheld in the FNDA of November 25, 2020, form the basis for the charges herein. The PNDA alleged as follows:

1. N.J.A.C. 4A:2-2.3(a)(6) Conduct unbecoming a public employee;
2. N.J.A.C. 4A:2-2.3(a)(12) Other sufficient cause:
3. Violation of Department Rules and Regulations:
 - 3:1.13 Obedience to Laws and Regulations;
 - 3:1.23 Knowledge of the Laws and Regulations;
 - 3:10.5 Truthfulness, and
 - 3:1.1 Standard of Conduct.

The PNDA further specified that:

Spencer wrongfully utilized the Family Medical Leave Act (FMLA) while in Mexico on vacation in August 2019. Specifically, on August 17, 2019, Spencer was involved in a domestic violence incident, which she failed to report to the shift

commander, [and] [T]his failure to report led to an investigation by Investigator Pomponio of the Internal Affairs. On August 19, 2019, Officer Spencer called Investigator Pomponio [...] and stated that she was out of the country and would not be back until Sunday August 25, 2019.

[O]n August 22, 2019, Spencer was absent without leave (AWOL) from work. At that time, Lt. Pires contacted Spencer to find out why she wasn't at work and Spencer stated that she was in Mexico and forgot to call out. Spencer then called out of work on August 23, 24, 25, and 26 stating she was taking FMLA leave. Spencer's use of FMLA was clearly fraudulent as she notified [...] Lt. Pires that she was in fact out of the country until August 25, 2019.

The initial charge that Spencer is guilty of conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6), is not supported by the record. Conduct unbecoming a public employee is an elastic phrase which 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)).

As to the charges that on August 22, 2019, Spencer was absent without leave (AWOL) from work, the record reveals that Spencer took an FMLA day on August 19, 2019, and August 22, 2019, which were initially approved by the Department of Corrections. In addition, the record further reveals that she spoke with Pires on August 19 and informed him of the domestic violence incident and that she was in Cancun and followed his instructions to contact Investigator Pomponio regarding the domestic violence incident. The record further reveals that Spencer called in on August 24, 25 and 26, 2019, and took FMLA days to tend to her child who was sick. The Department of Corrections does not refute Spencer calling in and using her FMLA days in August 2019, and they did not present any proofs that Spencer was AWOL as contained in the FNDA.

Therefore, I **CONCLUDE** that the Department of Corrections has failed to prove by a preponderance of the credible evidence that Spencer was AWOL on August 22, 2019, and any additional dates, thus the Department of Corrections charge that Spencer's conduct was conduct unbecoming of a public employee is **DENIED**.

As to the charges that Spencer's use of FMLA was "fraudulent as she notified [...] Lt. Pires that she was in fact out of the country until August 25, 2019.", when Spencer called and then "called out of work on August 23, 24, 25, and 26 stating she was taking FMLA leave," is also not supported by the record. Pires' testimony did not state that Spencer's conduct was "fraudulent" because she called in on August 23, 24, 25 and 26 to use her FMLA days. Pires stated that Spencer's "use" of FMLA while she was in Cancun was not "truthful" because she did not state she was in Cancun when she first called in on August 19, and the FMLA Sick Call Form provided her "address" as being home.

Pires' testimony is not consistent with the charges in the FNDA and what occurred. I therefore **CONCLUDE** that the Department of Corrections has failed to prove by a preponderance of the credible evidence that Spencer's conduct was fraudulent and thus the Department of Corrections charge that Spencer's conduct was conduct unbecoming of a public employee is **DENIED**.

I **CONCLUDE** that the record reveals that the Department of Corrections failed to conduct any investigation of the charges contained in the FNDA. The FNDA Specifications state that the Department of Corrections commenced an Internal Affairs investigation because Spencer failed to report the domestic violence incident, which the record reveals to be incorrect, and that as a result it determined that she fraudulently used FMLA time for August 19, 21, and August 23 through August 26, because she told Investigator Pomponio on August 19, that she would be out on FMLA until August 25. I **CONCLUDE** there is no testimony or evidence that supports this specification, Pires' testimony and the documents submitted reveal that the Department of Corrections was simply dismayed that Spencer was in Cancun when she requested FMLA time. Had the Department of Corrections conducted an investigation it would have realized that Spencer had a mitigating reason to go to Cancun with her mother and family, which was the result of the alleged domestic violence that occurred on August 17 and August 19.

