STATE OF NEW JERSEY

In the Matter of Sean Weeks, Irvington, Department of Public Safety	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket No. 2022-1915 OAL Docket No. CSV 01543-22	

ISSUED: November 7, 2024

The appeal of Sean Weeks, Police Officer,[1] Irvington, Department of Public Safety, six-month suspension, on charges, was heard by Administrative Law Judge Thomas R. Betancourt (ALJ), who rendered his initial decision on October 3, 2024. Exceptions were filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent, *de novo* evaluation of the record, including a thorough review of the exceptions, the Civil Service Commission (Commission), at its meeting on November 6, 2024, adopted the ALJ's Findings of Fact and Conclusions. However, it did not agree with his recommendation to modify the six-month suspension to a 60 working day suspension. Rather, the Commission modified the six month suspension to a 10 working day suspension.

Regarding the charges, the ALJ's determinations were based on his assessment of the testimonial and documentary evidence in the record and his assessment of the credibility of that evidence. 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

[1] The appellant received an accidental disability retirement, effective January 1, 2022.

(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, while the appellant's exceptions attempt to establish that the appointing authority's witnesses did not provide truthful testimony, they have not substantiated such claims sufficient to convince the Commission that the due deference normally afforded to an ALJ's credibility determinations should be ignored. As such, the Commission finds that the ALJ's credibility determinations and his findings were not arbitrary, capricious, unreasonable or otherwise in error. Accordingly, the Commission, upon its *de novo* review of the proffered charges, agrees with the ALJ regarding those that were upheld and those that were dismissed.

Regarding the penalty, similar to its review of the underlying charges, 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).

In this case, the ALJ recommended a 60 working day suspension, due to a previous settlement agreement, which indicated that for the next major disciplinary matter, the appellant was to receive a penalty between 60 and 180 days suspension and/or termination. In particular, the ALJ relied on the timing of the appellant's disclosure to his supervisor that he was in pain and would be booking out sick. Although the timing of the disclosure supports upholding the charges, other than the settlement agreement, there is no discussion as to why the appellant's actions warrant a significant major discipline. The ALJ found, as mitigating factors, that the appellant was on light duty due to a work-related incident and that there was no doubt that the appellant was in pain when he was given the assignment. The ALJ also found, that despite having the authority to do so, the appellant was not sent for a medical examination on the date in question. Initially, the Commission notes that it is not bound by the provisions of the previous settlement agreement regarding the penalty to be imposed and has exclusive jurisdiction to determine such matters upon

appeal. As such, the Commission finds that the appellant's suspension is more appropriately reduced to a 10 working day suspension as it was undisputed that he was injured at the time.

Since the suspension has been modified, the appellant is entitled to mitigated back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10.[2] However, he is not entitled to counsel fees. *N.J.A.C.* 4A:2-2.12(a) provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in the disciplinary appeal is the merits of the charges. See *Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121,128 (App. Div. 1995): *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although some charges were dismissed and the penalty was modified by the Commission, charges were sustained, and major discipline was imposed. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12, counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalties imposed by the appointing authority. However, per the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was justified. However, it modifies the six-month suspension to a 10 working day suspension. The Commission further orders that the appellant be granted back pay, benefits, and seniority. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

Counsel fees are denied.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to R. 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

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[2] The Commission notes that pursuant to *N.J.A.C.* 4A:2-2.10(d)9, a back pay award is subject to reduction for any period of time during which the employee was disabled from working.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6TH DAY OF NOVEMBER, 2024

Allison Chris Myers

Allison Chris Myers
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 01543-22
AGENCY REF. NO.: 2022-1915

SEAN WEEKS,
Petitioner,
vs.
IRVINGTON TOWNSHIP DEPARTMENT OF PUBLIC SAFETY,
Respondent.

Peter B. Paris, Esq., for Appellant (Beckett & Paris, LLC., attorneys)

Robert Devaney, Esq. and **Lester E. Taylor, III**, Esq. for Respondent[1] (Florio, Perucci, Steinhardt, Capelli, Tipton & Taylor, LLC, attorneys)

Record Close Date: July 18, 2024 Decided: October 3, 2024

BEFORE **THOMAS R. BETANCOURT**, ALJ:

[1] Mr. Devaney was trial counsel. Post hearing Mr. Taylor filed a Substitution of Attorney, and is on the post hearing brief.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Sean Weeks, appeals a Final Notice of Disciplinary Action (FNDA), dated February 2, 2022, imposing a penalty of 180 working days suspension, effective August 17, 2021.

