STATE OF NEW JERSEY

In the Matter of Yajaira Felipe,
Paterson, Fire Department

CSC DKT. NO. 2020-2714
OAL DKT. NO. CSV 06456-20

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: APRIL 6, 2022

The appeal of Yajaira Felipe, Public Safety Telecommunicator, Paterson, Fire Department, of her removal, effective March 25, 2020, on charges, was heard by Administrative Law Judge Leslie Z. Celentano (ALJ), who rendered her initial decision on March 1, 2022. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, including a thorough review of the exceptions and reply, the Civil Service Commission, at its meeting of April 6, 2022, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Yajaira Felipe.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6TH DAY OF APRIL, 2022

Deirdré 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. CSV 06456-20
AGENCY DKT. NO. 2020-2714

IN THE MATTER OF YAJAIRA FELIPE,
CITY OF PATERSON, FIRE DEPARTMENT

Matthew G. Connaughton, Esq., for appellant Yajaira Felipe (Cohen, Leder, Montalbano & Connaughton, LLC, attorneys)

Marlin G. Townes III, Esq., for respondent City of Paterson, Police Department (O'Toole Scrivo, LLC, attorneys)

Record Closed: January 27, 2022 Decided: March 1, 2022

BEFORE **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF THE CASE

Appellant Yajaira Felipe (appellant or Felipe) appeals the decision of respondent City of Paterson, Fire Department (respondent or Paterson), finding that she had failed to comply with the leave policy, had been absent without authorization for five or more consecutive days, and had thereby resigned her position not in good standing pursuant to N.J.A.C. 4A:2-6.2. Appellant was removed effective February 18, 2020, due to alleged chronic or excessive absenteeism, resignation not in good standing, and other sufficient cause pursuant to N.J.A.C. 4A:2-2.3(a).

PROCEDURAL HISTORY

By a Preliminary Notice of Disciplinary Action dated February 18, 2020, respondent advised appellant of the following charges:

N.J.A.C. 4A:2-2.3(a)4—Chronic or excessive absenteeism
N.J.A.C. 4A:2-2.3(a)12—Other sufficient cause
Violation of Section VII of City Leave of Absence Policy

Thereafter, by an Amended Preliminary Notice of Disciplinary Action dated April 23, 2020, respondent advised appellant of the following charges:

N.J.A.C. 4A:2-2.3(a)4—Chronic or excessive absenteeism
N.J.A.C. 4A:2-2.3(a)12—Other sufficient cause
N.J.A.C. 4A:2-6.2(b) Resignation not in good standing
Violation of Section VII of City Leave of Absence Policy

By Final Notice of Disciplinary Action dated June 8, 2020, appellant was determined to have resigned not in good standing and removed effective March 25, 2020.

The matter was transmitted to the Office of Administrative Law (OAL) on July 1, 2020, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The hearing was scheduled for March 10, 2021; however, discovery had not been completed at that time, and the hearing was adjourned. The hearing was then scheduled for August 2, 2021, and August 4, 2021, and took place on those dates. The parties requested an opportunity to submit post-hearing briefs, and the submissions were received on December 30, 2021. The record was reopened, however, on January 27, 2022, to permit appellant to move exhibits, previously marked only for identification, into evidence.

ISSUES

1. Whether respondent has proven the charges by a preponderance of the credible evidence.

2. Whether the penalty of removal effective March 25, 2020, and resignation not in good standing effective March 25, 2020, were justified and reasonable if a charge or charges are sustained.

FACTUAL DISCUSSION AND SUMMARY OF TESTIMONY

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 issues in this matter.

Testifying for respondent was Debra Hannibal.

Hannibal has been employed by the City of Paterson for four years. She has been the personnel director since November 2020 and oversees the personnel division, including payroll. She indicated she was aware of the Preliminary Notice of Disciplinary Action (PNDA) issued to appellant.[1] She noted that the Last Chance Agreement (LCA)[2] is referenced in the amended PNDA. (R-3.) The leave-of-absence policy (R-4) provides 15 days of sick leave for employees. This is also covered by the collective bargaining agreement (CBA) and applies to appellant. Hannibal noted that appellant was also sent information concerning Family and Medical Leave Act (FMLA) leave in 2019.

