STATE OF NEW JERSEY

In the Matter of Paulette Garrison, Ancora Psychiatric Hospital, Department of Health	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC Docket Nos. 2019-2352 and 2019-2353 OAL Docket No. CSV 04381-19 (Consolidated)	:	

ISSUED: MAY 24, 2023

The appeals of Paulette Garrison, Senior Human Services Technician, Ancora Psychiatric Hospital, Department of Health, two removals, effective February 15, 2019, on charges, were heard by Administrative Law Judge Jeffrey N. Rabin (ALJ), who rendered his initial decision on April 20, 2023. 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, the Civil Service Commission (Commission), at its meeting on May 24, 2023, adopted the ALJ's Findings of Facts and Conclusion and his recommendation to uphold the removals.

Upon its *de novo* review of the ALJ's thorough and well-reasoned initial decision as well as the entire record, including the exceptions filed by the appellant, the Commission agrees with the ALJ's determinations regarding the charges, which were substantially based on his assessment of the credibility of the witnesses. In this regard, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See also, In re Taylor,* 158 *N.J.* 644 (1999) (quoting *State v. Locurto,* 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra).* The Commission appropriately gives due deference

to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri u. Public Employees Retirement System,* 368 *N.J. Super.* 527 (App. Div. 2004). In this matter, the exceptions filed by the appellant are not persuasive in demonstrating that the ALJ's credibility determinations, or his findings and conclusions based on those determinations, were arbitrary, capricious or unreasonable. In this regard, the ALJ concluded that the appellant "[w]as not a credible witness and very little weight can be given to her testimony." The ALJ made numerous detailed determinations based on his assessment of the credible evidence and presented logical and reasonable explanations for each. Upon its review, the Commission finds nothing in the record or the appellant's exceptions to question those determinations or the findings and conclusions made therefrom.

The Commission's review of the penalty is *de novo.* In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock,* 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center,* 96 *N.J.A.R. 2d* (CSV) 463. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison,* 81 *N.J.* 571 (1980). It is settled that the theory 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. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007). Moreover, in In *In the Matter of Anthony Stallworth,* 208 *N.J.* 182, 199 (2011), the Supreme Court stated that:

> ...the contextual nature of the prior offenses is a relevant consideration when analyzing an employee's disciplinary record ... As already noted, progressive discipline is a flexible concept, and its application depends on the totality and remoteness of the individual instances of misconduct that compromise the disciplinary record. The number and remoteness or timing of the offenses and their comparative seriousness, together with an analysis of the present conduct, must inform the evaluation of the appropriate penalty. Even where the present conduct alone would not warrant termination, a history of discipline in the reasonably recent past may justify a greater penalty; the number, timing, or seriousness of the previous offenses may make termination the appropriate penalty. However, under the tenets of progressive discipline, removal is appropriate.

In this matter, the appellant's disciplinary history evidences numerous disciplinary actions between 2015 and 2018 for tardiness and absenteeism. The appellant negotiated settlements for most of these infractions and received five 15 working day suspensions, one 10 working day suspension, one five working day suspension, and one two working day suspension. The current matters involve an additional 13 incidents of tardiness and absenteeism. The Commission finds that when determining the proper penalty while utilizing progressive discipline, an employee's *entire history* may be considered. Utilizing the tenets of progressive discipline, removal is warranted. Given the above, this penalty is neither disproportionate to the offenses nor shocking to the conscious.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore upholds that action and dismisses the appeals of Paulette Garrison.

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 24TH DAY OF MAY, 2023

Allison Chris Myers

Allison Chris Myers
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
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 04381-19
AGENCY DKT. NO. 2019-2352
+
2019-2353

IN THE MATTER OF PAULETTE GARRISON,
DEPARTMENT OF HEALTH,
ANCORA PSYCHIATRIC HOSPITAL.

William A. Nash, Esq., for appellant, Paulette Garrison (Nash Law Firm, LLC, attorneys)

Sean P. Havern and **Eric Zimmerman** (on the Brief), Deputy Attorneys General, for respondent, Department of Health, Ancora Psychiatric Hospital (Matthew J. Platkin, Attorney General of New Jersey, attorney)

Record Closed: April 14, 2023 Decided: April 20, 2023

BEFORE **JEFFREY N. RABIN**, ALJ:

STATEMENT OF THE CASE

Appellant, Paulette Garrison, has appealed the removal from her position by respondent, Department of Health, Ancora Hospital (DOH or Ancora), due to respondent's allegations that appellant exhibited excessive lateness, absenteeism, conduct unbecoming, and other sufficient cause. Appellant has been charged with N.J.A.C. 4A:2-2.3(a)4 — Chronic or excessive absenteeism or lateness; N.J.A.C. 4A:2-

2.3(a)6 — Conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)12 — Other sufficient cause; Administrative Order 4:08 A-2.8 — Absent from work as scheduled without permission but with giving proper notice of intended absence; Administrative Order 4:08 A-4.8 — Chronic or excessive absenteeism from work without pay; Administrative Order 4:08 A-8.8 — Unreasonable excuse for lateness more than fifteen (15) minutes, and; Administrative Order 4:08 E-1.10 — Violation of a rule, regulation, policy, procedure, order or administrative decision. Appellant seeks reinstatement of her position at Ancora Hospital, back pay and no loss of seniority.