The Civil Service Commission transmitted the contested matter pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it were filed on February 28, 2022.

A prehearing conference was conducted on March 7, 2022, and a prehearing order entered on the same date by the undersigned.

A hearing was held on July 25, 2023. The record was kept open for counsel to submit written summations. Written summations were received from petitioner on May 13, 2024; and from respondent on July 18, 2024, whereupon the record closed.

ISSUES

Whether there is sufficient credible evidence to sustain the charges set forth in the two FNDAs; and, if sustained, whether the penalty imposed, 180 working days suspension, is warranted.

CREDIBILITY

When witnesses present conflicting testimonies, it is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. In other words, credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story in light of its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see Polk, supra, 90 N.J. 550. Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463 (1999). A fact finder is expected to base decisions of credibility on his or her common

sense, intuition or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973).

The finder of fact is not bound to believe the testimony of any witness, and credibility does not automatically rest astride the party with more witnesses. In re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved but may not be disregarded at an administrative proceeding. Middletown Twp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962). Credible testimony must not only proceed from the mouth of credible witnesses but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546 (1954).

When facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings. Credibility is the value that a finder of fact gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, its internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (8th Cir. 1963).

There are two witnesses in the instant matter whose credibility come into play: Appellant and Sergeant Sims.

I find Sergeant Sims to be the more credible witness. He answered all questions directly and in a professional manner. He did not hesitate to answer. His responses were clear and directed at the questions posed. His credibility was enhanced by his admission that he would not have reprimanded petitioner, and that he was ordered to write a report.

Appellant's testimony was somewhat problematic. His statement that he intended to book out sick before he spoke with Sergeant Sims does not ring as true. He initially had a conversation with the sergeant, and did not say anything about booking out sick. He explanation that he did not immediately advise the sergeant he was booking out was due to their being engaged in a conversation. That conversation was where Sergeant Sims told Appellant to work the NCIS desk. At that point he advised

the sergeant he was booking out. Further detracting from Appellant's credibility was his reticence in answering questions.

STIPULATED FACTS

1. Until he retired on accidental disability pension, which was effective January 1, 2022, Sean Weeks was a police officer with the Township of Irvington. (See Ex. J-1, PFRS minutes dated 11/14/22. (BATES J-001 – J-004)
2. On November 7, 2020, Officer Weeks was injured in the line of duty while attempting to arrest a combative suspect. (See Ex. J-2, Weeks' Administrative Report of the incident and incident report). (BATES J-005 -J-008). During the incident, Officer Weeks suffered a right shoulder injury that later resulted in Officer Weeks being approved for an accidental disability pension due to the permanent disability in the right shoulder.
3. From approximately November 13, 2020, through August 17, 2021, Office Weeks underwent treatment, including surgery, in accordance with the Townships workers compensation program and Department policies. (See Ex. J-3, containing correspondence and memos regarding workers compensation treatment and work status for Officer Weeks). (BATES J-009 – J-037)
4. On August 17, 2021, the Township formally deemed Officer Weeks to have "permanent restrictions" based on the finding that Officer Weeks had reached Maximum Medical Improvement (MMI). Those restrictions were: "activities of light duty; exerting up to 20 pounds of force working at his chest level; light administrative duties; and interviewing witnesses and directing traffic." (See Ex. J-3, at BATES J-305 – J-037)
5. The permanent restrictions noted above were based on the results of a Functional Capacity Examination (FCE), which occurred July 29, 2021. (See Ex. J-4, Report of Kinematic Consultants, July 29, 2021). (BATES J-038 – J-056). That report opined in pertinent part:

> Regardless of cause, the Examinee demonstrates ability for, at a minimum, Light category work (occasional life and work of 20 lbs.). He demonstrates ability for light administrative

> duties, directing traffic around work areas/accident scenes, interviewing witnesses/victims, etc. Due to the Examinees' mild to negligible residual functional finger movement issues, his frequency of movement/positioning for his right finger is unrestricted at this time. He is advised to maintain a neutral wrist/foreman posture during all lifting and working activities and keep loads close to his center of gravity to minimize stress on his UE joints. Unfortunately, due to the Examinee's elevated average coefficients of variation for all test protocols, no objective determination can be made with regards to the Examinee's abilities for heavy RUE gripping/grasping, work above chest height for his RUE, periods of prolonged or repetitive RUE activities > 10 minutes (i.e. pushing/pulling, lifting, heavy gripping/grasping), occupational driving, or heavier physical activities such as assisting with first aid, restraining unruly individuals, involvement with altercations, handling load > 20 lbs. etc. It is our understanding, as per the Examinee, that he is currently working. If this job information is accurate, he demonstrates ability for, at minimum, light category work with similar action requirements." (See Ex. J-4, Report of Kinematic Consultants, July 29, 2021 at BATES J-055 – J-056).

