

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 17TH DAY OF NOVEMBER, 2021

Deirdre L. Webster Cobb

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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 07182-20

AGENCY DKT. NO. *2020-2550*

**IN THE MATTER OF JUAN CRUZ,
HUDSON COUNTY DEPARTMENT OF
CORRECTIONS.**

Frank C. Cioffi, Esq., for appellant Juan Cruz (Sciarra & Catrambone, L.L.C., attorneys)

Georgina Pallitto, Assistant County Counsel, for respondent Hudson County Department of Corrections (Donato J. Battista, County Counsel)

Record Closed: September 22, 2021

Decided: October 20, 2021

BEFORE LESLIE Z. CELENTANO, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant Juan Cruz was resigned not in good standing, and removed effective August 11, 2020, based upon allegations of failure to comply with leave policy, and absences without leave. N.J.A.C. 4A:2-6.2. The matter was filed at the Office of Administrative Law (OAL) on April 22, 2020. The Civil Service Commission confirmed that "due to the covid-19 State shutdown, extremely limited staffing and mandatory furlough in July, this appeal could not be located until August 6, 2020." The appeal form

also noted an earlier pending case involving multiple suspensions assigned to another administrative law judge (ALJ). Appellant was employed as a correction officer with respondent Hudson County Department of Corrections (the County, or Department). Appellant appeals from the resignation not in good standing imposed based upon allegations of failure to comply with leave policy and appellant's absences from work. At issue is whether Cruz engaged in the alleged conduct, and if so, whether it constitutes actions for which a penalty of resignation not in good standing is warranted.

PROCEDURAL HISTORY

The County issued a Preliminary Notice of Disciplinary Action (PNDA) dated December 3, 2019, informing appellant of the following charges issued against him: (1) insubordination (7 counts); (2) conduct unbecoming a public employee (7 counts); (3) neglect of duty (7 counts); (4) chronic or excessive absenteeism (7 counts); (5) other sufficient cause; and (6) resignation not in good standing. He was also charged with violating Section III of Department policy ADM.13 (Absenteeism and Attendance Control), and Chapter 3 (Sections 3:2.1(a) and 3:6.4) and Chapter 5 (Section 5:1.1(a), (b), (c), (d), (k) and (l)) of the Custody Staff Rules and Regulations Manual. The charges were based on the following incidents set forth in the PNDA:

Charges and Specifications

The PNDA and attached Recommendation for Disciplinary Action ("RDA"), charged Ofc. Cruz with the following serious infractions:

- (1) Insubordination in violation of N.J.A.C. 4A:2-2.3(a)2 (x7);
- (2) Conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)6 (x7);
- (3) Neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)7 (x7);
- (4) Chronic or excessive absenteeism in violation of N.J.A.C. 4A:2-2.3(a)4 (x7);

(5) Other sufficient cause, in violation of N.J.A.C. 4A:2-2.3(a)12; and

(6) Resignation not in good standing in violation of N.J.A.C. 4A:2-6.2.

The specifications in support of the charges are:

On November 19, 20, 21, 22, 23, 26, [and] 27, 2019, Officer Cruz did not report for duty nor call off sick and thereby was marked D.N.R. (Did Not Report). As per County Policy, five (5) days of being absent without leave or D.N.R. constitutes "Resignation Not in Good Standing" in accordance with N.J.A.C. 4A:2-6.2 and Custody Staff Rules and Regulations Manual 4.2 Absence from Duty. Officer Cruz is in violation of the following HCDOC&R Policies and Procedures:

ADM .13 Absenteeism and Attendance Control, Section III, Abandonment of Position;

ADM .13 Absenteeism and Attendance Control, Section III, Did Not Report (DNR);

ADM .13 Absenteeism and Attendance Control, Section III, Chronic or Excessive Absenteeism;

ADM .13 Absenteeism and Attendance Control, Section III, Unauthorized Absence;

Custody Staff Rules and Regulations, Chapter 3: "Performance of Duties" Insubordination: Section 3:2.1(a);

Custody Staff Rules and Regulations, Chapter 3: "Performance of Duties" Absenteeism: Section 3:6.4; and

Custody Staff Rules and Regulations, Chapter 5: "Disciplinary Action" Violations Subject to Disciplinary Action: Section 5:1.1(a), (b), (c), (d), (k) and (l).