PROCEDURAL HISTORY

On February 22, 2019, respondent served appellant with two Final Notices of Disciplinary Action (FNDA), charging her with chronic or excessive absenteeism or lateness and other sufficient cause, seeking the removal from her position at Ancora Hospital, effective February 25, 2019. On March 14, 2019, appellant filed an appeal with the Civil Service Commission, Division of Appeals and Regulatory Affairs, who transmitted the matter to the Office of Administrative Law (OAL), where it was filed on March 28, 2019, as a contested case. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On November 4, 2019, respondent filed a motion for summary decision. Briefs were received by December 23, 2019, no oral argument was held, and respondent's motion was denied on April 15, 2020.

Hearings were held via Zoom, due to the continuing Covid-19 pandemic protocols, on July 6 and July 7, 2021. After delays caused by the pandemic, the date for issuance of this Initial Decision was extended nunc pro tunc until January 21, 2023. The record was reopened for resubmission of summation briefs, and the record closed on April 14, 2023.

FACTUAL DISCUSSION

Joint Stipulation of Fact (Exhibit J-2):

During the period of appellant's conduct which was the subject of discipline under this appeal, it was a known issue that operators who received calls from staff may have incorrectly coded a call, for example, by placing a call as sick time and not as Family Medical Leave Act (FMLA). After the period that is the subject of the present discipline, respondent Ancora implemented an audio recording system so that calls between employees and operators may be reviewed to determine whether a discrepancy occurred.

Testimony for respondents

Boa Duong (Duong) had been employed by Ancora for six years and in the position of Personnel Aide II for one and a half years, handling discipline for time and attendance issues. Employees had access to their leave balances through any computer at Ancora and could keep track of how many sick days or vacation days they had available. Employees were responsible for monitoring their own leave balances.

Ancora maintained a call out log. Anytime an employee called out, Ancora recorded the time, date, and type of leave the employee wanted to use. When an employee arrived at work, they signed in on the payroll time sheet, which was then transferred into the New Jersey Personnel Time and Leave Reporting System ("Reporting System"). The Reporting System also tracked when an employee did not come in to work. The far-right column of the Reporting System identified absences with a "U" if the absence was unauthorized. The system indicated "FL" for FMLA leave, used when an employee had been granted additional leave time regardless of their number of remaining available sick or vacation days.

An employee would call the Ancora operator to request time off, and would announce what type of leave they sought, such as FMLA. When an employee's application for intermittent FMLA leave was granted, a letter would be issued confirming

the approval and providing information on how intermittent FMLA leave could be used. By letter dated April 19, 2018, appellant was approved for intermittent FMLA leave that she could use one to two times every four weeks, for a maximum of eight hours or one shift at a time. Accordingly, appellant would not be able to call out three days in a row using intermittent FMLA leave.

Duong was familiar with appellant's past disciplinary history, set forth in Exhibit R-12.

Michael Voll (Voll) had been the Director of Nursing at Ancora for three and a half years in his twenty-five years there. He handled all aspects of the nursing department, including discipline and training.

Ancora had an Executive Policy and Procedure Manual ("Manual") covering their Attendence and Leave Policy. (Exhibit R-10.) It advised employees on how to use leave time, including FMLA leave, and potential discipline for infractions. New employees received a copy, and employees received a refresher course every year. Employees also could receive assistance with leave policies through their union representative. Employees receive fifteen sick days per year. Any sick time taken above fifteen days was considered unauthorized. Too many unauthorized absences could result in discipline, which was not meant as punishment but was necessary to ensure sufficient staff were at work to care for patients. (Exhibit R-11, New Jersey Department of Human Services Disciplinary Action Program.) Employees were responsible for keeping track of their own leave balances.

Progressive discipline was used regarding unauthorized absenteeism (an "A2" offense). Counseling or a written warning may be appropriate for a first offense through a third offense. The discipline increased with additional violations. A fourth through eighth violation could result in removal. Mitigating factors could be considered, but could be exhausted and were not unlimited. Ancora posted notices during flu season advising employees to stay home if they had flu-like symptoms. Having the flu would be considered a mitigating factor. If an absence was coded incorrectly, the employee could meet with a supervisor to correct it. Employees could use vacation or

administrative leave balances for absences if they were sick and had used up their sick days.

Intermittent FMLA requests required having a doctor complete and submit documentation to Human Resources. Ancora was not obligated to continue employing someone who abused their attendance policy. If an employee had an illness that unpredictably flared up, such employee was able to use the FMLA time for those episodes. An employee's supervisor should discuss FMLA with a chronically ill employee, but the employee had access to all respondent's sick leave policies to look up for themselves.

Robert Sirolli (Sirolli) had been a Safety Officer at Ancora for six years, handling commission surveys and communications, including managing the operators who took employee call-outs. Ancora has fourteen operators, with a maximum of three per shift. When calling in to take off time from work, employees would tell the operator their name, shift, which building, and the type of leave being used. The operator then logged the information given to them by the employee into the system and gave the employee a verification number. Operators had no knowledge of an employee's remaining leave balances. Operators used a predetermined drop-down menu that listed abbreviations for different leave times, and chose the one asked for by the employee. Changes to the selection could be made during the call but the system timestamped any changes. The operator center received around one hundred calls per day. Errors sometimes happened, but not often. There was a call-out discrepancy form the employee had to use if they thought something was entered wrong; a supervisor had to counter-sign that form. Beginning in November 2018, Ancora started using a recording system, so if a discrepancy form was filed, the form could be verified.

