



STATE OF NEW JERSEY

In the Matter of Christian Stevens,
Asbury Park, Fire Department

CSC DKT. NOS. 2022-691 and 2022-
700

OAL DKT. NOS. CSV 08861-21 and
CSR 09306-21

(Consolidated)

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

ISSUED: JUNE 20, 2022

The appeal of Christian Stevens, Fire Fighter, Asbury Park, Fire Department, seven working day suspension and removal, effective October 20, 2020, on charges, was heard by Administrative Law Judge Carl V. Buck, III (ALJ), who rendered his initial decision on April 21, 2022. Exceptions were filed by the appellant, *pro se*, and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, including a thorough review of the exceptions and reply, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of June 15, 2022, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision. However, it is noted that while the ALJ upheld the charges underlying both the suspension and removal, he did not indicate whether the penalty underlying the suspension should be upheld. Upon its review, the Commission agrees with the ALJ regarding the charges underlying the suspension, and finds that the penalty imposed was appropriate. Accordingly, along with upholding the removal, the Commission upholds the seven working day suspension.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending and removing the appellant was justified. The Commission therefore affirms those actions and dismisses the appeals of Christian Stevens.

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 15TH DAY OF JUNE, 2022

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
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Trenton, New Jersey 08625-0312

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. CSV 08861-21 and
CSR 09306-21 (CONSOLIDATED)
AGENCY DKT. NO. 2022-691

+
2022-700

**IN THE MATTER OF CHRISTIAN STEVENS,
CITY OF ASBURY PARK, FIRE
DEPARTMENT.**

Leonard C. Schiro, Esq., for appellant Christian Stevens (Mets Schiro McGovern, attorneys)

Michael A. D'Aquanni, Esq. and Heather J. Fay, Esq., for respondent City of Asbury Park (Law office of Michael A. D'Aquanni, LLC, attorneys)

Record Closed: March 31, 2022

Decided: April 21, 2022

BEFORE CARL V. BUCK III, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Christian Stevens (Stevens or appellant) appeals actions by the City of Asbury Park Fire Department (Department or respondent) imposing penalties of a seven-day suspension and removal, effective December 3, 2020. Two disciplinary charges were brought; initiating at the same series of events and sustained. Appeals for the respective actions were filed as OAL Dkt. No. CSV 08861-21 and OAL Dkt. No. CSR

09306-21. The two appeals were consolidated at the request of the parties on April 5, 2022. This Initial Decision will address the disciplinary actions, in toto.

Charges against appellant were issued on August 7, 2020 and December 3, 2020, against Stevens. (J-2, J-3.) The events which led to the two sets of charges started on June 24, 2020, when appellant was a "no call no show" for his shift. Being unable to contact Stevens, his supervisor, Battalion Chief Siciliano (Siciliano), went to Stevens' house and found Stevens disheveled and apparently unready to work that day. Respondent ordered appellant to attend a fitness for duty examination (examination) on June 25, 2021. Appellant failed to report to Meridian Health (Meridian) for the examination and failed to respond to the respondent's attempts to contact him on June 25, 2021. Further action will be detailed herein. Based on appellant's actions he received a seven-day suspension (August 7, 2020 PNDA and September 7, 2021 FNDA.) Appellant did not comply with respondents' request for an examination and thus he was not cleared to return to duty. Respondent then issued charges against Stevens seeking a penalty of removal, which charges were later sustained in a FNDA dated September 7, 2021 for removal effective December 3, 2020. (J-2 and J-3.)

The hearing was held on March 16, 2022 and the parties were given until March 30, 2022 to provide closing documents. On March 31, 2022 the record closed. The time frame for the hearing was accelerated as the parties had initially advised the tribunal that they were in expectation that the matters would be settled by the parties. However, this was not the case and time was expended during the attempted settlement process and appellant did not waive the 180-day decision period applicable to these types of matters.

FACTUAL DISCUSSION

Testimony

D. Kevin Keddy

(Donald) Kevin Keddy, (Keddy) had been the Fire Chief of Asbury Park for approximately sixteen years and had other positions prior. He was not the direct supervisor of appellant but was aware of the chain of command and that appellant was hired in 2009. He testified that on June 24, 2020, Stevens was scheduled to work on June 24, 2020 from 8:00 am to 8:00 am on June 25, 2020 but failed to report for roll call and failed to call out sick. After several attempts to reach him by telephone, Stevens' supervisor, Siciliano went to appellant's home and knocked on the door at 9:30 a.m. Stevens answered and said his alarm never went off. He was ordered to get dressed and report to work, but after observing his appearance and mental state and being concerned with his well-being, Siciliano decided it was best if appellant remained home.

Keddy testified that due to the circumstances, and in consultation with the City Manager, he determined that appellant should go to a Fitness for Duty examination. On June 24, 2020, at 3:41 p.m. Keddy emailed Stevens advising Stevens that he was ordered to attend a Fitness for Duty examination with Meridian on June 25, 2020, at 10:30 a.m. ,Siciliano called Stevens multiple times and left a message, advising him of the Chief's email ordering Stevens for the examination.

On the morning of June 25, 2020, Keddy and Siciliano attempted to contact Stevens by telephone but received no response. Keddy went to Stevens' house, but no one answered, although cars were in the driveway. Keddy left Stevens a voicemail on his telephone. Stevens never contacted the respondent to advise that he was leaving his house and missed his 10:30 a.m. Fitness for Duty examination at Meridian.