Hannibal sent correspondence to appellant on July 19, 2019 (R-27) after Deputy Chief Aboyoun asked why appellant had been absent from work since June 27, 2019. Hannibal reached out to appellant to schedule an appointment and talk about her

[1] Appellant stipulated to the Final Notice of Disciplinary Action (FNDA) that was issued. (R-2.)
[2] The LCA was entered into on November 5, 2019. Appellant agreed to a one year probationary period during which time she would not exceed 120 hours of sick leave nor violate any policies; and that violating the LCA could result in termination. The LCA also provided that any unauthorized leave for five or more consecutive days or more would result in her being marked as having resigned not in good standing.

absence. A meeting was scheduled; however, appellant did not call or show up for the meeting, and so a follow-up letter was sent. Included with that letter was the documentation to request leave under the FMLA.

The FMLA paperwork was again sent to appellant after another call from the deputy chief indicating that she was not at work. (R-28.) Appellant eventually returned that paperwork after she had already returned to work. She had family leave from January 16, 2020, to February 1, 2020, but they had to call her doctor because she never obtained a "return-to-work note."

Hannibal then emailed the deputy chief indicating that appellant was not actually eligible for FMLA, as she had not worked the minimum hours of 1,250 for the prior year at that point; she had only worked 911.50. Hours are calculated from the date of request and back one year to see if the employee worked 1,250 hours the prior year, and so she checked appellant's attendance transaction report (R-5) and saw that she had not worked the minimum. Hannibal noted that appellant had not worked at all from June 28, 2019, until November 3, 2019. Hannibal testified that appellant "kept going around and around" and was very vague. She did not disclose any reasons for her absences, even though they were trying to help her substantiate those absences. Appellant offered no explanation for them. She obtained no doctors' notes, even though they asked. None were ever received.

Ms. Hannibal explained further that sick time is "front loaded" at the start of the year. Only certain absences qualify for FMLA leave, and the leave has to be substantiated by a doctor's note. If someone has not worked the requisite number of hours they would be denied FMLA leave, but then they could use personal leave for their issue. The time actually worked is what counts, and paid holidays do not go into the calculation to determine whether they have sufficient hours. If someone exhausts their leave time they do not accrue paid leave time during unpaid leave. (R-4 at 14.)

Appellant was initially approved for FMLA from June 27, 2019, but was told that she needed to provide a doctor's note by August 5, 2019, to substantiate it. She had worked her regular hours combined with some overtime, and thus met the minimum and

so was eligible for FMLA. (R-27.) A subsequent request for leave commencing January 14, 2020, was denied because she had worked insufficient time. (R-28.) Appellant was out for three months on unpaid leave and they were waiting for her to substantiate it.

I found Hannibal to be a credible and reliable witness.

Also testifying for respondent was R. Cameron Gardner, who retired July 1, 2020, from the position of deputy chief in Paterson. He was with the City for twenty-five years, most recently as the chief of communications. He oversaw the Police and Fire Dispatch and the Office of Emergency Management. He testified that the fire department took over police dispatch in 2019, and so he oversaw both divisions.

The union agreement (R-6) at page 3, paragraph 2b, provides for 15 sick days for fire operators. The agreement also provides that a doctor's note is required after five consecutive days' absence.

Gardner testified about two memos he received from the captain regarding appellant being out sick. (R-7; R-8.) Appellant was out for more than five days and was told to have a doctor's note, which she agreed to do, but returned to work without bringing any notes in, and never did provide them.

Another email from the captain that he received (R-9) notes that appellant was almost out of sick leave for all of 2020 as of January 27, 2020.