Subsequently, the County issued a Final Notice of Disciplinary Action (FNDA) dated April 16, 2020, sustaining the charges, and providing for appellant's removal effective August 11, 2020.

Appellant filed an appeal, and the matter was filed at the Office of Administrative Law. On August 28, 2020, a telephone prehearing conference was held. The parties intended to seek consolidation of this matter with prior disciplinary charges pending before another ALJ, but the request for consolidation was denied by that ALJ. The parties were advised that the matter needed to proceed on one of several October dates offered, unless appellant agreed to waive back pay and not seek reinstatement pursuant to the 180-day rule. On October 26, 2020, appellant waived reinstatement as codified in N.J.A.C. 4A:2-2.13. The matter was scheduled for a hearing on December 11, 2020. On December 10, 2020, counsel for appellant requested an adjournment due to a quarantine issue at his office, and the hearing was converted to a telephone conference. The matter was then rescheduled for March 26, 2021, and adjourned due to the undersigned being scheduled for a mandatory seminar. The case was rescheduled for April 12, 2021, on which date the matter was heard. At the conclusion of the hearing, the parties requested the opportunity to submit post-hearing briefs and asked that they be permitted to do so after a decision was issued as to the three pending suspensions before another ALJ.

A decision was issued on July 19, 2021, in the other disciplinary matters before another ALJ. A telephone conference was scheduled for August 10, 2021, to ascertain whether the parties intended to supplement their briefs based upon the determinations made in the other disciplinary matters. The telephone conference was adjourned at appellant's attorney's request and rescheduled, and held on August 16, 2021. Counsel for appellant indicated he may supplement his prior submission, and did so on August 25, 2021. Following receipt of all submissions and exhibit lists, the record was closed.

FACTUAL DISCUSSION AND SUMMARY OF TESTIMONY

It is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. Credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story considering its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see In re Polk, 90 N.J. 550 (1982). Credibility conclusions "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto,

157 N.J. 463, 474 (1999). A fact finder is expected to base decisions on credibility on his or her common sense, intuition, or experience. Barnes v. United States, 412 U.S. 837 (1973).

What follows is not a verbatim accounting of the testimony, but rather a summary of the testimonial and documentary evidence I found to be relevant to resolving the issue in this matter. Captain Geoghegan and Jennifer DeSalvo testified for respondent. Officer Cruz testified on his own behalf. Based upon consideration of the testimonial and documentary evidence presented, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following as **FACTS**:

Captain Geoghegan retired from the Department of Corrections on April 1, 2021. He had been a county correction captain since September 2017, and prior to that a tour commander since February 2010. He began working at the County in April 1996 as a county correction officer. He was appellant's tour commander since 2019. Appellant has had many disciplinary matters regarding attendance. The most recent were three other disciplinary charges in 2019, and this matter was the fourth one.

On December 3, 2019, the fourth PNDA was served indicating that in the fall appellant had gone on medical or ADA (Americans with Disabilities Act) leave. He was due back in November 2019 but did not return, did not call, and did not report (DNR) for seven days. Not reporting for five days is considered a resignation not in good standing; however, they did not charge him until the seventh day. The PNDA notifies him of the resignation not in good standing for being out on November 19, 20, 21, 22, 23, 26, and 27, which is seven consecutive days. Attached to the PNDA is a suspension notice dated December 3, 2019, which was served on him and which the captain signed. Also attached to the PNDA is a request for disciplinary action (RDA) that had been submitted by the lieutenant. The RDA outlines the charges and the rules and regulations violated.

There is also an activity report generated on a daily basis (R-2) showing the details of where an employee was assigned and the time. Cruz had been on an approved medical leave from November 1 to November 16 and was due back on November 19 but did not report. On November 28 he had an approved vacation day, but all of the days in

between, November 19 through November 27, he was a no-call, no-show DNR. If he had called out there would be notes in the "reasons" section, thus the resignation not in good standing commenced on November 28. Cruz was directed to provide a doctor's note clearing him to work on November 18, 2019 (R-3). Cruz had started the year with negative sick and vacation days (R-4), as he had overspent his time in 2018. He never worked a single full week for all of 2019, and ended that year with negative sick and vacation days as well.