Keddy testified to the medical script received on June 25, 2020, at 1:27 p.m., from Dr. Elizabeth Ginn-Scott, (Scott) (Stevens' psychiatrist) stating, "It is medically necessary that he stay out of work for two weeks. He will be reevaluated on July 8."

Stevens then failed to contact the City on July 8, 2020 and July 9, 2020. Stevens was scheduled to work on July 10. Stevens did not report for duty on July 10, nor did he call the respondent to advise he was not reporting. Due to Stevens' failure to contact the respondent or report to work on July 10, Keddy tried calling Stevens but was not able to reach him. On July 10, 2020, Keddy emailed Stevens, asking for an update since the last note Stevens provided said that he was to be out of work until July 8, 2020. Stevens responded the same day, advising that "Over the past few weeks I've made an effort to avoid all electronics/devices while I'm working through some issues..." and provided a new note, dated July 8, 2020, from Scott stating that "it is medically necessary that he stay out of work until 7/22/2020." Stevens acknowledged that his "sick leave" was to be extended due to this note and Stevens was out of work on sick leave until July 22, 2020.

On July 22, 2020, Stevens emailed Keddy advising him that Scott, cleared him to return to work on July 23, 2020. Stevens provided a prescription note from Scott which stated that "Christian's sleep has been regulated and that he was stable at this time and cleared to return to work without restrictions as of 7/23/2020." The note provided no additional information.

On July 25, 2020, Keddy emailed Stevens, ordering Stevens to appear for a Fitness for Duty Examination with Meridian and a psychological Fitness for Duty examination scheduled for July 29, 2020, in order to clear him to return to duty and on July 27, 2020, Stevens attended the fitness for duty examination with Meridian clearing him to medically return to full duty. During this examination, Stevens tested positive during the drug screen analysis but was later declared "negative" after proving he had a valid prescription for the drug and the report and email did not identify what medication Stevens was using.

On July 29, 2020, Stevens attended the psychological fitness for duty examination with Dr. Krista Dettle (Dettle) from the Institute for Forensic Psychology at which Stevens refused to sign the Authorization to Release his psychological and/or psychiatric records from Scott to Dettle.

On August 7, 2020, the City issued a PNDA seeking a seven-day suspension based on Stevens' failure to report to work on June 24, 2020; failure to be available by phone on June 25, 2020; and failure to report to the scheduled Fitness for Duty examination on June 25, 2020. The charges were "violating N.J.A.C. 4A:2-2.3 (1)- incompetency, inefficiency or failure to perform duties; N.J.A.C. 4A:2-2.3 (2)- Insubordination; N.J.A.C. 4A:2-2.3 (3)- Inability to Perform Duties N.J.A.C. 4A:2-2.3 (4)- Chronic or excessive absenteeism or lateness; N.J.A.C. 4A:2-2.3 (7)- Neglect of Duty; N.J.A.C. 4A:2-2.3 (12)- Other sufficient cause; Standard Operating Guideline 102.01- Code of Conduct; Standard Operating Guideline 100.16- Sick Leave Verification and Procedure; City of Asbury Park Personnel Manual- Medical Examinations; and City of Asbury Park Personnel Manual- Sick Leaw (sic)."

On October 19, 2021, Keddy received the Privileged and Confidential Psychological Report for Stevens from Dettle wherein Dettle concluded that "[n]o determination as to the subject's psychological fitness for duty can be made until his complete psychiatric treatment history is made available."

As a result of the foregoing, the respondent issued a Preliminary Notice of Disciplinary Action, dated December 3, 2020 ("12/3/2020 PNDA"), seeking Stevens' removal as he was not cleared by Dettle to return to duty and therefore unfit for duty. See Exhibit J-2. The respondent charged Stevens with violating N.J.A.C. 4A:2-2.3 (1)- incompetency, inefficiency or failure to perform duties; N.J.A.C. 4A:2-2.3 (3)- Inability to Perform Duties; N.J.A.C. 4A:2-2.3 (7)- Neglect of Duty; N.J.A.C. 4A:2-2.3 (12)- Other sufficient cause; Standard Operating Guideline 102.01- Code of Conduct; Standard Operating Guideline 100.16- Sick Leave Verification and Procedure; City of Asbury Park Personnel Manual- Medical Examinations; and City of Asbury Park Personnel Manual- Sick Leave. Id.

Keddy testified that he could not allow Stevens to return to work without a full Fitness for Duty examination. He also stated Stevens had several infractions, had taken approximately 2,000 hours of sick time over the past five years and that Stevens did not apply for Family Medical Leave (FML) during this sequence of events.

The testimony detailed above was found to be credible and based in the facts of this matter. Therefore, I **FIND as FACT** the sequence of events as testified by Keddy as detailed above.

Christian Stevens

Christian Stevens (Stevens) has been employed as a firefighter by the respondent since July 1, 2009. His testimony regarding the check of June 24, 2022, was in sync with Keddy, with Stevens expounding that he contacted his union president, Fred Bates (Bates), to discuss his sleeping issues and to ask Bates to speak with Siciliano. He did not have any way to access his work computer, so he was unable to see the notes forwarded to him.