6. The Irvington "Sick Leave Policy and Procedures", which apply to all Irvington police officers, are enumerated in Standard Operating Procedure (SOP) #2016-08, which is attached as Ex. J-5. (BATES J-057 – J-092)

FINDINGS OF FACT

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I **FIND** the following **FACTS**:

1. Sergeant Malik Sims was Appellant's supervisor on August 14, 2021. (Tr. 12:3-5)
2. On August 14, 2021, Sergeant Sims advised Appellant that he was to work at NCIS at 2230 hours. Appellant advised Sergeant Sims that he would not do this as his extremities were bother him. (Tr. 15:8-9)
3. Appellant complained that his right shoulder bothered him. Sergeant Sims inquired if Appellant could use his left hand. Appellant responded that he would not use his left hand and would book out sick. (Tr. 15:13-15, 15:19-20)

4. Appellant advised Sergeant Sims hat he would not work, not that he could not work. (Tr. 16:3-4)
5. Work at the NCIS desk consists of typing. (Tr. 17:7-21)
6. Sergeant Sims assigned Appellant to work the NCIS desk as Appellant was on light duty and he did not want to take someone off the road. Appellant was certified to work the NCIS desk. (Tr. 36:10-22)
7. Appellant did not seek medical attention after booking out sick. (Tr. 37:13-15)
8. Sergeant Sims was directed to prepare a report regarding the instant matter and was ordered to do so by Sergeant Sampson, who had spoken to Lieutenant Taj Jackson bout the incident with Appellant. (R-2; Tr. 24:1-23)
9. Sergeant Sims had the authority to reprimand Appellant at the time but did not. (Tr. 25:6-11; 36:4-6)
10. Sergeant Sims had the authority to order Appellant to be checked at the hospital but did not. (Tr. 34:4-11)
11. Sergeant Sims was aware that Appellant had been injured, but did not know he was deemed permanently disabled. (Tr. 22:21-25; 23:1-7)
12. It is not uncommon for an officer to report for work and then book out sick. (Tr. 33:20-24)
13. The Irvington Department of Public Safety maintains a Standard Operating Procedure manual. (J-5)
14. Section V. A. 1 thereof states in pertinent part: "All sworn members shall ... immediately report sickness or injury, in person or by telephone whether it occurred on or off duty, to the Patrol Operations Desk Supervisor, and notify the Desk Supervisor of all relevant information required to complete the 'Irvington Police Sick/Injured Report'." (J-5)
15. At Section V. A. 2(c) it states in pertinent part "... there shall be no fundamental distinction between members who book off sick on-duty or off-duty."

16. Appellant did not comply with Section V of the SOP manual in that he did not advise his supervisor "immediately" he was sick or injured. Rather, Appellant only did so in response to a work assignment he did not wish to do.

17. A Preliminary Notice of Disciplinary Action PNDA, with an immediate suspension without pay, was issued on August 17, 2021. (R-7)

18. Appellant waived a departmental hearing on the PNDA and a Final Notice of Disciplinary Action (FNDA), containing the same charges as the PNDA was issued on February 2, 2022. The FNDA provided for a penalty comprising a 180 working days suspension. (R-8 and R-12)

LEGAL ANALYSIS AND CONCLUSION

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a civil service employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointments and broad tenure protection. See Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this state is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). In order to carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

A public employee who is protected by the provisions of the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2 2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given

conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). This burden of proof falls on the agency in enforcement proceedings to prove violations of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987).