Testimony for appellant

Christina Chappell (Chappell) was employed by respondent as a Human Services Technician (HST). She was familiar with appellant outside of work and familiar with appellant's health condition. Appellant had endometriosis.

Tiffany McClinton (McClinton) was employed by respondent for twenty years, as a Senior Human Service Technician, and was the local AFSCME Vice President. She was "sort of familiar" with intermittent FMLA. The frequency for the use of intermittent leave would be determined when Ancora analyzed the information provided by the employee's doctor. FMLA was used mostly by employees with unpredictable health conditions such as a flare-up. It was McClinton's understanding that operators mishandled or misdocumented entries. This prompted the union to take action, resulting in the new recording system. A supervisor usually worked with an employee having issues with callouts or lateness, per their contract. The supervisor helped identify mitigating circumstances.

Asked about Exhibit P-10, an email regarding a flu outbreak, McClinton said she had not seen that email before, but had seen similar emails. Employees were encouraged to get a flu shot and not spread the flu. There were employee posters saying, "Stay home if you are sick" and "Stay away from sick people."

McClinton was not a supervisor. She was not responsible for monitoring attendance. An employee was supposed to show up for work, and on time. She testified as to her confusion regarding what "late" meant and whether an employee could make up the time or had a grace period, but said a grace period would not cover a person who was an hour late. In her opinion, half of all FMLA calls were wrong. She testified that twenty discrepancy forms were filed in 2018, which was less than half. But she then testified that there was no official discrepancy form, and that someone just made up that fact, and that nobody knew about any discrepancy form. Later she testified that there was no proof that half of all FMLA calls were improperly received or filed wrong. She later testified that the "discrepancy form" was an "in-house form" and not an "official form." Employees were not even aware that they were entitled to FMLA.

McClinton was not able to discuss specific disciplinary issues regarding appellant. Employees were entitled to progressive discipline. All appellant's disciplinary issues were handled in one batch, which went against the concept of progressive discipline. She was not aware of appellant disciplinary issues from 2015 or 2016.

Paulette Garrison (appellant or Garrison) was hired by the State of New Jersey in December 2002 to work at the Vineland Developmental Center in a group home. In 2012, the group home was closed and, based on her seniority, she was moved to Ancora. At orientation, Ancora did not provide her with copies of the attendance and leave policy which she saw for the first time during this litigation.

Appellant stated that she had endometriosis, and had uncontrollable flare-ups twice per month that lasted from thirty minutes to two hours. There was no cure for endometriosis. It caused her pain and interfered with her work attendance; she could not make her 7:15 a.m. starting time because she could not drive while in pain. To deal with the pain, she was prescribed Ibuprofen and Tramadol.

She had prior disciplinary actions. Her director of nursing met with her but never her supervisor. Employee Advisory Services (EAS) were never offered to her, until she signed the Settlement Agreement.

When she worked at Vineland, her condition rarely affected her attendance, as she was assigned to the night shift, and her endometriosis flare-ups usually occurred in the early morning. But she later testified that she had attendance issues at Vineland.

She called out sick on April 15, 2018, through April 18, 2018, because she had flu-like symptoms. She had no sick time left. She was given Theraflu. She had a doctor's note. (Exhibit P-1.) Looking at that note, she had not been diagnosed with the flu and it did not specify what illness she might have had. The doctor's note permitted her to stay home from work; she testified that she would have gone in to work, but the flu posters displayed at Ancora instructed employees that individuals with flu-like symptoms should refrain from entering any building. She later changed her testimony to state that she would not have gone into work.

She went to the flu doctor on April 14, 2018, and filed for FMLA; she did this because she had just been through suspensions, and needed FMLA to keep her job. Respondent issued her a confirming letter that she was approved for FMLA intermittent leave. She then learned from Human Resources that she was not put down for FMLA,

but that her time was put down as "sick time." When she received the PNDA, was the first time she learned that her time was not coded as FMLA. Nobody ever discussed her late and sick callouts with her.

On April 12, 2018, appellant executed Settlement Agreements for her past issues. She knew the Ancora rules regarding attendance.

Appellant testified that she reported late to work on April 18, 2018, April 20, 2018, May 3, 2018, May 5, 2018, and May 9, 2018, because she was experiencing flare-ups from endometriosis. She called the operator and said she would be using "sick/FMLA." She was covered by FMLA.

On April 30, 2018, she called out of work for jury duty. She was marked down as being on jury duty. She was then not needed for jury duty that day, so she called back in to work and took the full day off for "sick/FMLA," because she was having a bad flare-up. Exhibit P-2 indicated she went to Jury Duty on May 1, 2018, which was to be her day off; she did not turn this note in to her employer, but still obtained the note "just in case work asked about it." In actuality, she had called the jury phone line on Sunday evening April 29, 2018, which advised her that evening that she was not needed for jury duty on April 30, 2018.