An email chain from the chief includes one wherein he advises appellant that they have tried to reach her via emails and telephone calls and reminds her of her responsibility to initiate the FMLA packet and provide doctors' notes. The email also reminded appellant that if she did not comply she would be considered to be abandoning her job. Yet another email from Captain Fournier advises the witness that appellant had used all of her sick time for the year 2020 as of January 30, 2020, and she was actually over by 4.5 hours. The witness then sent a memo to the department chief, Brian McDermott, advising that appellant had used all of her sick leave for 2020 as of January 30, 2020, and, further, that he had left her a voice mail that she needs a doctor's note prior to returning. Appellant

never called him back, and he asked Ms. Hannibal to send appellant an FMLA packet. Thereafter, the captain sent Gardner a memo on February 3, 2020 (R-14) noting that on February 1 appellant had asked for a personal day, but was denied because she was not cleared to come back to work and overtime would have been needed to cover her shift. On February 2 she showed up to work without a note and was advised to go home and get her note. Overtime was needed to cover her shift again. On February 3 appellant indicated that she was not going to come in because she still did not have a note, and once again, for the third day in a row, overtime was required to cover her shift.

On March 18, 2020, appellant called out sick after initially not showing up for work at 6:30 a.m. when her shift began. A senior dispatcher had called her, and appellant advised the dispatcher that she needed an hour, as she had just awakened. Appellant, however, did not have any comp time available to her, yet was given an hour, and also allowed to take her lunch hour early, so she could come in at 8:30 a.m. She then called back, and said she had a flat tire. She then called back again, and said she had a cough and a doctor's appointment at 10:45.

The department continued to reach out to her in March 2020 to get updates on the status of her doctors' notes.

On April 20, 2020, Gardner prepared a memo to Chief McDermott (R-21) to inform him that appellant had been out sick since March 18 and kept promising to send doctors' notes, but did not do so. Appellant was not responding to repeated phone calls from supervisors, and still not providing any doctors' notes or explanations for her absences.

There was significant impact on the department from appellant's constant absences, primarily as to the need for overtime. Too few dispatchers puts the City at risk, with the volume of calls Paterson receives that have to be addressed in a timely matter. He also described the situation as an "administrative goose chase," constantly trying to reach her to no avail to get paperwork in order, and to get overtime coverage.

I found Gardner to be a credible and reliable witness.

Captain Elizabeth Fournier has been with the Paterson fire department for eighteen years and in 2020 was the communications captain, a position she held for two years, from June 6, 2018, to June 20, 2020. Her duties as communications captain included overseeing fire dispatchers and police dispatchers, approvals for sick days, tracking vacation and sick time, overseeing procedures generally, and payroll.

On July 1, 2019, police and fire dispatchers were merged under the Office of Emergency Management (OEM), which was under fire department control. Appellant was a fire dispatcher then. Captain Fournier testified that she prepared R-8, a report to the department chief, regarding appellant because she had no doctor's note, and according to the collective bargaining unit "a doctor's note shall be required after five consecutive days." She sent an email to the chief (R-9) advising that as of January 27, 2020, appellant had used 12.5 of her 15 sick days for the year 2020. She actually had 14 days that year, because they had allowed her to use one of her 2020 days in 2019. The captain is also aware that appellant had an LCA.

A subsequent memo she wrote to Chief Gardner on January 30, 2020 (R-11) advised the chief that appellant had used all of her sick time, plus an additional 4.5 hours over and above her allotted sick leave. The captain prepared a chart (R-11) for each dispatcher showing sick time used, and in 2019 appellant used 128 hours; she also used 156 hours of vacation time and 336 hours of unpaid leave.

Subsequent emails she sent to the chief (R-13) noted the pattern of abuse of sick leave on appellant's part.

In another memo to the chief (R-14), the captain detailed how appellant had asked for an emergency day on February 1, but was denied because she was not cleared to return to work yet. On February 2 she returned, but still had no doctor's note. On February 3 she did not come in because she did not have a note, and so two days were unpaid, and the 4.5 hours of sick time were over her allotted leave. Overtime was needed to cover her shifts on all three days.