He had been seeing Scott for three to four years and detailed changes in his Adderall prescription he was taking for Attention Deficit Hyperactivity Disorder (ADHD) which was affecting his sleep. After two weeks he went back to see Scott and told her he could not use the extended-release prescription and she put me out for another two weeks until July 22, 2020.

He stated Keddy contacted him on Sunday and that he would be out on administrative leave pending a Fitness for Duty examination. As to the release for psychiatric information he was advised by counsel to not sign the release. Within a week of his failure to sign the release, he was advised he was taken of administrative leave and put back on sick leave.

On cross-examination, he stated that he had a doctor appointment on August 24, 2020, but he did not inform his supervisor, Siciliano¹ He acknowledged he received voice messages but did not know when they were from – they were checked after June 24, 2020. He also acknowledged that he received the documents for FMLA but did not submit those documents. He did not apply for FMLA as it would be unpaid so he used his accrued sick leave and was out of work from June 24 to July 8, 2020 but did not contact anyone at the respondent to tell them he would not be returning on July 8, 2020.

¹ Presumably appellant misspoke and this was his appointment with Scott on June 24, 2020.

Stevens testified that the release of July 29, 2020, was signed under threat of termination and that Dettle's report contained information which was not true. Further he appeared for a Fitness for Duty examination but not from the respondent's doctor and never said that he was suffering from a disability which required an accommodation.

Stevens' testimony, although at times was self-serving, was credible and by his own admission I **FIND as FACT** that Stevens:

1. Did not appear for work on June 24, 2020.
2. Went to a doctor's appointment with Scott on June 24, 2020, without notice to his supervisor or anyone at the respondent.
3. Did not appear for his June 25, 2020 Fitness for Duty examination and did not notify his supervisor or anyone at the respondent that he was not going to that appointment.
4. Did not comply with the directives of his supervisor in compliance with the respondent's policies and the collective bargaining agreement (CBA) between the respondent and IAFF.
5. Did not advise the respondent that he was taking a medication that would yield a "positive" during a drug screen analysis.
6. Did not maintain contact with his supervisor to communicate his condition and status during the time he was out of work.

LEGAL ANALYSIS AND CONCLUSIONS

A civil service employee who commits a wrongful act related to their employment may be subject to major discipline, which may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2. In an appeal of a disciplinary

action the burden of proof is on the appointing authority to show that the action taken was justified. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). The respondent must establish by a preponderance of the competent, relevant, and credible evidence that the employee is guilty of the alleged charges. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be sufficient to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263 (1958).

In this matter, the FNDA of September 7, 2021, sustained the following charges against Stevens: "(1)- N.J.A.C. 4A:2-2.3(1)- Incompetency, Inefficiency or Failure to Perform Duties; (2) N.J.A.C. 4A:2-2.3(3)- Inability to Perform Duties; (3) N.J.A.C. 4A:2-2.3(7)- Neglect of Duty; (4) N.J.A.C. 4A:2-2.3(12)- Other Sufficient Cause; (5) Standard Operating Guideline 102.01- Code of Conduct; (6) Standard Operating Guideline 100.16 Sick Leave Verification and Procedure; (7) City of Asbury Park Personnel Manual – Medical Examinations; (8) City of Asbury Park Personnel Manual – Sick Leaw (sic)."

The charges initiate from Stevens' failure to attend work on June 24, 2020, whereafter Stevens was unavailable by telephone or at his home and failed to attend his scheduled Fitness for Duty examination on June 25, 2020. Stevens was out for medical reasons from June 25, 2020 to July 23, 2020. Stevens ultimately provided a medical note from his psychiatrist stating he was clear to return to work. However, respondent conducted a psychological Fitness for Duty examination, wherein the physician did not come to a determination and specifically stated that such decision could not be made without appellant's complete psychiatric information.

The need for a fitness for duty clearance is necessary to guarantee not only that the employee is fit to perform their duties, but to guarantee that the employee is not a risk to others through performance of their duties. Pursuant to the collective bargaining CBA between the respondent and IAFF, "[t]he City may require an employee who has been absent because of personal illness, as a condition of his/her return to duty, to be examined at the expense of the City by a physician designated by the City. Such examination shall establish whether the employee is capable of performing his/her

normal duties and that his/her return will not jeopardize the health of the other employees." See Exhibit J -5, Article XIV- Sick Leave, Section D (3) (p. 27).

1. N.J.A.C. 4A:2-2.3(7) Neglect of Duty

Appellant is charged with "neglect of duty," N.J.A.C. 4A:2-2.3(a)(7). "Neglect of duty" has been interpreted to mean that "an employee . . . neglected to perform an act required by his or her job title or was negligent in its discharge." In re Glenn, CSV 5072-07, Initial Decision (February 5, 2009), adopted, Civil Service Commission (March 27, 2009) <<https://njlaw.rutgers.edu/collections/oal/final/csv5072-07.pdf>>. The term "neglect" means a deviation from the normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" means conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (citation omitted). Neglect of duty can arise from omitting to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job. A failure to perform duties required by one's public position is self-evident as a basis for the imposition of a penalty in the absence of good cause for that failure.