She was disciplined in 2019 for reporting late four times between July 2, 2018, and July 18, 2018. She was under FMLA at the time. She had a total of 208 hours of FMLA and used only 78 hours. But the operator improperly recorded her request to use intermittent FMLA leave every time. But appellant never filled out a discrepancy form or looked at what leave she had used on Ancora's portal, despite knowing that she was able to do so. Her prior disciplines were all lumped together. She received all average performance reviews, meaning she met all her requirements.

Her endometriosis was still ongoing. If reinstated, she would not take off fourteen days per month, as she has learned to live with endometriosis. She would be better off with the night shift.

ADDITIONAL FINDINGS OF FACT

Credibility:

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div.1961). A credibility determination requires an overall assessment of the witness' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Further, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), cert. den., 10 N.J. 316 (1952). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

Testimony for respondent

Boa Duong testified in a very matter-of-fact style and appeared knowledgeable. He was a credible witness.

Michael Voll appeared experienced and very knowledgeable. He was fluent in staffing and employee procedures. I found him to be a credible witness.

Robert Sirolli was knowledgeable, and was clear about what he knew and when he did not have data from which to reach a conclusion. He was a credible witness.

Testimony for appellant

Christina Chappell testified essentially as a character witness. She testified as to appellant's alleged health conditions. Nothing was proffered to demonstrate why she knew that appellant had endometriosis, so little weight can be given to her testimony.

Tiffany McCLinton, like Chappell, was an HST, but she was not a Human Resources employee, and not a supervisor. She was not responsible for attendance, and she had no experience dealing with attendance issues. She offered conflicting testimony as to the discrepancy form used by respondent, at one point testifying about it, at another point stating that "nobody knows about the discrepancy form." She was familiar with their union contract, as she was a union representative. It was not clear as to why she had any expertise regarding an alleged flu outbreak; she had not seen the email about a flu outbreak. She also offered merely personal opinions regarding the use of sick time. She testified as to being confused about what being "late" to work meant. She testified that employees were not even aware that they were entitled to FMLA, without explaining why, as their union representative, she did not make them aware of its availability. She never discussed whether appellant's purported FMLA requests had been filed correctly, because she did not know. I did not find her to be a credible witness.

Appellant **Paulette Garrison** testified. She offered a doctor's note to cover time off from work on April 18, 2018, but the note did not specify an illness, nor was it on a physician's letterhead or signed by a doctor. She confused "sick" time with "FMLA" leave. She claimed to not know the proper procedures for taking time off, yet she had been disciplined many times previously for attendance issues, and clearly knew what the procedures were. She testified at one point that she had never used FMLA prior to

the within incidences, but later corrected herself by stating she had used FMLA twice before.

She testified about jury duty, stating she called out from work for jury duty on April 30, 2018, only to be advised that she was not needed that day, when in fact she learned the evening before, on April 29, that she was not needed for jury duty on April 30. Further, she claimed she decided to still take off on April 30, requesting sick time, because she had a flare-up of endometriosis. Yet, she produced no doctor's note regarding that claim, and did not explain why she needed a full day off from work when she had testified that her flare-ups lasted only between thirty minutes and two hours.

She initially said she had no disciplinary issues at Vineland, later stating that she did have disciplinary issues there. She testified at one point that the endometriosis was still ongoing and she was still taking a lot of medication, only later testifying that she was working with a specialist and she was in fact improving.

Finally, regarding April 15, 2018, through April 17, 2018, she stated she had flu-like symptoms but had no sick days left; she testified that she would have gone to work if it were not for the posters around the building telling employees to stay home if they had flu-like symptoms. But she later testified that she would not have gone to work, because her doctor told her not to go to work.

She was not a credible witness and very little weight can be given to her testimony.

Therefore, based on the testimony, briefs and a review of the evidence, I **FIND**, by a preponderance of the credible evidence, the following additional **FACTS**:

Appellant Garrison was hired by respondent Ancora Hospital in October 2002, as a senior human services technician; reporting to work on-time when scheduled was part of appellant's written job description.

Appellant was diagnosed with endometriosis in 2012; to deal with pain, appellant was prescribed Ibuprofen and Tramadol.

Ancora had an Executive Policy and Procedure Manual ("Manual") covering their Attendence and Leave Policy, that advised employees on how to use leave time, including FMLA leave, and potential discipline for infractions; new employees received a copy of the Manual, and employees received a refresher course every year; employees could receive assistance with leave policies through their union representative; Ancora employees received fifteen sick days per year; any sick time taken above fifteen days was considered unauthorized; too many unauthorized absences could result in discipline, done to ensure sufficient staff were at work to care for patients; employees had access to their leave balances through any computer at Ancora and could keep track of how many sick days or vacation days they had available; employees were responsible for monitoring their own leave balances.

An employee would call an Ancora operator to request time off; Ancora had fourteen operators, with a maximum of three per shift; when calling in to take off time from work, employees would tell the operator their name, shift, which building, and the type of leave being used, such as FMLA; the operator then logged the information given to them by the employee into the system and gave the employee a verification number; operators had no knowledge of an employee's remaining leave balances; operators used a predetermined drop-down menu that listed abbreviations for different leave options asked for by the employee; changes to the selection could be made during the call with the operator, with the system timestamping any changes; the operator center received approximately one hundred calls per day, and errors sometimes happened, but not often; if an absence was coded incorrectly, Ancora had a call-out discrepancy form that an employee had to use, which a supervisor would review and counter-sign; beginning in November 2018, Ancora started using a recording system, providing recorded verification for when a discrepancy form was filed.