Cruz acknowledged receiving the Department regulation, ADM.13, Absenteeism and Attendance Control (R-5). He signed for the rules and the policy on December 11, 2018, and would have received six or more copies of these policies each time they were updated. He also would have received the Custody Staff Rules and Regulations Manual (R-6), including Chapter 3, Performance of Duties, which outlines his responsibilities.

Chapter 3 of the Custody Staff Rules and Regulations, at Section 3.2.1, defines insubordination as including failure to abide by the policy for absenteeism. The captain also referenced Section 3.6.4, which reflects that being absent and failing to appear for duty for five days as a DNR constitutes a resignation not in good standing. Such violations subject a custody staff member to disciplinary action pursuant to Chapter 5:1.1. Appellant acknowledged receipt of these policies on October 20, 2017.

The employee handbook (R-7) specifically references returning to work from leaves of absence and the need to keep supervisors informed.

Captain Geoghegan indicated that attendance issues had been the subject of a settlement agreement and release dated August 30, 2018, involving six attendance violations and forty-six absences. Those multiple pending disciplinary actions were settled for a ten-day suspension. The employee profile for appellant (R-10) also notes that Cruz had other discipline prior to 2018. He had a five-day fine in 2007, and then on May 31, 2013, had a two-days'-pay fine for excessive lateness. On November 15, 2013, he received a one-day fine for absenteeism, and on March 31, 2017, a one-day fine for absenteeism. October 20, 2018, was the date of the ten-day suspension/settlement for other absenteeism.

Captain Geoghegan explained that all of this absenteeism jeopardizes the safety and security of the facility. Each time appellant called out sick, someone would have to stay on overtime, which strains resources, and officers have to cover more areas. This creates a risk of contraband, violence, and other safety concerns. An officer is supposed to call in by 12:45 if their shift starts at 1:45, but Cruz never called in on November 19, 2019, and did not return to work, thus he was a "no call, no show," and was marked DNR. There is also considerable overtime cost involved in having other officers stay over past their own shifts.

On June 6, 2019, Lieutenant Martins issued a memorandum to appellant (R-12) advising him of his options for medical leave, which Cruz had asked for in May. The captain had asked the lieutenant to reach out to Central Personnel and get information for Cruz to answer his questions. Jennifer DeSalvo in Central Personnel provided the answers to the questions appellant had, and that was the source of the information in Lieutenant Martins's memo.

On cross-examination, Captain Geoghegan agreed that officers can go on light duty, but stated that no one worked light duty on the 2:00-p.m.-to-10:00-p.m. shift he commanded. He was also not aware that appellant had requested light duty, because he never heard from him. Captain Geoghegan proved to be a credible and reliable witness.

Jennifer DeSalvo is an employee benefits specialist in Central Personnel with Hudson County. She oversees County benefits and processes all leaves of absence. She has been with the County in this position since 2013.

There are different types of leaves available to County employees, to include furlough, personal leave, donated leave, domestic-abuse leave, Family and Medical Leave Act (FMLA), and the New Jersey Leave Act. Medical leave is for an individual for up to twelve weeks under the FMLA. Employees can seek donated leave from others when they run out. To receive donated leave someone has to have been with the County for a year and had no previous discipline for the previous two years, and have exhausted their own time. They also have to have worked a minimum of 1,250 hours in the prior

year to receive FMLA leave. An employee contacts Central Personnel if they want medical leave. Prior to Covid, Personnel would have scheduled an in-person appointment with the employee to see what the situation is and provide the paperwork. After obtaining the necessary forms, the individual seeking leave completes the request form, and also has their doctors fill out the medical certifications. The employee then has fifteen days to return the forms, and is considered absent without leave if they do not provide the paperwork within fifteen days. If the paperwork is turned in late, Personnel tries to work with the employee, and will backdate the form if there is a good reason that it is late.

The application is reviewed, and then the employee is told whether their leave is approved or not and for what dates. Personnel then informs the Department what type of leave the person will be on, and the dates they will be out. An employee has to bring in a note when they have been approved to return, or they can request an extension or just provide a new note from the doctor extending the justification for the leave. DeSalvo testified that she knows appellant from leaves over the years, and indicated that he "generally returns the paperwork on time."