A firefighter's position is of such a nature that the "negligent or improper performance of the duties of a firefighter can result in serious harm to persons and property ..." In re Jackson, 294 N.J. Super. 233, 236 (App. Div. 1996); In re Cruz, No. A-5313-16T2, 2019 N.J. Super. Unpub. LEXIS 870, at *20 (N.J. Super. Ct. App. Div. Apr. 15, 2019).

The basis of the charge of neglect of duty was appellant's failure to report to work on June 24, 2020, as well as appellant's failure to be available by telephone on June 25, 2020, and failure to report to the scheduled fitness for duty examination on June 25, 2020. On June 24, 2020, after appellant failed to appear at work, Siciliano went to appellant's home. After observing his appearance and mental state, Siciliano told appellant it would be best to stay home for the remainder of his tour of duty which was

from June 24, 2020 through June 25, 2020. After consulting with the City Manager, Keddy ordered Stevens to attend a Fitness for Duty examination on June 25, 2020 and sent appellant notice of same on June 24, 2020. Siciliano called appellant regarding the examination on June 24, 2020, and then again on June 25, 2020, with no response, and even went to appellant's door but not one answered. Stevens provided a doctor's note on June 25, 2020 (from his doctor), which stated that on June 24, 2020, "Christian was evaluated today in the office" and "it is medically necessary that he be out of work for two weeks." (J-7.)

As a firefighter, appellant is held to a high standard of conduct. Firefighters are depended upon by the public to provide safety services, and as such are depended upon by the public to be punctual and fit for duty. Appellant's behavior constituted a neglect of duty when he failed to report to duty, and then failed to be available by telephone. Firefighters are depended upon to provide essential safety services and, as such, they must be punctual and fit for duty to provide such services to the community. Thus, I **CONCLUDE** that appellant violated N.J.A.C. 4A:2-2.3(7) Neglect of Duty.

2. N.J.A.C. 4A:2-2.3(12) Other Sufficient Cause

Appellant has also been charged with a violation of N.J.A.C. 4A:2-2.3(a)(12) (other sufficient cause). "Other sufficient cause" is essentially the catchall provision for conduct, which is not specified in the eleven listed causes at N.J.A.C. 4A:2-2.3, as the reason for which an employee may be subject to discipline. Such cause has been described as other conduct, not delineated withing the regulation, which would "violate the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." In re Keith Harkcom, Dep't of Corrections, CSR 14703-19 (April 13, 2020), <https://njlaw.rutgers.edu/collections/oal/html/initial/csr14703-19_1.html>, adopted Comm'r (May 22, 2020).

Specifically, appellant is charged with violating the following Operating Guidelines of Asbury Park: (1) 100.16 Sick Leave Verification and Procedure; (2) the Sick Leave provision of the Manual of the City of Asbury Park; (3) 102.01 Code of

Conduct; and (4) the Medical Examinations provision of the Manual of the City of Asbury Park.

3. Violations of Sick Leave Procedures

Appellant has been charged with a violation of the City of Asbury Park Fire Department Standard Operating Guideline (SOG), Sick Leave Verification Procedure 100.16 which states:

1. Employees reporting out sick are required to call out sick at least one hour prior to the start of their shift on a recorded telephone line... They are to remain at home for the entire duration of their assigned shift and shall remain available for telephone contact, unless permission is received from the Tour Commander or designee. Call forwarding, answering machines, beepers, or continuous busy signals upon repeated attempts and other like circumstances shall constitute unavailability.
2. If an employee is at home and becomes "temporarily indisposed", he or she shall insure, through another individual or answering machine that a message can be received. It shall then be the responsibility of the employee to return the call within fifteen (15) minutes. Failure to do so shall constitute an unauthorized absence from the employee's residence...
6. Employees are permitted to leave their homes to see a licensed physician or to obtain prescription medicine from a local pharmacy. Employees who are granted sick leave will contact the Tour Commander on duty prior to leaving their homes.
7. Employees who are not available for telephone contact, fail to keep an appointment with the City Physician, or are unavailable for a home visit, feign illness or injury, deceive a physician in any way as to their true condition, or fail to contact the Tour Commander or designee prior to leaving their place of confinement, shall be subject to disciplinary action and are not entitled to paid leave for the occurrence.

[R-2.]

Appellant has also been charged with a violation of the City of Asbury Park Personnel Manual-Sick Leave which states:

Sick leave is governed by the applicable collective bargaining agreements. Any employee, who is out sick for five (5) days or more, must return to work with a doctor's note. A doctor's note may be requested, at the discretion of the Department Head, for absences less than three (3) days. Non-union employees may be requested, at the discretion of the City Manager, to provide a doctor's note for absences totaling less than five (5) days. For voluntary procedures, a doctor's note shall be required for estimated time off to ensure a department is staffed.

The City shall comply with all applicable standard rules and regulations of the New Jersey Paid Sick Leave Act (A-1827) of 2018.

[Ex. E at 37.]

The CBA between City of Asbury Park, Monmouth County, New Jersey and International Association of Firefighters Local 384, AFL-CIO-CLC (IAFF) states:

C. If an employee is absent for reasons that entitle him to sick leave, his/her immediate supervisor shall be notified promptly as of the time of the employee's usual reporting time except in those work situations where notice must be made prior to the employee's start time.

1. ...