On March 18, 2020, appellant called out sick. (R-15.) The incidents of that morning are described in another memo (R-16), which notes that appellant was initially called because she had not shown up for work. She said she had just awakened and needed an hour. She did not have any comp time, but she was given an hour anyway and allowed to take her lunch hour in advance so she could come in at 8:30, two hours later than her 6:30 a.m. start time. She then texted that she had a flat tire. She then called again and said she had a dry cough and would go to the doctor.

On March 24 appellant advised that she would provide a doctor's note, but that her printer would not scan. (R-18.) As of April 13 she still had not provided a note.

Appellant had a doctor's note to return to work on March 30 (R-17), but a memo from senior dispatch notes that she did not show or call on March 31.

The captain sent another memo to the chief (R-20) detailing that appellant had been out March 18 to March 22, 2020, and was to return March 23, 2020. On that date she got a doctor's note saying she could return March 30, 2020. There was no reference whatsoever to COVID or COVID symptoms in the notes; however, she submitted another note saying she was being "tested for covid" and could not return until the results were in. The captain noted that appellant was paid for the two weeks while she was supposedly waiting for the test results; however, nothing was ever received to suggest she had COVID. On April 13, 2020, she was asked for those results; she did not provide anything, and did not return to work.

Appellant did not follow any of the sick-leave procedures, and the charts the captain prepared (R-23) show the carried overtime, the new hours granted, the total used, and the balance. As of the end of 2019 appellant was minus 19.87 vacation hours, and minus 3.5 comp-time hours. Where there is an "X" on the chart, that indicates she was not at work when she was supposed to be.

Appellant's absenteeism was rampant and they constantly had to scramble for overtime to cover her shift. She did not provide doctors' notes when she was supposed

to, and they had to call in overtime coverage and could not plan in advance. In all of 2019 appellant worked a total of 111 days.

I found Captain Fournier to be a credible and reliable witness.

Yajaira Felipe testified that she does not recall seeing the PDNA's; however, she agreed that there was an LCA that she signed in November 2019. She testified that she was never "offered" the unpaid one-year leave of absence set forth in the CBA.[3] She agreed that she took FMLA leave in 2018 and 2019. She indicated that she was out from July 2019 through November 2019 for anemia. Felipe testified that she was not aware of any requirement that she provide a doctor's note prior to returning to work from an absence, and that it was only because of the LCA that she was required to do so going forward. She did not think that same policy applied to other employees.

Appellant testified that she felt "targeted at work." She said that people talked about her never having doctors' notes. Appellant indicated that she was supposed to get a senior position (P-2), although she was out most of the year. She indicated that the last time she was sick was in March 2020. She made multiple vague references to anemia. Regarding the memo where no one could reach her (R-10), she testified that she did not answer the phone if she "did not see the work number." She said she never received any messages, and never received any emails, and speculated, "maybe they did not call from the work line." She also testified that she did not receive anything about absences or FMLA information. She also testified that she tested negative for COVID, but that she had a fever for a month until the end of April. She "doesn't remember" if she gave Paterson the negative COVID results.

She testified that she felt uncomfortable at work because "she needed a note for everything" in 2018, and that they kept asking for doctors' notes to return to work. She also felt passed over for promotions (P-2), but agreed that she never filed any unfair-practice charges, only emailed her union rep.

[3] The CBA, R-6, at page 33, indicates "upon request." The employer is not required to "offer it."

I found appellant's testimony to be evasive and not credible.

LEGAL DISCUSSION AND CONCLUSION

The Civil Service Act and regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:2-1.1 to 4A:2-6.2. A civil service 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, -20; N.J.A.C. 4A:2-2.2, -2.3.

In an appeal such as this from a disciplinary action that resulted in the termination of employment, the appointing authority has 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); In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of the credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Credibility, or, more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954). Both guilt and penalty are redetermined on appeal from a determination by the appointing authority. Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

A public employee who is protected by the provisions of the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are enumerated at N.J.A.C. 4A:2-2.3, which provides, in salient part:

(a) An employee may be subject to discipline for:

. . . .

4. Chronic or excessive absenteeism or lateness;

. . . .

12. Other sufficient cause.

Appellant is also charged with resignation not in good standing. N.J.A.C. 4A:2-6.2(b) provides:

> 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.