Ancora maintained a call out log; anytime an employee called out, Ancora recorded the time, date, and type of leave the employee sought to use; when an employee arrived at work, they signed in on the payroll time sheet, which would then be

transferred into the New Jersey Personnel Time and Leave Reporting System ("Reporting System"); the Reporting System also tracked when an employee did not come to work; the far-right column of the Reporting System identified absences with a "U" if the absence was unauthorized; the Reporting System indicated "FL" for FMLA leave, used when an employee had been granted additional leave time regardless of their number of remaining available sick or vacation days.

Intermittent FMLA requests required having a doctor complete and submit documentation to Human Resources; if an employee had an illness that unpredictably flared up, such employee was able to use FMLA time for those episodes; an employee's supervisor should discuss FMLA with a chronically ill employee, but the employee has access to all respondent's sick leave policies to look up for themselves.

When an employee's application for intermittent FMLA leave was granted, a letter would be issued confirming the approval and providing information on how intermittent FMLA leave could be used; appellant filed for FMLA on April 14, 2018; by letter dated April 19, 2018, appellant was approved for intermittent FMLA leave that she could use one to two times every four weeks, for a maximum of eight hours or one shift at a time, meaning that appellant would not be able to call out three days in a row using intermittent FMLA leave; the April 19, 2018, confirming letter from Ancora instructed appellant to advise the operator when she called in that she was using intermittent family leave.

Appellant began having issues with tardiness and absenteeism in 2015, resulting in ten disciplines between 2015 and 2018; appellant negotiated a settlement of eight disciplines on April 12, 2018.

Appellant called out sick on April 15, 2018, through April 17, 2018, stating she had flu-like symptoms, although she had no sick time left; the operator put down appellant's requests as being for sick time and did not record a request for use of FMLA; appellant had not been diagnosed with having the flu.

On April 19, 2018, April 20, 2018, May 3, 2018, May 5, 2018, and May 9, 2018, appellant called the Ancora operator and requested using "sick/FMLA" time and then reported late to work; appellant reported to work late four times between July 2, 2018, and July 18, 2018, and was disciplined for these in 2019; appellant disagreed with how the Ancora operator recorded her time requests, but never filled out a discrepancy form.

On Sunday evening April 29, 2018, the evening before her first day of jury duty, appellant called the jury phone line, which advised her that she was not needed for jury duty on April 30, 2018; on April 30, 2018, appellant called the Ancora operator and took the day off for jury duty; the call log from April 30, 2018, indicated that appellant requested "vacation due to lack of sick leave," with the Reporting System indicating "pending jury duty appellant subsequently called back in to work and took the full day off for "sick/FMLA."

Progressive discipline could be used regarding unauthorized absenteeism, known as an "A2" offense; counseling or a written warning could be appropriate for a first offense through a third offense; discipline increased with additional violations, and a fourth through eighth violation could result in removal; mitigating factors could be considered, but could be exhausted and were not unlimited; Ancora posted notices during flu season advising employees to stay home if they had flu-like symptoms; those notices and other CDC and NJ Health guidelines provided to employees did not state that they superseded respondent's sick leave policy; having the flu could be considered a mitigating factor; employees could use vacation or administrative leave balances for absences if they were sick and had used up their sick days.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The issue is whether the respondent acted properly in terminating appellant's employment.

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6 and N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to

public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her duties. N.J.S.A. 1 1A:1-2(a). 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, including removal. N.J.S.A. 1 1A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2. The general causes for such discipline are set forth in N.J.A.C. 4A:2- 2.3(a).

Appellant's filing of an appeal required the OAL to conduct a hearing de novo to determine the appellant's guilt or innocence, as well as the appropriate penalty, if the charges were sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). Respondent had the burden of proof to establish by a fair preponderance of the credible evidence that appellant was guilty of the charges. Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence was found to preponderate if it established the reasonable probability of the facts alleged and generated a reliable belief that the tendered hypothesis, in all human likelihood, was true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. 487 (1962).

Appellant has been charged with N.J.A.C. 4A:2-2.3(a)4 — Chronic or excessive absenteeism or lateness; N.J.A.C. 4A:2-2.3(a)6 — Conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)12 — Other sufficient cause; Administrative Order 4:08 A-2.8 — Absent from work as scheduled without permission but with giving proper notice of intended absence; Administrative Order 4:08 A-4.8 — Chronic or excessive absenteeism from work without pay; Administrative Order 4:08 A-8.8 — Unreasonable excuse for lateness more than fifteen (15) minutes, and; Administrative Order 4:08 E-1.10 — Violation of a rule, regulation, policy, procedure, order or administrative decision.