B. Verification of Sick Leave

1. An employee who shall be absent on sick leave for three (3) or more consecutive working days shall be required to submit acceptable medical evidence substantiating the illness and physician's certification that said employee is able to return to full duty.

...

b. The City may require proof of illness of an employee on sick leave whenever such requirement appears reasonable and warranted under the circumstances. Abuse of sick leave shall be cause for disciplinary action.

...

3. The City may require an employee who has been absent because of personal illness, as a condition of his/her

return to duty, to be examined at the expense of the City by a physician designated by the City. Such examination shall establish whether the employee is capable of performing his/her normal duties ...

[J-4 at 26-27.]

As stated above, appellant did not alert the city regarding his failure to appear for work on June 24, 2020, and thus failed to comply with the Standard Operating Guidelines and the CBA. Moreover, on June 25, 2020, appellant was ordered by his superior to remain at his home. However, appellant was unavailable by telephone despite multiple attempts to reach him.

Appellant argues that because Siciliano advised appellant that he would deduct two personal days for the June 24, 2020 and June 25, 2020 absences, appellant is relieved from having to comply with any of the sick leave requirements of the CBA or the City's Standard Operating Guidelines. However, as appellant was out due to medical reasons, this is governed by the relevant sick leave policies. Indeed, appellant provided a medical note stating he was out for "medical reasons" which stated "Christian was evaluated today in the office. It is medically necessary that he be out of work for two weeks." (J-7.) Thus, because appellant failed to report to work on June 24, 2020 and June 25, 2020, due to medical reasons, the respondent's sick leave procedures apply.

Even assuming that appellant rightfully relied upon a statement that he was to use a "personal day" rather than a "sick" day, appellant also failed to comply with the personal leave procedure either. Pursuant to Article XI of the CBA, twenty-four hours' notice must be given for a firefighter to take a personal leave. (J-4 at 19.) Appellant did not provide any notice prior to his shift; thus he did not comply with either the sick day or the personal day procedure.

Therefore, I **CONCLUDE** appellant violated the Standard Operating Agreement Sick Leave Verification Procedure 100.16 as well as the City of Asbury Park's Personnel Manual-Sick Leave.

4. Medical Examinations

Appellant has also been charged with a violation of the City of Asbury Park Personnel Manual-Medical Examinations which states:

Some employees are required to have a medical examination prior to employment by the City. The examination will be performed by a physician designated by the City at no cost to the employee. Some employees, as required by State and Federal Law, must take medical examinations during employment. Employees required to take medical examinations during employment should consult their supervisor for the appropriate policy and/or procedure for the examinations.

[Ex. E at 27.]

Pursuant to the CBA, "[t]he City may require an employee who has been absent because of personal illness, as a condition of his/her return to duty, to be examined at the expense of the City by a physician designated by the City. Such examination shall establish whether the employee is capable of performing his/her normal duties and that his/her return will not jeopardize the health of other employees." (J-4 at 27.)

Psychological fitness-for-duty examinations are "medical examinations" under the ADA which require that the examination must be "job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A). A medical examination of an employee may be "job-related and consistent with business necessity" when an employer "has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition." In re Williams, 443 N.J. Super. 532, 5444 (App. Div. 2016)

Further, public employers have a non-negotiable managerial prerogative to require employees to be tested for fitness before they are allowed to return to work. See City of Millville, P.E.R.C. No. 2012-12; City of Elizabeth, P.E.R.C. No. 2001-33, 27

(requiring a psychological examination); State of New Jersey, P.E.R.C. No. 96-55, 22 NJPER 70 (prerogative to conduct fitness testing). Following these precedents, the respondent had the unilateral right to require Stevens to undergo a fitness for duty testing before being allowed to return to work after utilizing sick leave.

The Civil Service regulations do not include guidelines or standards for the removal of an employee on a charge of psychological or mental unfitness. However, agencies have followed the procedural requirements for admission of psychological reports in such applicant appeals, specifically advising that the reports submitted by either of the parties shall include the following:

1. The professional's signature, type of license (including the type of license or educational degree of any person contributing to the report), address, and the date;
2. The length of the examination or interview;
3. A specific diagnosis or statement of behavioral pattern or the specific reasons for a recommendation;
4. A finding as to the qualifications of the appellant for effective performance of the duties of the title; and
5. All tests that have been administered (for example, EKG, EEG, X-ray, M.M.P.I., Rorschach and T.A.T.) and all raw data, protocols, computer printouts and profiles from these tests.

[N.J.A.C. 4A:4-6.5(f); In the Matter of Charlayne Powell, City of Paterson Fire Dep't., CSR 03689-15, Initial Decision, (Aug. 21, 2015), https://njlaw.rutgers.edu/collections/oal/html/initial/csr03689-15_1.html].

The occupation of firefighter is high-risk to the public as firefighters are engaged with safety services, thus firefighters are held to a high standard. Because appellant has demonstrated absenteeism, a fitness examination in this circumstance was warranted as it relates to a business necessity. It is undisputed that appellant was out of work from June 24, 2020 through July 23, 2020, for "medical reasons" at the advice of appellant's psychiatrist, Scott who provided notes on June 24, 2020 and July 8, 2020, stating, "it is medically necessary that he [be] out of work." (J-7.) Appellant then provided a note from Scott, dated July 22, 2020, which stated his "sleep was regulated"

and he was “clear to return to work.” (*ibid.*) Keddy ordered appellant for a Fitness for Duty examination which was reasonable based upon appellant’s failure to report to work which may prevent him from performing the essential functions of a firefighter.