In 2019, Cruz took intermittent leave starting at the beginning of the year to care for his spouse. Later in the year he took another leave for himself. For his January 2019 leave the recertification was late, but they backdated it for him. In the spring of 2019 he returned to work and emailed DeSalvo from the jail asking what types of leaves were available to him, and she responded with all the information (R-12). In the fall he reached out to her again seeking leave, and she gave him the paperwork (R-13). DeSalvo informed Cruz that he was not eligible for donated leave because of his suspensions and because he had chronic and excessive absenteeism within the prior two years. He also did not qualify for leave under the FMLA because he had not met the requisite 1,250 hours worked the prior year, so leave under the ADA was his only option. DeSalvo noted in her correspondence that based upon the information he had provided, Cruz was requesting an indefinite leave of absence without any specified time period or return date noted, and that a request for indefinite leave is "not a reasonable accommodation." She informed him that they could not take medical information without a return-to-work date, and asked him to obtain the information and submit it to the office. Thereafter, approval

was provided for Cruz's leave as an accommodation under the ADA (R-3). Cruz never sent in a letter stating that he could return to work; never submitted an extension request; and never submitted a note from his doctor or orthopedist. They told him he could not do desk duty at the jail at the time of his request, and since the doctor's note he provided indicated that he could return to full duty on November 18, 2019, he was expected to return then. However, nothing further was ever heard from appellant.

DeSalvo noted that the doctor's note said appellant could work light duty as of the time of his request, and that, if not, in any event, he could return to full duty November 18, 2019. However, there is no light duty available at the jail. Cruz would have to perform the essential functions of an officer in a law-enforcement capacity, and had asked for no standing, walking, or bending, which they cannot offer at the jail. Cruz could have applied for a further job accommodation request under the ADA if his injury had continued. She added that they have no obligation to contact the employee as to their status; rather, it is the employee's obligation to contact them and provide the necessary documentation and return-to-work notes when they have them. Ms. DeSalvo proved to be a credible and reliable witness.

Mr. Cruz was a correction officer for twenty years. Prior to 2018 he had no issues with absenteeism or sick-leave abuse. In 2019 he had issues with his wife, but recently it was his injury. He broke his kneecap and sprained his arm while skateboarding on September 15, 2019. He called Ms. DeSalvo the next day. The emailed he received from her indicated he was to provide by October 1, 2019, a doctor's note with a return-to-work date. He thought November 18 was just a "recertification date only to provide additional information." He "thought [he] was still on leave." He did not contact anyone because he was immediately suspended and was "going through a lot of stuff." He agreed, however, that R-3 clearly states the dates, including the return-to-work date of November 18, 2019. He agreed that he was familiar with the process for recertifying and extending leave, yet did not do that for the November 2019 leave. He neither recertified nor extended the leave. Cruz "thought he was still out" on December 9, 2019, three days after he was served with the PNDA (and when his attorney indicated he was too incapacitated to attend a departmental hearing), took a position on the town council, and showed up for all meetings.

LEGAL DISCUSSION

Police officers are held to a high standard of conduct both on and off the job. In re Phillips, 117 N.J. 567, 577 (1990). Correction officers serve in a capacity analogous to police officers. As such, they have a duty to serve the public with the highest fidelity, honesty, integrity, and good faith. A law-enforcement officer's primary duty is to enforce and uphold the law. In the performance of that duty, the officer is required to "exercise tact, restraint and good judgment in his relationship with the public." Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). As they are vested with powers and responsibilities not held by other public employees, law-enforcement officers are held to the highest standards of conduct. See In re Carberry, 114 N.J. 574 (1989). Consequently, those who choose to become law-enforcement officers cannot complain that they are being held to an unfairly high standard of conduct, as they have consented to that standard by joining a law-enforcement agency. Phillips, 117 N.J. at 576-77; In re Emmons, 63 N.J. Super. 136, 142 (App. Div. 1960).

The Civil Service Act, N.J.S.A. 11A:1-1 et seq., governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576, 581 (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 sets forth that State policy is to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). To carry out this policy, the Act authorizes the discipline (and termination) of public employees. N.J.S.A. 11A:2-6.