Appellant is also charged with violation of the City of Paterson, Personnel Policies and Procedures Manual, Section VII, Leaves of Absence, which provides in salient part:

> All employees are responsible for notifying their Division Head if they will be absent due to illness within 15 minutes of the employee's start time. If an employee is unable to reach his or her Division Head, the employee should contact the Personnel Division.
>
> Failure to follow the procedure for notification of absence due to illness could result in denial of sick leave for that absence and/or other disciplinary action. Employees absent for five (5) consecutive working days who do not notify their Division Head or Personnel Division would be considered to have voluntarily quit their employment.
>
> Verification of Sick Leave
>
> A certificate from a physician designated by the City or the employee's own physician may be required as a proof of the need for sick leave regardless of the length of the absence.

When dealing with the question of penalty in a de novo review of a disciplinary action against a civil service employee, the Civil Service Commission is required to

reevaluate the proofs and "penalty" on appeal based upon the charges. N.J.S.A. 11A:2-19; Henry, 81 N.J. 571; Bock, 38 N.J. at 519.

In a disciplinary proceeding, an employee's past record may be resorted to "for guidance in determining the appropriate penalty for the current specific offense." Bock, 38 N.J. at 523. This past record includes "formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously called to the attention of and admitted by the employee." Id. at 524. However, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. Henry, 81 N.J. 571.

The record in this matter includes documentary evidence and the testimony of individuals who 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.

Here, appellant and respondent entered into a Last Chance Agreement (LCA) pursuant to the terms of which appellant admitted to not having followed the leave-of-absence policy. She was reinstated effective November 5, 2019, pursuant to the LCA, and placed on a one-year probationary period commencing on that date. She agreed to not exceed 120 hours of sick time nor violate any policies during the probationary period, and agreed that if she did, it could result in her termination. Pursuant to the LCA, appellant also acknowledged that "any unauthorized leaves of absence for five (5) consecutive business days or more will result in her being marked as having resigned not in good standing." Appellant acknowledged having no remaining sick time for 2019 at the time of execution of the LCA, and agreed that during the time of negotiation and execution of the agreement she had union representation.

Notwithstanding the terms of the LCA, appellant continued to be absent without authorization and continued to fail to follow the leave-of-absence policies and procedures. Her absenteeism persisted, as did the failure to provide doctors' notes, and by January 30, 2020, she had exhausted her 2020 leave time. Appellant continued to miss additional days in February.

Appellant's employer had a right to expect that appellant would be present at work, willing and able to perform her duties, in a highly regulated environment operated on a tight schedule. Appellant was a public-safety dispatcher, a critical public-safety position. She consistently and routinely flouted and disregarded the City's policies and procedures, failing to comply with the notification and verification procedures. Too few dispatchers puts the City at risk given the volume of calls that are received in Paterson. She ignored her supervisors when they attempted to reach her. Overtime was constantly needed to cover her shifts, at great additional expense to the City. Her absences also created hardships for her coworkers, who had to absorb her duties when she was not present to perform them. Appellant showed little concern for responsibility to her colleagues and to the public-safety needs of the institution that employed her.

In Delgesso v. Atlantic County Adult Detention Center, 97 N.J.A.R.2d (CSV) 321, an employee's absence for fifty-nine days in one year was determined sufficient to support a finding of excessive absenteeism.

In Viereck v. City of Gloucester City, 97 N.J.A.R.2d (CSV) 573, an employee was to return to work on September 26, 1994, from family leave, and did not return as scheduled. On September 28, 1994, the employee was terminated. On October 3, 1994, the employee provided a doctor's note dated September 23, 1994; however, two days' absence was determined to be sufficient under the circumstances of that case to support removal. The employee was ultimately reinstated by the Merit System Board, which indicated in its final decision that the two-day absence cited by the ALJ was not sufficient to support removal, largely due to the employee's sterling attendance record up to that point. This case is therefore easily distinguished from the within matter.[4]