Consistent with the CBA, a Fitness for Duty examination was performed by a physician designated by the City of Asbury Park, Dr. Krista Dettle. Dettle performed a psychological fitness for duty on July 29, 2020. Dettle did not come to a determination as to appellant’s fitness. (J-8.) She issued her report to the respondent, advising that “No determination as to the subject’s psychological fitness for duty can be made until his complete psychiatric treatment history is made available.” (*Id.* at 9.) Dettle noted that “sleep disturbance is a symptom of a number of mental health conditions. As such, a more complete picture of this man’s health history is necessary to determine his psychological fitness for duty.” (*Id.* at 8.)

In her report, Dettle acknowledged that Stevens did not complete the requested mental health information form, nor did he supply adequate information during his interview. (*See* J-8.) Specifically, Stevens admitted to being under the care of a doctor for sleep deprivation, and stated during the interview that he has a diagnosis of ADHD and was prescribed Adderall and his provider recently reduced his dosage. (J-8 at 4.) Dettle indicated in her report that she requested additional collateral medical information from appellant to gain a full and complete understanding of appellant’s psychological functioning. (*Id.* at 7.) However, Stevens stated he would not disclose information such as history of other psychiatric diagnoses or psychotropic medications. Dettle “assured [Stevens] that any medical information not relevant to the evaluation would not be included in the undersigned’s report or decision.”

Appellant did not sign a release provided by Dettle which would authorize Scott to provide Dettle with “all psychological and/or psychiatric records.” Rather, appellant completed a release from Scott’s office which allowed Scott to “answer Dettle’s questions” to “my sleeping habits and issues, only.” When asked to identify diagnoses assigned to Stevens, Scott “stated that she could say he was diagnosed with ADD (Attention Deficit Disorder), but ‘can’t talk about anything’ else in terms of his diagnoses.”

Regarding the June 24, 2020 note, Scott noted that Stevens “complained of his sleep wake pattern issues before but this time he slept through 6 alarms” and was “very upset...in crisis...anxious.” (*Ibid.*) Although she explained that Stevens was taking Adderall “differently than prescribed because of his shift and two jobs,” and that he “wasn’t abusing it to get high, just burning the candle at both ends and needed to come off it completely for a bit,” she noted again that she is “not able to talk about the matter in detail.” (*Id.* at 7-8.) When asked if she prescribes him any other medications, she refused to answer, as it was outside the scope of the release. (*Id.* at 8.) When asked whether Stevens has a history of drug or alcohol abuse treatment, she refused to answer, as it was outside the scope of the release.

Appellant claims that the request for all psychiatric/psychological records is unnecessary for Dettle to make a determination. (Br. of Appellant at 17.) Appellant further contends that such request is overbroad, and the respondent has not provided a legal basis of entitlement to such medical records. (Br. of Appellant at 11, 13.)

Appellant notes that three other doctors have provided his clearance to work. Appellant provided a note from Scott, dated July 22, 2020 stating that he was “stable at this time and cleared to return to work without restrictions as of 7/23/20.” (J-7.) Scott’s letter refers to an undisclosed medication he takes. This note appears to be in reference to appellant’s leave of absence from work. The City’s doctor, Dr. Shaun Shahani, checked the box that appellant was “medically able to return to work full duty” as of July 29, 2020. (J-6.) Appellant also provided a note from Dr. Steven Dyckman dated March 15, 2021, which states: “After meeting with Mr. Stevens and speaking with his psychiatrist Dr. Ginn-Scott, it is my medical professional opinion that Mr. Stevens is fit for duty and can return to work immediately [and] [h]e should continue to see his psychiatrist as needed but requires no additional treatment.” (J-9.)

Appellant notes that Dettle is the only doctor that has stood in the way of his return to work, and even Dettle never concluded that he was unfit for duty. (*See* App. Br. at 12.) Appellant contends that the respondent did not provide a reason why he was not sent to another medical doctor if Dettle could not render a conclusive opinion. (*Ibid.*)

Appellant further contends that his objection to the release of information requested by Dettle was a good faith objection as the request for all psychological/psychiatric records is overbroad. (Id. at 11–12.)

Here, the City of Asbury Park is entitled to order such examination due to appellant's absenteeism as detailed above. Although appellant provides medical letters claiming he may return to work, appellant failed to comply with the Fitness for Duty examination. For the first examination, scheduled on June 25, 2020, appellant failed to appear. For the second examination, appellant did not provide all of the necessary information for Dettle to complete a report. Appellant contends that two other doctors aside from Dettle cleared him for work; however, the medical notes by Dyckman and Scott are not detailed and do not constitute a fitness for duty evaluation and may not overcome the findings of the respondent's doctor. Dettle attempted to provide such examination; however, appellant's failure to provide information to the doctor has warranted the doctor unable to clear appellant for duty.