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. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3. The general causes for such discipline are set forth in N.J.A.C. 4A:2-2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the

competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); In re Polk, 90 N.J. 550, 561 (1982).

The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 275 (1958). Therefore, the judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Delaware, Lackawanna & W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). Evidence is said to preponderate if "it establishes 'the reasonable probability of the fact.'" Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citations omitted). Precisely what is needed to satisfy this burden must be judged on a case-by-case basis.

The reasons supporting disciplinary action must be sufficient and not arbitrary, frivolous, or "likely to subvert the basic aims of the civil service program." Prosecutor's Detectives & Investigators Ass'n v. Hudson Cty. Bd. of Freeholders, 130 N.J. Super. 30, 42 (App. Div. 1974) (quoting Kennedy v. Newark, 26 N.J. 178, 189-90 (1959)).

N.J.A.C. 4A:2-6.2 provides in salient part:

- (b) Any employee who is absent from duty for five or more consecutive business days without the approval of his or her superior shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing. Approval of the absence shall not be unreasonably denied.

Charges and Specifications

The PNDA and attached Recommendation for Disciplinary Action, charged Officer Cruz with the following serious infractions:

- (1) Insubordination in violation of N.J.A.C. 4A:2-2.3(a)2 (x7);
- (2) Conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)6 (x7);

- (3) Neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)7 (x7);
- (4) Chronic or excessive absenteeism in violation of N.J.A.C. 4A:2-2.3(a)4 (x7);
- (5) Other sufficient cause, in violation of N.J.A.C. 4A:2-2.3(a)12; and
- (6) Resignation not in good standing in violation of N.J.A.C. 4A:2-6.2.

The specifications in support of the charges are:

On November 19, 20, 21, 22, 23, 26, [and] 27, 2019, Officer Cruz did not report for duty nor call off sick and thereby was marked D.N.R. (Did Not Report). As per County Policy, five (5) days of being absent without leave of D.N.R. constitutes "Resignation Not in Good Standing" in accordance with N.J.A.C. 4A:2-6.2 and Custody Staff Rules and Regulations Manual 4.2 Absence from Duty. Officer Cruz is in violation of the following HCDOC&R Policies and Procedures:

ADM .13 Absenteeism and Attendance Control, Section III, Abandonment of Position;

ADM .13 Absenteeism and Attendance Control, Section III, Did Not Report (DNR);

ADM .13 Absenteeism and Attendance Control, Section III, Chronic or Excessive Absenteeism;

ADM .13 Absenteeism and Attendance Control, Section III, Unauthorized Absence;

Custody Staff Rules and Regulations, Chapter 3: "Performance of Duties" Insubordination: Section 3:2.1(a);

Custody Staff Rules and Regulations, Chapter 3: "Performance of Duties" Absenteeism: Section 3:6.4; and

Custody Staff Rules and Regulations, Chapter 5: "Disciplinary Action" Violations Subject to Disciplinary Action: Section 5:1.1(a), (b), (c), (d), (k) and (l).

The Department Policy ADM.13 Absenteeism and Attendance Control (R-5), states in pertinent part:

Abandonment of Position

Any HCDOC&R employee who has five (5) days of consecutive unauthorized absences shall be considered to have abandoned his/her position, constituting "Resignation Not in Good Standing" in accordance with N.J.A.C. 4A:2-6.2, and shall be documented as such unless it is determined by the department that there existed a legitimate and documented emergency situation.

Did Not Report (DNR)

An individual is charged "Did Not Report" upon failing to report for duty and failure to notify the department of the inability to report.

Chronic or Excessive Absenteeism

Chronic or excessive absenteeism is frequent and[/]or repetitive absences, or when an HCDOC&R employee has depleted all available sick leave balances.

Unauthorized Absence

Every employee who fails to appear for duty at the date, time and place specified and without consent or proper authorization is "Absent No Pay" (ANP) or "Did Not Report" (DNP). This absence must be reported in writing to the Unit Manager and also on a Request for Disciplinary Action Report by the Officer-in-Charge.