In the instant matter the sustained charges as set forth in the FNDA are as follows:

Charge #1 Immediate Suspension without pay
Charge #2 N.J.A.C. 4A:2-2.3(a)2 - Insubordination;
Charge #3 N.J.A.C. 4A:2-2.3(a)6 – conduct unbecoming a public employee;
Charge #4 N.J.A.C. 4A:2-2.3(a)6 – conduct unbecoming a public employee;
Charge #5 N.J.A.C. 4A:2-2.3(a)6 – conduct unbecoming a public employee;
Charge #6 N.J.A.C. 4A:2-2.3(a)(12) - Other sufficient cause

Charge #1 Immediate Suspension without pay

This charge is not sustained. Respondent presented no evidence that an immediate suspension without pay was warranted "as per Director of Public Safety Tracey Bowers, an immediate suspension is necessary to maintain the safety, health, order, or effective direction of the police department specifically due to being blatantly insubordinate to an order on August 14, 2021 give by Sergeant Malik Sims." (R-7)

Director Bowers did testify, but none of that testimony supported an immediate suspension without pay.

N.J.A.C. 4A:2-2.3(a)2 – Insubordination

Black's Law Dictionary 802 (11th3 Ed. 2019) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Similarly, the Disciplinary Action Program

definition of "insubordination" includes "intentional disobedience or refusal to accept a reasonable order." (J-12 at 37.) The above definitions incorporate acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the alleged insubordinate person. Insubordination is always a serious matter. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971).

I **FIND** the Township has met its burden with regard to this charge. It is clear to the undersigned that Appellant did not want to work the NCIS desk and chose to book out sick rather than do his job. I understand that Appellant was injured and in some pain. However, Sergeant Sims did not ask him to do something he could not do. He merely had to do data entry. This, in turn, allowed Sergeant Sims to maintain manpower on the road. Appellant could have book out sick before reporting or do so when he arrived at work. He did not and failed to comply with the requirements of the SOP manual.

N.J.A.C. 4A:2-2.3(a)6 – conduct unbecoming a public employee

"Conduct unbecoming a public employee" is an elastic phrase that 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 Atl. City, 152 N.J. 532, 554 (1998); see also, In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). 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)).

I **FIND** the Township has carried its burden as to this charge. Appellant did not comply with the SOP manual. He refused to comply with an order. By booking out sick improperly he caused a reduction in manpower on the road.

N.J.A.C. 4A:2-2.3(a)(12) - Other sufficient cause; violations of City Policies

There is no definition in the New Jersey Administrative Code for other sufficient cause. Other sufficient cause is generally defined in the charges against petitioner. The charge of other sufficient cause has been dismissed when "respondent has not given any substance to the allegation." Simmons v. City of Newark, CSV 9122-99, Initial Decision (February 22, 2006), adopted, Comm'r (April 26, 2006), http://njlaw.rutgers.edu/collections/oal/final/. Other sufficient cause is an offense for conduct that violates 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.

I **FIND** the Township has carried its burden as to this charge. Appellant willfully disobeyed an order by improperly booking out sick. This conduct violates the implicit standard of good behavior.

This forum has the duty to decide in favor of the party on whose side weight of the evidence preponderates, in accordance with a reasonable probability of truth. Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). The burden of proof falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The respondent must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson, supra, 37 N.J. 143. The evidence needed to satisfy the standard must be decided on a case-by-case basis.

Here it is clear that the evidence preponderates in favor of Respondent as set forth above.

What now must be determined is whether a 180 suspension is the appropriate penalty.

An appeal to the Merit System Board[2] requires the Office of Administrative Law to conduct a de novo hearing and to determine appellant's guilt or innocence as well as the appropriate penalty. In the Matter of Morrison, 216 N.J. Super. 143 (App. Div. 1987). In determining the reasonableness of a sanction, the employee's past record and any mitigating circumstances should be reviewed for guidance. West New York v. Bock, 38 N.J. 500 (1962). Although the concept of progressive discipline is often cited by appellants as a mandate for lesser penalties for first time offences,

> that is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> [In re Hemmann, 192 N.J. 19, 33-4 (2007) (citing Henry, supra, 81 N.J. 571).]

Although the focus is generally on the seriousness of the current charge as well as the prior disciplinary history of the appellant, consideration must also be given to the purpose of the civil service laws. Civil service laws "are designed to promote efficient public service, not to benefit errant employees . . . The welfare of the people as a whole, and not exclusively the welfare of the civil servant, is the basic policy underlining the statutory scheme." State Operated School District v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). "The overriding concern in assessing the propriety of the penalty is the public good. Of the various considerations which bear upon that issue, several factors may be considered, including the nature of the offense, the concept of

[2] Now the Civil Service Commission, N.J.S.A. 11A:11-1

progressive discipline, and the employee's prior record." George v. North Princeton Developmental Center, 96 N.J.A.R. 2d. (CSV) 463, 465.