Reporting to work on-time when scheduled was part of appellant's written job description. Ancora had an Executive Policy and Procedure Manual ("Manual") covering their Attendence and Leave Policy, that advised employees on how to use

leave time, including FMLA leave, and also advised as to potential discipline for infractions. New employees received a copy of the Manual, and employees received a refresher course every year. Employees could receive assistance with leave policies through their union representative, or they could discuss these issues with their supervisor. Ancora gave its employees fifteen sick days per year, and any time above that was considered unauthorized. Ancora did not discipline employees for violations of its attendance policy purely to punish the employee; they had the responsibility to ensure that sufficient staff were at work to care for patients. Employees had access to their leave balances through any computer at Ancora and could keep track of how many sick days or vacation days they had available. Employees were responsible for monitoring their own leave balances.

Appellant began having issues with tardiness and absenteeism in 2015, resulting in ten disciplines between 2015 and 2018. She negotiated a settlement of eight disciplines on April 12, 2018. Between her disciplinary experiences regarding Ancora's attendance policies, and receiving the Manual and refresher courses, appellant clearly was in a position to be completely familiar with Ancora's attendance rules. Employees were responsible for monitoring their own leave balances. To that end, employees had access to their leave balances through any computer at Ancora and could keep track of how many sick days or vacation days they had available. After reaching a settlement as to past attendance violations, appellant should have been diligently monitoring her attendance records. Had she done so, she would have been able to discover if any of her absences had been coded incorrectly by the operator. As her encounters with the operators were before the current recording system was created, and no evidence was produced to show actual mistakes made by operators, and because appellant never completed discrepancy forms in an attempt to correct any purported coding mistakes, any claims by appellant that operators improperly entered her leave requests were unsubstantiated conjecture.

Respondent correctly set forth that "just cause for dismissal can be found in habitual tardiness or similar chronic conduct." West New York v. Bock, 38 N.J. 500, 522 (1962). The Bock Court stated, "while a single incident may not be sufficient, numerous occurrences over a reasonable short space of time, even though sporadic, may

evidence an attitude of indifference amounting to neglect of duty." Bock, 38 N.J. at 522. In judging whether an employee's absenteeism is chronic or excessive, relevant factors include the number of absences, the time span between the absences, and the negative impact on the workplace. See, Harris v. Woodbine Developmental Center, CSV 4885-02 (March 27, 2003); Hendrix v. City of Asbury, CSV 10042-99, (June 8, 2001); Morgan v. Union County Runnells Specialized Hospital, 97 N.J.A.R. 2d (CSV) 295; Bellamy v. Twp. of Aberdeen, Dep't. of Public Works, 96 N.J.A.R. 2d (CSV) 770.

Respondent also submitted that "excessive absenteeism is not necessarily limited to instance of bad faith or lack of justification on the part of the employee who was frequently away from . . . [their] job," citing Terrell v. Newark Housing Auth., 92 N.J.A.R. 2d (CSV) 750, 752. As explained in Terrell:

> 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. An employer is entitled to be free of excessive disruption and inefficiency due to an inordinate amount of employee absence.

It appeared that respondent gave appellant every opportunity to learn from her past violations and improve her attendance. However, appellant continued to be excessively absent or late for work. As of April 2018, appellant had already used up her fifteen allotted sick days. Despite that fact, she was absent from work on April 15, 2018, through April 17, 2018. Those absences were deemed to be "unauthorized" because she had no sick days left. Similarly, appellant was late for work on April 19, 2018, April 20, 2018, May 8, 2018, and May 9, 2018. The Reporting System listed a 'U' next to each of those dates, indicating that each of those absences and late arrivals were unauthorized. She knew of the importance of diligent attendance, having executed a settlement agreement of attendance violations just three days before her April 15, 2018, unauthorized sick day. Although appellant had been approved for intermittent FMLA leave as of April 14, 2018, she was not allowed to use three days of intermittent FMLA leave in the same week as she did April 15, 2018, through April 17, 2018.

Caselaw has held that excessive absenteeism did not need to be tolerated by an employer. See Muller v. Exxon Research and Engineering Company, 345 N.J. Super. 595, 605-06 (App. Div. 2001); Svarnas v. AT&T Communication, 326 N.J. Super. 59, 78 (App. Div. 1999) ("reasonably regular, reliable, and predictable attendance is a necessary element of most jobs. An employee who does not come to work cannot perform any of the job functions, essential or otherwise."); Kotlowski v. Eastman Kodak Co., 922 F. Supp. 790 (W.D.N.Y. 1996) ("an employee who cannot get to work does not satisfy the essential requirements of her employment"); Santiago v. Temple Univ., 739 F. Supp. 974 (E.D. Pa. 1990), aff'd, 928 F. 2d 396 (3rd Cir. 1991) (an employee of any status . . . cannot be qualified for his position if he is unable to attend the workplace to perform the required duties, because attendance is necessarily the fundamental prerequisite to job qualification).

Abuse of attendance policies would be particularly concerning in a health care scenario. Ancora provided individualized, direct in-person care to its patients, and therefore had staffing minimums. It should go without saying that when one staff member missed a day of work, other staff members would have to pick up the load, which would lead to other staff members being forced to work overtime. It would be a perilous situation to have an overworked hospital staff serving patients who might be a danger to themselves or others. Respondent further pointed out that paying employees for overtime shifts costs them additional money, considering that the pay rate for overtime was higher.