Given the seriousness of appellant's failure to report to work and the surrounding circumstances, it is necessary that appellant be cleared for duty pursuant to a Fitness of Duty examination. Due to appellant's behavior and absenteeism, the respondent had a reasonable belief that appellant's condition may prevent him from performing the essential functions of a firefighter, or otherwise pose a direct threat to the safety of himself or others. Appellant, as a firefighter, has a serious role in the safety of the public and as such any condition which renders him incapable of getting to work is serious and a full Fitness for Duty evaluation is warranted. However, appellant failed to provide Dettle with the necessary information to complete the examination, despite attempts to receive such information.

Therefore, I **CONCLUDE** that appellant failed to comply with Dettle's Fitness for Duty examination in violation of the City of Asbury Park Personnel Manual-Medical Examinations.

5. Standard Operating Guideline 102.01 Code of Conduct

Appellant has been charged with a violation of the City of Asbury Park Fire Department Standard Operating Guideline ("SOG"), Code of Conduct 102.01 which states:

[A]ll members [of the Asbury Park Fire Department] have an obligation to conduct their official duties in a manner that serves the public interest, upholds the public trust, and protects the department's resources. To this end, all members have the responsibility to:

...

H. Report for duty at the appointed time and place fully equipped, fit, and able to perform assignments.

[Ex. R-2]

Appellant has clearly violated the SOG, Code of Conduct 102.01(H). As detailed above, appellant did not report for duty at the appointed time/place as he did not show up to work on June 24, 2020. Moreover, appellant was subsequently unavailable by telephone, and did not show up for a Fitness for Duty evaluation scheduled for June 25, 2020, as detailed above. Consequently, I **CONCLUDE** that appellant has violated the SOG Code of Conduct 102.01.

6. N.J.A.C. 4A:2-2.3(1) Incompetency, Inefficiency or Failure to Perform Duties

The FNDA sustained the charge of Failure to Perform Duties, N.J.A.C. 4A:2-2.3(1). In general, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315 (1980). Incompetence means that an individual lacks the ability or the qualifications to perform the duties required of him or her. Rivera v. Hudson Cty. Dep't of Corr., CSR 6456-16, Initial Decision (October 24, 2016) < https://njlaw.rutgers.edu/collections/oal/html/initial/csr06456-16_1.html>, adopted, CSC (November 28, 2016).

Here, the key issue is that the Fitness for Duty examination was not able to be completed on behalf of the respondent that would help determine whether appellant was incompetent or inefficient in his duties. As detailed above, appellant was out from work from June 24 through July 23, 2020, for “medical reasons.” The respondent provided a basis for requesting a Fitness for Duty examination. Had Dettle been able to come to a conclusion, this would assist in a determination as to whether appellant was indeed unable or unwilling to perform his duties. However, Dettle did not receive the requisite information to reach a conclusion as to appellant’s fitness, and therefore appellant’s reasons for being absent remain somewhat unclear. Therefore, this charge is premature as the requisite information was not provided.

Thus, I **CONCLUDE** the City of Asbury Park has not proven the charge of N.J.A.C. 4A:2-2.3(1) Incompetency, Inefficiently or Failure to Perform Duties by the preponderance of the evidence.

7. N.J.A.C. 4A:2-2.3(3) Inability to Perform Duties

Appellant is charged with “inability to perform duties.” The charge of inability to perform duties, under N.J.A.C. 4A:2-2.3(a)(3), has been upheld where the employee is incompetent to execute his job responsibility. Klusaritz v. Cape May Cnty, 387 N.J. Super. 305, 317 (App. Div. 2006) (removal of accountant who was incapable of preparing a bank reconciliation and was of no value to the county); Richard Stockton College v. Parks, CSV 4279-03, Initial Decision (January 31, 2005), adopted, Merit Sys. Bd. (April 3, 2005), <<http://njlaw.rutgers.edu/collections/oal/final/csv4279-03.pdf>> (where respondent failed to prioritize and complete tasks in a timely manner).

As detailed above, a Fitness for Duty examination determination would assist this tribunal in a determination as to whether appellant is unable to perform his duties. Given a determination as to appellant’s psychological fitness was not completed in a Fitness for Duty examination and the reasons for appellant’s absences from work are not entirely clear, this charge is premature. Thus, I **CONCLUDE** the City of Asbury Park

has not proven the charge of N.J.A.C. 4A:2-2.3(3) Inability to Perform Duties by a preponderance of the evidence.

8. Penalty

The final issue to be decided in this matter is whether the penalty imposed by the appointing authority was justified. A public employee that commits a wrongful act related to their duties may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). To determine the appropriate level of discipline requires a de novo review of the disciplinary action to determine if the punishment is “so disproportionate to the offense, in light of all the circumstances, as to be shocking to one’s sense of fairness.” In re Polk, 90 N.J. 550, 578 (1982) (internal quotes omitted).

New Jersey has an established system of progressive discipline to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is related to an employee’s past record, and looks at the nature, number, and proximity of prior disciplinary infractions to determine the reasonableness of the penalty imposed. See In re Disciplinary Procedures of Phillips, 117 N.J. 567, 581 (citing West New York v. Bock, 38 N.J. 500, 523 (1962)). An employee’s past record may not be used to prove the present charges, but it is to be considered when determining the appropriate penalty for the current offense. Ibid. An employee’s past record may also include reasonably recent promotions and commendations as well as both formal and informal disciplinary actions. West New York v. Bock, at 524.