In West New York v. Bock, 38 N.J. 500, 522 (1962), which was decided more than fifty years ago, our Supreme Court first recognized the concept of progressive discipline, under which "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct." In re Herrmann, 192 N.J. 19, 29 (2007) (citing Bock, supra, 38 N.J. at 522). The Court therein concluded that "consideration of past record is inherently relevant" in a disciplinary proceeding, and held that an employee's "past record" includes "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously brought to the attention of and admitted by the employee." Bock, supra, 38 N.J. 523–24.

Appellant has an extensive prior disciplinary history set forth in R-10. The controlling factor in deciding discipline in the instant matter is the Settlement Agreement entered into by Appellant and respondent on March 15, 2016, wherein respondent agreed to rehire Appellant with certain conditions imposed. One of those conditions was a penalty of between 60 and 180 days suspension and/or termination for any major discipline. (R-9)

While Appellant certainly did violate SOP when he booked out sick, there are mitigating circumstances. Petitioner had been seriously injured and had been on light duty. Working the NCIS desk is light duty and Appellant refused an order to so work. I do not doubt he was in pain when ordered to do so. The proper course was to notify his supervisor and book out. That he did not do. He then was retired on accidental disability. Based on the totality of the matter it seems the lower end of the agreed upon major discipline penalty of 60 days suspension is appropriate herein.

Based upon the above, I **CONCLUDE** that Respondent has demonstrated by a preponderance of the credible evidence that Appellant is guilty of the sustained charges

in the FNDA as set forth above by the undersigned, and that the appropriate penalty is a 60 working days suspension.

ORDER

It is hereby **ORDERED** that the following charges set forth in **FNDA** are **SUSTAINED**:

Charge #2 N.J.A.C. 4A:2-2.3(a)2 - Insubordination;
Charge #3 N.J.A.C. 4A:2-2.3(a)6 – conduct unbecoming a public employee;
Charge #4 N.J.A.C. 4A:2-2.3(a)6 – conduct unbecoming a public employee;
Charge #5 N.J.A.C. 4A:2-2.3(a)6 – conduct unbecoming a public employee;
Charge #6 N.J.A.C. 4A:2-2.3(a)(12) - Other sufficient cause

It is hereby further **ORDERED** that the following charges set forth in **FNDA** are **NOT SUSTAINED**:

Charge #1 Immediate Suspension without pay

It is further **ORDERED** that the appropriate discipline for FNDA shall be sixty working days.

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.

Thomas R. Betancourt

October 3, 2024
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: October 3, 2024

Date Mailed to Parties: October 3, 2024

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APPENDIX

List of Witnesses

For Appellant:

Sean Weeks, Appellant

For Respondent:

Malik Sims

Tracy Bowers

List of Exhibits

For Appellant:

P-1 Div. Pension & Benefits Medical Examination by Personal or Treating Physician Form, dated 9/13/21, and letter from Dr. Roman Isaac, dated 08/16/21

For Respondent:

R-1 Dr. Roman Isaac Notes

R-2 Sgt. Malik Sims Administrative Report re: 8/14/21 incident

R-3 Internal Affairs Report, IA# 2021-098

R-4 Internal Affairs Supplemental Report, IA#2021-098

R-5 Director Tracy Bowers Orders Re: Officer Weeks Suspension

R-6 Notice sent to Officer Weeks

R-7 31A (Preliminary Notice of Disciplinary Action, or PNDA)

R-8 31B with attachments (Final Notice of Disciplinary Action or FNDA)

R-9 Physical therapy appointment schedule for Peter Gobel 2/1/22 through 2/18/22

R-10 Settlement Agreement

R-11 Director Bowers Disciplinary Memo

R-12 Dr. Isaac Prescriptions

R-13 Correspondence from P. Paris waiving Departmental hearing

Joint Exhibits:

J-1 PFRS minutes of meeting November 14, 2022

J-2 Irvington Police Department Administrative Report, dated November 7, 2020

J-3 correspondence and memos regarding workers' compensation treatment and work status

J-4 Report of Kinematic Consultants, dated July 29, 2021

J-5 Irvington Sick Leave Policy and Procedures