Chapter 3 of the Custody Staff Rules and Regulations Manual, entitled "Performance of Duties" (R-6), states in pertinent part:

Insubordination

3:2.1 Custody staff members shall not commit acts of insubordination. The following specific acts are prohibited by this section:

- (a) Failure or deliberate refusal to obey a lawful order, verbal or written, by the Director of Corrections,

Deputy Director, Unit Manager(s) or other supervisory staff member(s) or any authorized person

. . . .

Absenteeism

. . . .

3:6.4 Every employee who fails to appear for duty at the date, time and place specified and without consent or proper authorization is "Absent No Pay" (A.N.P.) or "Did Not Report" (D.N.R.). Five (5) days of being absent without leave or D.N.R. constitutes "Resignation Not in Good Standing."

Chapter 5 of the Custody Staff Rules and Regulations Manual, entitled "Disciplinary Action" (R-6), states in pertinent part:

Violations Subject to Disciplinary Action

5:1.1 Any staff member of the HCDOC&R found guilty of the following may be subject to disciplinary action:

- (a) Unethical behavior
- (b) Conduct unbecoming an officer
- (c) Disobeying any lawful command received from a superior officer
- (d) Incompetent performance of duty
-
- (k) Absence or tardiness
- (l) Any other misfeasance, malfeasance or nonfeasance of duty

Insubordination encompasses an employee's failure or refusal to follow a directive, order, or instruction of a supervisor. Eaddy v. Dep't of Transp., 208 N.J. Super. 156, 158–59 (App. Div.), certif. granted, 104 N.J. 392, order vacated, appeal dismissed, 105 N.J. 569 (1986); City of Newark v. Massey, 93 N.J. Super. 317, 322 (App. Div. 1967).

Conduct unbecoming a public employee has been described as an “elastic” phrase that includes “conduct which adversely affects the morale or efficiency” of the public entity or “which has a tendency to destroy public respect for [public] employees and confidence in the operation of [public] services.” In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (citation omitted); see Karins v. City of Atl. City, 152 N.J. 532 (1998).

Neglect of duty is an employee’s failure to perform or discharge a duty required by the employee’s position, and includes official misconduct or misdoing as well as negligence. Clyburn v. Twp. of Irvington, 2001 N.J. AGEN LEXIS 654 (September 10, 2001), adopted, 2001 N.J. AGEN LEXIS 1323 (December 27, 2001); see Steinel v. Jersey City, 193 N.J. Super. 629 (App. Div. 1984), aff’d on other grounds, 99 N.J. 1 (1985).

Although the regulation does not define when absenteeism will rise to the level of chronic or excessive, it is generally understood that chronic conduct is conduct that continues over a long time or recurs frequently, Good v. N. State Prison, 97 N.J.A.R.2d (CSV) 529, 531, and “excessive” is defined as “exceeding what is usual, proper, necessary, or normal,” Merriam-Webster online dictionary, <https://www.merriam-webster.com/dictionary/excessive> (last visited October 18, 2021). Appellant did not work a full week for all of 2019, and began and ended that year with negative sick days and negative vacation days.

Based upon the foregoing, I **CONCLUDE** that the Department has amply met its burden of proving, by a preponderance of the credible evidence, that appellant’s failure to report to work or complete his tour of duty on the seven days in November 2019 constitutes insubordination, conduct unbecoming a public employee, neglect of duty, chronic or excessive absenteeism, and a resignation not in good standing, due to his absences from work. I further **CONCLUDE** that appellant’s actions relating to his absences from work amount to other sufficient cause, namely, violation of Section III of Department policy ADM.13 (regarding abandonment of position, chronic or excessive absenteeism, and unauthorized absence), and violation of Section 3:2.1(a) insubordination, and Section 3:6.4 of the Custody Staff Rules and Regulations Manual (regarding absenteeism). The Department also charges appellant with violation of

Section 5:1.1(a), (b), (c), (d), (k) and (l) of the Custody Staff Rules and Regulations Manual; that section indicates violations that could result in disciplinary action, and thus duplicates the above-sustained charges, and so that charge is dismissed.