Appellant's defenses did not bear weight. Appellant said her physical condition was worse in the mornings, which was why she was often late for her morning shift, and that she would do better if she was working the overnight shift. However, appellant offered no proof that she ever requested a change to the night shift. Appellant stated experiencing flare-ups of pain due to endometriosis, without offering any documentation or expert testimony as to what endometriosis was or how it affected one's body. Although her testimony was generally not credible, she had testified that her condition had been improving, not getting worse. There was no evidence that appellant ever sought any work accommodations from Ancora under the Americans with Disabilities Act (ADA).

Appellant did not work on April 15, 2018, through April 17, 2018, claiming she had flu-like symptoms, and that flyers were posted around work telling employees not to come to work if they had the flu. These posters, however, did not state that they represented a mandatory requirement nor that they superseded Ancora's sick leave policies. In other words, it was recommended that employees stay home if sick with the flu, subject to the proper use of Ancora's sick leave policy. Further, appellant had not been diagnosed with the flu; she offered a doctor's note to cover time off from work on April 18, 2018, but the note did not specify that she actually had an illness, nor was it on a physician's letterhead, nor was it signed by a doctor. Additionally, appellant had no sick time left.

Appellant seemingly confused "sick" time with "FMLA" leave. She claimed not to know the proper procedures for taking time off, yet she had been disciplined many times previously, and therefore had to know what the procedures were. She testified at one point that she had never used FMLA prior to the within incidences, but later corrected herself by stating she had used FMLA twice before. The FNDAs charging appellant with chronic or excessive absenteeism or lateness were issued on February 22, 2019; before that date, appellant had successfully used intermittent FMLA leave for fifteen hours, including eight hours on April 24, 2018, and she used intermittent FMLA leave thirty times between April 23, 2018, and August 25, 2018. These facts indicate that appellant did know how to properly use the system.

Ultimately, appellant claimed that the three operators who received her phone calls on April 15, 2018, through April 17, 2018, as well as the operators who took her calls regarding late time on April 19, 2018, April 20, 2018, May 3, 2018, May 8, 2018, and May 9, 2018, all made errors, entering "sick time" instead of the intermittent FMLA she claimed to have requested. However, appellant offered no proof that these mistakes occurred, and offered no proof that she discovered errors by going into the computer program to manage her leave time, nor that she ever completed the required discrepancy form to correct any coding errors that might have been made by the operators. Further, regardless of appellant's unsubstantiated claims of operator errors,

the intermittent FMLA granted to her would not have permitted her to use intermittent FMLA three days in a row as she did on April 15, 2018, through April 17, 2018.

As there was no proof that appellant had the flu, and she offered no valid defenses to the claim of unauthorized sick days on April 15, 2018, through April 17, 2018, these incidences would not serve to mitigate her chronic and excessive absenteeism and lateness. The FNDAs in the within matter covered five absences and four late arrivals, which violations occurred only days after she settled eight other past disciplines for similar wrongful conduct. I agree with respondent that although mitigation needed to be considered, it was inappropriate under these circumstances.

Another incident of unauthorized absenteeism was regarding appellant's absence on April 30, 2018. Her testimony was that on April 30, 2018, she called out of work for jury duty, and was marked down as being on jury duty. She was then not needed for jury duty that day, so she called back in to work and took the full day off for "sick/FMLA," because she was having a bad flare-up. The call log indicated that appellant used "vacation due to lack of sick leave" and the Reporting System showed "pending jury duty appellant subsequently called back in to work and took the full day off for "sick/FMLA." Appellant asserted that the operator improperly recorded her request, but there was no evidence presented that a mistake had occurred and there was no proof that appellant ever attempted to mitigate or fix this purported problem. Because appellant learned that she was not needed for jury duty on Sunday evening, April 29, there would have been no reason to call an operator on Monday, April 30, to take time off for jury duty, and therefore there should not have been any such notation of "pending jury duty appellant subsequently called back in to work and took the full day off for "sick/FMLA." Further, whether she attempted to not come in to work due to jury duty, sick time, vacation time, or FMLA, was a matter of confusion caused by appellant herself. She made no subsequent attempts to rectify this confusion, except to blame the operator.

Appellant was right to offer that New Jersey Civil Service law protected classified employees from arbitrary dismissal and onerous sanctions, citing Prosecutors, Detectives and Investigators Assoc. v. Hudson Bd. of Freeholders, 130 N.J. Super. 30,

41 (App. Div. 1974): Scancarello v. Dept. of Civil Service, 24 N.J. Super. 65, 70 (App. Div. 1952). It was correct that respondent had both the burden of persuasion and the burden of production, required to demonstrate by a preponderance of the competent, relevant, and credible evidence that appellant committed the infractions listed in the FNDA. See generally Coleman v. E. Jersey State Prison, CSV 1571-03, Initial Decision (February 25, 2004); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550, 560 (1982); In re Darcy, 114 N.J. Super. 454, 458 (App. Div. 1971).

Appellant's summation brief admitted that chronic or excessive absenteeism constituted grounds for major discipline under N.J.A.C. 4A:2-2.3(a)4. Appellant offered that chronic conduct was conduct that continued over a long time or recurred, citing Good v. Northern State Prison, 97 N.J.A.R. 2d (CSV) 529, 531. Respondent proved that appellant met this definition of chronic or excessive absenteeism; the within matter dealt with five absences and four late arrivals from 2018, which violations were reoccurrences subsequent to eight other past disciplines for similar wrongful conduct that happened as early as 2016.