In Littlejohn v. Division of Medical Assistance & Health Services, 96 N.J.A.R.2d (CSV) 471, the employee was terminated and deemed to have abandoned her position and resigned not in good standing after failing to return to work following a leave of absence. She did not provide a timely medical verification of her illness, and only after

[4] Viereck subsequently sued Gloucester City for violations of the FMLA (Viereck v. City of Gloucester City, 961 F. Supp. 703 (D. N.J. 1997)).

receiving the Preliminary Notice of Disciplinary Action did she provide a physician's note to her employer. The ALJ determined that the employee's attempt to supply a physician's note after receiving the notice of discipline failed to rehabilitate the circumstances and was unavailing.

Felipe clearly was chronically and excessively absent in 2020. The Civil Service Commission has recognized that attendance at work is the most basic duty of an employee, especially in the area of public safety, and employees who cannot maintain an acceptable attendance record can expect to be subject to disciplinary action, up to and including removal. In re Kines, 2013 N.J. CSC LEXIS 507 (July 31, 2013). The negative impact of excessive absenteeism on the efficiency and morale of a public-safety agency cannot be overstated. See ibid.

Abuse of sick leave has been recognized as a subset of chronic or excessive absenteeism. See In re Adams, 2014 N.J. CSC LEXIS 406 (Aug. 13, 2014). The Civil Service Commission has further recognized that excessive absenteeism is not necessarily limited to instances of bad faith or lack of justification on the part of the employee who was frequently away from their job. In re Johnson, 2013 N.J. CSC LEXIS 128 (Jan. 9, 2013) (quoting Terrell v. Newark Housing Auth., 92 N.J.A.R.2d (CSV) 750, 752). After reasonable consideration is given to an employee by an appointing authority, the employer is left with a serious personnel problem, and a point is reached where the absenteeism must be weighed against the public right to efficient and economic service. Terrell v, 92 N.J.A.R.2d (CSV) at 752. An employer is entitled to be free of excessive disruption and inefficiency due to an inordinate amount of employee absence. Ibid.

Respondent resigned Felipe not in good standing for being absent from duty for more than five consecutive business days without approval, thereby deeming her to have abandoned her position, N.J.A.C. 4A:2-6.2(b), and removed her for habitual abuse of the family-and-medical-leave policy and leave-of-absence policy.

Appellant's employer had a right to expect that she would be present at work, willing and able to perform her duties. Certainly respondent is not obligated to continue to employ a person who either cannot, or will not, perform her job duties on a regular

basis. Frequent absences, especially in a critical public-safety position, put the public at risk, and cause disruption in the public work place, creating hardships for the remaining employees, who must absorb the job duties of a person who cannot or will not perform them.

Appellant had multiple warnings making abundantly clear what the policy was, and yet failed and refused to comply, providing insufficient or no notice, providing insufficient medical documentation, and ignoring the warnings. The fact that the leaves were approved after the fact does not justify her conduct.

Based upon the credible evidence in the record and the specific findings above, I **CONCLUDE** that respondent has amply met its burden of proving, by a preponderance of the credible evidence, all of the charges against appellant. Respondent was more than accommodating to appellant, who had multiple opportunities to correct her chronic and excessive absenteeism.

It was recognized in Bock, 38 N.J. at 522, that "[j]ust cause for dismissal can be found in habitual tardiness or similar chronic conduct." The same principle can be applied to the instant matter, where the charges and proofs include a consistent, long-term and unimproved course of habitual and chronic absenteeism. Moreover, the respondent benevolently exhibited great patience towards the appellant. She was warned more than once, yet none of the warnings bore any positive results. Considering the totality of the circumstances, and particularly considering the degree of patience exhibited by respondent, I **CONCLUDE** that respondent was justified in taking disciplinary action against appellant and justified in imposing the penalty of removal.

Respondent has afforded appellant ample opportunity to report to work on a regular basis and to comply with required procedures. Appellant is either unable or unwilling to do so. Accordingly, I **CONCLUDE** that the penalty imposed is appropriate. Therefore, as respondent has met its burden of proof with respect to the charges, appellant's removal and resignation not in good standing from her position are **AFFIRMED**.