An employer has a legitimate right to expect that its employees will attend work as scheduled. Appellant's absences from work caused frequent disruption of the workplace and created a hardship to the Department in that other correction officers had to absorb appellant's job duties, and receive overtime pay. The absences also created potential safety issues at the jail. Appellant's repeated failure to work his assigned shifts is conduct that adversely affects the morale of other governmental-employee correction officers who had to undertake appellant's work and adversely affects the efficient operations of the jail. Appellant's failure to perform his mandated duties due to his absences from work constitutes neglect of his duties as a correction officer, and conduct unbecoming a public employee.

The only remaining issue concerns the penalty that should be imposed. It is beyond debate that appellant's past disciplinary record may be considered for guidance in determining the appropriate penalty, and the principle of progressive discipline is applied in this state. See W. New York v. Bock, 38 N.J. 500, 522 (1962). Although an employee's past record may not be considered for purposes of proving the present charge, past misconduct can be a factor in determining the appropriate penalty for the current misconduct. In re Herrmann, 192 N.J. 19, 29 (2007); In re Carter, 191 N.J. 474, 484 (2007); Bock, 38 N.J. at 522-23. The underlying purpose of progressive discipline is to provide an employee with notice of his or her deficiencies and the opportunity to correct those deficiencies. In re Thomas, 2000 N.J. AGEN LEXIS 1131 (November 17, 2000).

Appellant's disciplinary record includes a ten-day suspension for one count of chronic or excessive absenteeism pursuant to a settlement agreement executed in August 2018. That settlement agreement was a global resolution of six recommendations for major discipline in 2018: 3/3/18, 3/15/18, 3/30/18, 4/16/18, 5/10/18, and 6/12/18. He previously had a five-day suspension on August 31, 2004, and fines on March 31, 2013, for lateness; November 15, 2013, for sick-leave abuse/absenteeism; and March 31, 2017,

for being absent no pay. There were also three pending charges for time and attendance issues on July 30, 2019, September 12, 2019, and November 18, 2019.¹ In other words, appellant was given ample notice of the need to improve his attendance, and appellant's current infractions are not an aberration in an otherwise unblemished career.

The Department resigned Mr. Cruz not in good standing for being absent from duty for more than five consecutive business days without approval, thereby deeming him to have abandoned his position, N.J.A.C. 4A:2-6.2(b), and for habitual abuse of the attendance and leave policies. Appellant was well aware of the requirements of the policies, and despite that knowledge abandoned his position when he was absent, no call, no show, on November 19, 2019. As such, the termination of his employment was warranted; indeed, the County has worked with appellant over the years and approved all of his leave requests, including an intermittent leave approved as such in January 2019, where appellant then took straight leave although the medical certification contemplated intermittent only. The County permitted him to overspend his vacation and sick time both in 2018 and 2019, yet despite accommodating appellant at every turn, he remained unable to follow procedures for taking leaves and had consistently unreliable attendance. He continued to violate and abuse that policy even after the County rolled six major disciplinary actions into one suspension. Yet he did not change his behavior in order to comport with the policies and procedures of the Department.

There is also no evidence that the request for leave was unreasonably denied; indeed, appellant had multiple warnings making abundantly clear what the policy was, and appellant failed and refused to comply each and every time, providing insufficient notice and insufficient medical documentation, and ignoring the warnings. The fact that the leaves were approved after the fact does not justify his conduct. As such, I **CONCLUDE** that the Department has met its burden in sustaining the charges.

Based upon all of the foregoing, I **CONCLUDE** that the Department appropriately applied progressive discipline in this matter and that a resignation not in good standing is appropriate.

¹ These are the consolidated appeals decided under CSV 6019-20.

The record in this matter includes documentary evidence and the testimony of the individuals that had knowledge of the incidents they described. I **FIND** the testimony of respondent's witnesses to be believable and persuasive and more credible than that of appellant. Appellant was on an approved leave until November 17, 2019, and scheduled to return to work on November 19, 2019, but was a "no call, no show," and thus marked DNR pursuant to the absenteeism and attendance control policy. Appellant continued to be a "no call no show" and was marked DNR for seven consecutive work days leading to the November 28, 2019, memorandum indicating "resignation not in good standing." (R-1.) Appellant had a previously approved vacation day for November 28, yet continued to be in DNR status for November 29 and 30. After failing to report as of December 6, 2019, appellant was served with the PNDA indicating a resignation not in good standing; indeed, appellant never returned to work again.