As to the second charge that Spencer's conduct is grounds for a finding of a violation for "other sufficient cause" under N.J.A.C. 4A:2-2.3(a)(12), there is no definition

in the New Jersey Administrative Code for other sufficient cause. Other sufficient cause is generally defined in the charges against petitioner. The charge of other sufficient cause has been dismissed when "respondent has not given any substance to the allegation." Simmons v. City of Newark, CSV 9122-99, Initial Decision (February 22, 2006), adopted, Comm'r (April 26, 2006), <<http://njlaw.rutgers.edu/collections/oal/final/csv9122-99.pdf>>.

In the within matter, the Department of Corrections has not provided any substance to the allegations that Spencer violated department Rules and Regulations 3:1.13 Obedience to Laws and Regulations; 3:1.23 Knowledge of the Laws and Regulations; 3:1.1 Standard of Conduct and 3:10.5 Truthfulness. Pires provided testimony that Spencer violated all the aforementioned policies and procedures by simply reading the same into the record without providing any specific instance of how Spencer violated the Rules and Regulations. Pires did not provide any knowledge of why Spencer had been approved for FMLA and therefore how she was in violation of the same because she was in Cancun. Pires even admitted that an employee could use a vacation day when calling in out for FMLA. In essence, Pires' testimony was devoid of any knowledge of FMLA requirements and how Spencer had violated the same because she was in Cancun while on FMLA.

As stated previously, Pires testified that Spencer violated regulations 3:10.5 Truthfulness, when he stated that Spencer was not "truthful" in failing to state on August 19 that she was in Cancun when she used a "no pay" day for her FMLA. Pires did not provide any additional testimony regarding Spencer violating the remaining Rules and Regulations. I **CONCLUDE** that Pires' testimony was insufficient to establish that Spencer violated regulation 3:10.5, and that the Department of Corrections has failed to prove by a preponderance of the credible evidence that Spencer's conduct was violative of the Rules and Regulations cited in the FNDA. Therefore, I **CONCLUDE** that Department of Corrections charge that Spencer's conduct violated N.J.A.C.: 4A:2-2.3(a)(12) other sufficient cause is **DENIED**.

I **CONCLUDE** that while Spencer's reasons for going to Cancun was a result of her fear for her safety and that of her children because of the two alleged domestic violence incidents involving Touchstone, and the same may or may not be an approved

FMLA reason, the Department of Corrections has failed to provide proof by a preponderance of the credible evidence that Spencer conduct was conduct unbecoming a public employee, and a violation of the Rules and Regulations for other sufficient cause. For these reasons, the Department of Corrections decision to terminate Spencer effective November 25, 2020, is **DENIED**.

PENALTY

When dealing with the question of penalty in a *de novo* review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and penalty on appeal based on the charges. N.J.S.A. 11A:2-19. Factors determining the degree of discipline include the employee's work history, his prior disciplinary record, and the gravity of the misconduct. 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."

As the record reveals that the Department of Corrections has failed to prove by a preponderance of the evidence that Spencer violated N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming, and N.J.A.C. 4A:2-2.3(AA) (12), other sufficient cause, and the Rules and Regulations cited herein, I **CONCLUDE** that the Department of Corrections' decision to terminate Spencer effective November 25, 2020, is **DENIED** and Spencer should be restored to her position of Corrections Officer

ORDER

Having concluded that the Department of Corrections has not sustained its burden of proof of any the charges contained in the FNDA, I **ORDER** that the action of the Department of Corrections in terminating Spencer effective November 25, 2020, is **REVERSED**.


I **ORDER** that Spencer is entitled to back pay, if the penalty has already been served, and seniority pursuant to N.J.A.C. 4A:2-2.10.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 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 17, 2021
DATE


JULIO C. MOREJON, ALJ, ALJ

Date Received at Agency:

September 17, 2021

Date E-Mailed to Parties:

September 17, 2021

JCM/lr

APPENDIX

Witnesses

For Appellant:

Malikah Spencer

Shirley Smith

For Respondent:

Associate Warden Antonio Pires

Exhibits

For Appellant:

A-1 NJFMLA Notice dated 3/27/2019 and FMLA Notice dated 9/20/2019

A-2 Police Incident Report dated 8/17/2019

A-3 Continuation report of Police Incident Report dated 8/17/2019

A-4 Newark Beth Israel Medical Center admission notice

A-5 Newark Beth Israel Medical Center Excuse from School/Work note

A-6 PNDA dated 12/18/2019

A-7 FNDA dated 11/25/2020

For Respondent:

R-1 PNDA dated 12/18/2019

R-2 FNDA dated 11/25/2020

R-3 Essex County Department of Corrections, Sick Call Form dated 8/19/2019

R-4 Essex County Department of Corrections, Sick Call Form dated 8/22/2019

R-5 Flight itinerary

R-6 Essex County Department of Corrections, Rules and Regulations