ORDER

It is hereby **ORDERED** that the removal and resignation not in good standing of Yajaira Felipe are **AFFIRMED** and her 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.

March 1, 2022
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: March 1, 2022

Date Mailed to Parties: March 1, 2022

dr

APPENDIX

Witnesses

For Appellant:

Yajaira Felipe

For Respondent:

Debra Hannibal

R. Cameron Gardner

Captain Elizabeth Fournier

Exhibits

For Appellant:

P-1 Report from appellant to commanding officer dated June 19, 2019

P-2 Email from appellant to union representative dated November 21, 2019

P-3 Report from appellant to commanding officer dated December 7, 2019

P-4 Report from appellant to commanding officer dated December 11, 2019

P-5 Report from appellant to commanding officer dated December 16, 2019

P-6 Grievance report filed by appellant on December 18, 2019

P-7 Monthly detail sheet 5/17/20 to 6/13/20

P-8 Memorandum from Chief McDermott on February 12, 2020, to all Public Safety Tele-Communicators regarding the sick-call-out procedure

P-9 Email exchange between appellant and Chief McDermott

P-10 Special Order to all OEM Dispatch Personnel regarding lunch and break procedures dated February 13, 2020

P-11 Email exchange between appellant and union representative between February 10, 2020, and February 18, 2020

P-12 Email from appellant to Ms. Hanibal dated February 6, 2020

P-13 Email exchange between Ms. Hanibal and appellant on February 6, 2020

P-14 Report from appellant to commanding officer dated February 14, 2020

P-15 Email from appellant to T. Suarez on February 23, 2020

For Respondent:

R-1 February 18, 2020, Preliminary Notice of Disciplinary Action

R-2 April 23, 2020, Amended Preliminary Notice of Disciplinary Action

R-3 2019 Last Chance Agreement

R-4 City of Paterson Personnel Policies and Procedures Manual

R-5 May 6, 2020, email from Debra Hannibal with attachments

R-6 Excerpt of July 1, 2014, to June 30, 2019, Collective Negotiations Agreement between City of Paterson and International Brotherhood of Teamsters, Local 125

R-7 December 19, 2019, report from E. Bates-McDuffie to Deputy Chief Gardner

R-8 December 27, 2019, report from Captain Fournier to Deputy Chief Gardner

R-9 January 27 and January 28, 2020, email chains between Captain Fournier, Deputy Chief Gardner, and Chief McDermott

R-10 January 29, 2020, email chain between Ms. Felipe and Chief McDermott

R-11 January 30, 2020, report from Captain Fournier to Deputy Chief Gardner with attachments

R-12 January 30, 2020, report from Deputy Chief Gardner to Chief McDermott

R-13 February 1, 2020, email chain between Captain Fournier and Chief McDermott

R-14 February 3, 2020, report from Captain Fournier to Deputy Chief Gardner

R-15 March 18, 2020, Reporting Sick or Injury Form

R-16 March 18, 2020, report from Sr. Dispatcher Watkins to Captain Fournier and Deputy Chief Gardner

R-17 March 31, 2020, report from Sr. Dispatcher Watkins to Captain Fournier

R-18 March 24, 2020, and April 13, 2020, email chain between Ms. Felipe and Captain Fournier

R-19 Second March 24, 2020, and April 13, 2020, email chain between Ms. Felipe and Captain Fournier

R-20 April 20, 2020, report from Captain Fournier to Chief McDermott

R-21 April 20, 2020, report from Deputy Chief Gardner to Chief McDermott

R-22 March 18, 2020, March 23, 2020, and March 30, 2020, doctors' notes

R-23 2019 Felipe Vacation/Sick/Personal Day Usage Chart

R-24 2020 Felipe Vacation/Sick/Personal Days Usage Chart

R-25 Dispatch Sign-in sheets

R-26 Bi-Weekly Time Sheets

R-27 July 19, 2019, letter from Debra Hannibal and FMLA paperwork

R-28 2020 FMLA request form