As a correction officer, appellant's position is analogous to that of police officer and his beat is the prison. His responsibilities include maintaining the safety and security of the facility. When correction officers call out the impact on the jail and staff is significant and the safety and security of officers and inmates alike are at additional risk. Appellant was required to call out one hour prior to the start of his shift and often did not, and the facility cannot mandate that officers remain to do double shifts, but when other officers do remain, this increases overtime costs and impacts the operating budget.

The Department resigned Cruz not in good standing for being absent from duty, DNR, for seven consecutive business days without approval, thereby deeming him to have abandoned his position, N.J.A.C. 4A:2-6.2(b), and for habitual abuse of the leave policies and procedures. Appellant was well aware of the requirements of the policies and procedures, and despite the fact that he was expected to report back to work on November 19, 2019, nevertheless abandoned his position when he was absent for seven consecutive work days; and then had an approved vacation day; and then continued to be DNR for November 29 and 30, 2019, and beyond. As such, the termination of his employment was warranted. Appellant admitted that he did not call out or report to work on the seven consecutive days in question, and had taken nine prior leaves before 2019, confirming that he was well aware of the requirements relative to the process. He also

commenced new employment as a town councilman three days after he was served with discipline, and on the same date he was purportedly too incapacitated to attend a departmental hearing.

An employer has the right to expect that its employees will appear for work as scheduled. Appellant had a lengthy record of prior discipline, including a global settlement in 2018 of six recommendations for major discipline. Pursuant to that agreement Cruz pled guilty to one count of chronic and excessive absenteeism in exchange for a ten-day suspension. (R-9.)

Moreover, at the time of the filing of this matter three other PNDA's from 2019 for time and attendance issues were pending under docket number CSV 6019-20. Those charges were ultimately sustained and a penalty of three, thirty-day suspensions was imposed. Thus, in this case, even after multiple fines and suspensions, appellant did not change his behavior to comport with the policies and procedures of the Department. By not following those policies and procedures, his conduct justified the Department resigning him not in good standing.

Based upon all of the foregoing, I **CONCLUDE** that the Department appropriately applied progressive discipline in this matter and that a resignation not in good standing is appropriate.

ORDER

It is hereby **ORDERED** that the charges of violation of Section 5:1.1(a), (b), (c), (d), (k), and (l) of Chapter 5 of the Custody Staff Rules and Regulations are duplicate charges and therefore are **DISMISSED**, and **FURTHER ORDERED** that the remainder of the charges against appellant are all **SUSTAINED**. Appellant's appeal is hereby **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.

October 20, 2021
DATE



LESLIE Z. CELENTANO, ALJ

Date Received at Agency: October 20, 2021

Date Mailed to Parties: October 20, 2021
dr

APPENDIX

Witnesses

For Appellant:

Juan Cruz

For Respondent:

Captain Geoghegan

Jennifer DeSalvo

Exhibits

Joint:

J-1 County of Hudson Leave Request forms for 2018 and 2019

J-2 Letter to appellant dated March 4, 2019, advising that medical leave needed to be recertified

For Appellant:

P-1 Hudson County's Donated Leave Policy

P-2 E-mail from Jennifer DeSalvo to appellant dated September 16, 2019

For Respondent:

R-1 Preliminary Notice of Disciplinary Action dated 12/3/19

R-2 November 2019 Calendar and Activity Report

R-3 Letter from Jennifer DeSalvo dated 10/21/19

R-4 2019 Attendance Record Calendar

R-5 ADM.13 Absenteeism and Attendance Control

R-6 Custody Staff Rules and Regulations—Chapter 3, Performance of Duties, and Chapter 5, Disciplinary Actions

R-7 Employee Handbook—Extended Absences

R-8 N.J.A.C. 4A:2-2.3—General Causes

N.J.A.C.4A:2-6.2—Resignation Not In Good Standing

- R-9 Settlement Agreement
- R-10 Employee Profile
- R-11 Final Notices of Disciplinary Action dated 2/7/20 and 4/16/20
- R-12 Memorandum from Lieutenant Martins to Cruz 6/6/19
- R-13 Letter from Jennifer DeSalvo 10/2/19