However, the principle of progressive discipline is not a “fixed and immutable rule to be followed without question.” Rather, it is recognized that “some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record.” Carter v. Bordentown, 191 N.J. 474, 484 (2007). Progressive discipline may be bypassed when the misconduct is severe, when it renders the employee unsuitable for continuation in the position, or when the application of progressive discipline would be contrary to the public interest—such as when the

position involves public safety and the misconduct causes risk of harm to persons or property. In re Herrmann, 192 N.J. 19, 33 (2007).

Further, an appointing authority may impose discipline and may even seek removal, for an employee's failure to submit to a fitness for duty examination. See In the Matter of Peter Villani, Docket No. A-6839-00T5 (App. Div. February 20, 2003) (Removal of a Sheriffs Officer for insubordination based on his refusal to submit to a psychological examination was upheld); In the Matter of Jane Bentley, Atlantic County (MSB, decided July 27, 2005) (A Sheriffs Officer was removed for failing to submit to a psychological evaluation).

A firefighter's position is of such a nature that the "negligent or improper performance of the duties of a firefighter can result in serious harm to persons and property ..." In re Jackson, 294 N.J. Super. 233, 236 (App. Div. 1996); In re Cruz, No. A-5313-16T2, 2019 N.J. Super. Unpub. LEXIS 870, at *20 (N.J. Super. Ct. App. Div. Apr. 15, 2019).

In this case, the circumstances surrounding appellant's tardiness and absenteeism warranted a Fitness for Duty examination. Stevens was provided the opportunity to comply with the orders of the Fitness for Duty examination following his leave from June 24, 2020 through July 23, 2020, however, failed to do so. Thus, the respondent's physician was unable to clear Stevens for duty based upon the limited information provided, and therefore he cannot be returned to the duty of a firefighter.

The nature of the obligations and responsibilities of a firefighter's position demands that one be fully alert and mentally and physically fit to carry out such duties which involve the safety of the public. As demonstrated in Stevens' personnel file, Stevens previously engaged in similar misconduct of tardiness/being absent from work. (See Ex. R-8.) Steven had six prior disciplines for lateness and failing to report to work since 2017, the latest having occurred on January 4, 2020 (only six months prior to the current offense). Id.

Given the serious nature of appellant's conduct particularly in light of the importance of firefighters' work in the community, appellant would need to be cleared for duty prior to his return. However, given that appellant has not been cleared for duty and the surrounding circumstances, removal is the only appropriate penalty.

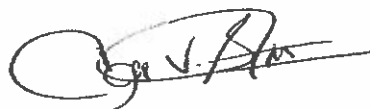
ORDER

Given the findings of fact and conclusions of law herein, I **ORDER** that Christian Stevens be terminated from his employment as a firefighter for the municipality of Asbury Park.

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, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



April 21, 2022

DATE

CARL V. BUCK III, ALJ

Date Received at Agency:

April 21, 2022

Date Mailed to Parties:

April 21, 2022

CVB/lam

WITNESSES

For Appellant:

Christian Stevens

For Respondent:

D. Kevin Keddy

EXHIBITS

Joint:

Exhibit J-1 - CSC & OAL Appeal, dated September 13, 2021

Exhibit J-2 - PNDA's dated, August 7, 2020 and December 3, 2020

Exhibit J-3 - FNDA's, dated September 7, 2021

Exhibit J-4 - Collective Negotiations Agreement, dated January 1, 2018 through December 31 2020

Exhibit J-5 - Personnel Manual

Exhibit J-6 - Dr. Shahani Shaun - Drug Test Result and Report, dated July 29, 2020

Exhibit J-7 - Dr. Elizabeth Ginn-Scott - Report and Notes, dated September 2, 2020

Exhibit J-8 - Dr. Krista Dettle – Report, dated October 17, 2020

Exhibit J-9 - Dr. Steven Dyckman – Report, dated March 15, 2021

Exhibit J-10 - Dr. Elizabeth Ginn-Scott Authorization Release, dated July 29, 2020

Exhibit J-11 - IAFF Fitness for Duty Manual

Exhibit J-12 - October 30, 2020 letter from Kevin Keddy

Exhibit J-13 - November 2, 2020 letter from Mary K. Callahan

For Appellant:

Exhibit A-1 - Tour Roster

Exhibit B-2 - Chapter 5 – Current Issues in Psychological Fitness for Duty Evaluations

For Respondent:

- R-1- City Internal Incident Report, dated June 25, 2020
- R-2- City Standard Operating Guidelines Nos. 100.16 & 102.01
- R-3- City Fire Chief E-Mail re: Fitness for Duty Exam, dated June 24, 2020
- R-4- Employee E-Mail fwd: Doctor's Note, dated June 25, 2020
- R-5- June 25, 2020 and July 14, 2020 E-Mails - Employee Declining FMLA
- R-6 - July 10, 2020 E-Mails Employee Extending Absence Two Weeks
- R-7- City Fire Chief E-Mails re: Fitness for Duty Exam, dated July 25, 2020
- R-8- Employee Disciplinary History of Tardiness/Absences 2017-2020
- R-9- Krista Dettle, MD. Release (unsigned)
- R-10- Krista Dettle, MD. E-Mail re: Unsigned Release, dated July 31, 2020
- R-11- JACP Fitness for Duty Guidelines