I **CONCLUDE** that respondent has proven by a preponderance of the competent, relevant, and credible evidence that appellant had committed N.J.A.C. 4A:2-2.3(a)4 — Chronic or excessive absenteeism or lateness; N.J.A.C. 4A:2-2.3(a)12 — Other sufficient cause; Administrative Order 4:08 A-2.8 — Absent from work as scheduled without permission but with giving proper notice of intended absence; Administrative Order 4:08 A-4.8 — Chronic or excessive absenteeism from work without pay; Administrative Order 4:08 A-8.8 — Unreasonable excuse for lateness more than fifteen (15) minutes, and; Administrative Order 4:08 E-1.10 — Violation of a rule, regulation, policy, procedure, order or administrative decision.

Finally, appellant was charged with "Conduct unbecoming a public employee," under N.J.A.C. 4A:2-2.3(a)6. Conduct unbecoming a public employee is an elastic phrase which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the

complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A. 2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

In the within matter, respondent showed that appellant violated specific rules regarding sick leave and attendance. It also made a cogent argument that abuse of attendance policies was extremely concerning in a health care scenario. As Ancora provided individualized, direct in-person care to its patients, staffing issues were always of concern. When one staff member missed work, other staff members would end up overburdened, a troublesome situation to have when serving patients who might be a danger to themselves or others. Patients and their families would be poorly served if dealing with a hospital which faced constant staffing shortages; this would clearly affect the morale and efficiency of a governmental unit (Ancora Psychiatric Hospital, under the New Jersey Department of Health) and would negatively affect public respect in the delivery of governmental services.

I **CONCLUDE** that appellant committed conduct unbecoming a public employee.

PENALTY

Having met its burden of proving the above-referenced violations of statutes, regulations and policies, this Court may then look to whether respondent acted properly in applying discipline against appellant in the form of termination.

Where appropriate, concepts of progressive discipline involving penalties of increasing severity are used in imposing a penalty and in determining the reasonableness of a penalty. West New York v. Bock, 38 N.J. 500, 523-24 (1962). Factors determining the degree of discipline include the employee's prior disciplinary

record and the gravity of the instant misconduct. Progressive discipline is not a fixed and immutable rule to be followed without question. In re Carter v. Bordentown, 191 N.J. 474 (2007). The determination of a penalty is subjective and follows no specific formula. One may consider the seriousness of the infraction, the length of employment, the amount of training received, as well as prior disciplinary matters. West New York v. Bock, 38 N.J. at 523-24.

While progressive discipline could be used regarding unauthorized absenteeism, and counseling or a written warning could be appropriate for a first offense through a third offense, Ancora's policies allow that discipline to increase with subsequent violations. A fourth through eighth violation could result in removal. Here, appellant was found to have violated attendance policies on seventeen occasions. No mitigating factors were proven by appellant.

I **CONCLUDE** that termination of appellant's employment with Ancora was appropriate.

DECISION AND ORDER

I **ORDER** that the charges of N.J.A.C. 4A:2-2.3(a)4 — Chronic or excessive absenteeism or lateness; N.J.A.C. 4A:2-2.3(a)6 — Conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)12 — Other sufficient cause; Administrative Order 4:08 A-2.8 — Absent from work as scheduled without permission but with giving proper notice of intended absence; Administrative Order 4:08 A-4.8 — Chronic or excessive absenteeism from work without pay; Administrative Order 4:08 A-8.8 — Unreasonable excuse for lateness more than fifteen (15) minutes, and; Administrative Order 4:08 E-1.10 — Violation of a rule, regulation, policy, procedure, order or administrative decision be **SUSTAINED**.

I **FURTHER ORDER** that respondent's termination of appellant's employment with Ancora be **SUSTAINED**.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 20, 2023
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

JNR/cb

APPENDIX

WITNESSES

For appellant

Christina Chappell

Tiffany McClinton

Paulette Garrison, appellant

For respondent

Boa Duong

Michael Voll

Robert Sirolli

EXHIBITS

For appellant

P-1 Appellant Medical Note, dated April 19, 2018

P-2 Jury Duty Note, dated May 1, 2018

P-3 Appellant Medical Records

P-4 Prevent the Spread poster

P-5 Letter Approval of Intermittent Leave, dated April 19, 2018

P-6 Sick Note History

P-7 Time and Leave Report

P-8 Performance Assessment

P-9 Callout Discrepancy Forms

P-10 Flu Emails

For respondent

R-1 FNDA, dated February 22, 2019

R-2 PNDA, dated May 16, 2018

R-3 Second FNDA, dated February 22, 2019

R-4 PNDA, dated July 25, 2018

R-5 Appellant's Employee Callout Log

R-6 Time and Leave Reporting System April 13, 2018, through May 12, 2018

R-7 Time and Leave Reporting System June 23, 2018, through July 21, 2018

R-8 FMLA Approval Letter, dated April 19, 2018

R-9 Appellant's Leave Maintenance Log

R-10 Policy HR 0501

R-11 Disciplinary Action Program

R-12 Past Disciplines

BRIEFS

For appellant

Post-hearing Brief, resubmitted and dated March 24, 2023

For respondent

Post-hearing Brief, received November 24, 2021