



STATE OF NEW JERSEY

**DECISION OF THE
CIVIL SERVICE COMMISSION**

In the Matter of Kimberly Mitchell,
Cumberland County, Sheriff's
Department

CSC Docket No. 2016-1588
OAL Docket No. CSV 00196-16

ISSUED: JANUARY 15, 2025

The appeal of Kimberly Mitchell, Keyboarding Clerk 1, Cumberland County, Sheriff's Department, removal, effective August 25, 2015, was heard by Administrative Law Judge Carl V. Buck, III (ALJ), who rendered his initial decision on December 9, 2024. Exceptions were filed on behalf of both parties.

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 January 15, 2025, adopted the ALJ's Findings of Facts and Conclusions of Law, except as noted below. However, it did not agree with the recommendation to uphold the removal. Rather, the Commission imposed a 30 working day suspension.

Initially, the Commission does not adopt the ALJ's recommendation to dismiss the charges of chronic or excessive absenteeism. That charge was dismissed at the departmental level and was not contained on the Final Notice of Disciplinary Action. As such, the ALJ should not have considered it. Regardless, the Commission finds the ALJ's upholding of the other charges appropriate.

The Commission makes the following comments. The ALJ's initial decision was thorough and comprehensive. Notwithstanding that, the appellant argues in her exceptions that the ALJ did not consider that the appointing authority violated State and federal leave laws. The Commission is not persuaded. In this matter, the credible evidence in the record indicates that the appellant was not medically restricted from performing the duties of her position after being cleared by Dr. Bernardini, and as such, the appointing authority would not have been required to grant such leave thereafter. Moreover, the appellant's exceptions argue in that regard that the ALJ should not have credited two employees' testimony regarding the

duties of the position since he did not hear their testimony.¹ She also contends that the ALJ did not present a credibility determination regarding her testimony even though he did hear some portions of it. The Commission rejects these contentions. Generally, the ALJ, who has the benefit of hearing and seeing the witnesses, is 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). Here, while the ALJ did not “hear” the two employees’ testimony, he did find their recitation of the duties of the position more persuasive than the appellant’s. Moreover, the Commission finds no persuasive evidence in the record or in the appellant’s exceptions to demonstrate that the ALJ’s findings and conclusions based on his assessments in that regard were arbitrary, capricious or unreasonable.

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 matter, the Commission finds reason to impose a penalty less than removal. Initially, the record does not indicate that the appellant had any prior disciplinary history, and the testimony in the record otherwise indicates that there were not any issues with her work performance. Additionally, notwithstanding that the final doctor’s opinion found the appellant clear to work, the appellant’s belief,

¹ This matter was reassigned to the current ALJ after the original ALJ was appointed to the Superior Court.

albeit mistaken, that she was entitled to remain on her already approved Family and Medical Leave Act leave until its original expiration date further mitigates against the removal. While this mistaken belief supports that the underlying charges were properly sustained as the appellant did not follow the orders to return, to impose removal in such a circumstance is inappropriate. Accordingly, while the Commission is not minimizing the appellant's misconduct in any way, it finds that the appropriate penalty in this matter is a 30 working day suspension, which shall serve as a warning to the appellant that any future misconduct may lead to more severe disciplinary penalty, including removal.

Since the removal has been modified, the appellant is entitled to be reinstated with back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10 from 30 working days after the first date of separation without pay until the date of actual reinstatement. However, she 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, while the removal 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 penalty 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. In the interim, as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to her permanent position.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore modifies that action to a 30 working day suspension.

The Commission orders that the appellant be granted back pay, benefits, and seniority from 30 working days after the first date of separation without pay to the actual date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. 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. Pursuant to *N.J.A.C.*

4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

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.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF JANUARY, 2025

Dolores Gorczyca

Dolores Gorczyca
Member
Civil Service Commission

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and
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 00196-16

AGENCY DKT. NO. 2016-1588

**IN THE MATTER OF KIMBERLY MITCHELL,
CUMBERLAND COUNTY SHERIFF'S
DEPARTMENT.**

Herbert J. Stayton, Jr., Esq., for appellant, Kimberly Mitchell (Stayton Law, LLC,
attorneys)

Theodore Baker, Assistant County Counsel, for respondent, Cumberland County
Sheriff's Department (John G. Carr, County Counsel, attorney)

Record Closed: June 11, 2024

Decided: December 9, 2024

BEFORE CARL V. BUCK III, ALJ:

STATEMENT OF THE CASE

The respondent, Cumberland County Sheriff's Department (Cumberland or Sheriff or Appointing Authority), terminated the employment of the appellant, Kimberly Mitchell (appellant or Mitchell). Mitchell was terminated from her clerical position at the Cumberland County Sheriff's Office for insubordination and abandoning her position. The appellant appealed these charges and the termination. The County seeks the removal of appellant. For the reasons discussed below, the removal is affirmed.

BACKGROUND

In July 1993, the County of Cumberland Board of Chosen Freeholders adopted Policy Number 2:07, Family and Medical Leave of Absence. The Policy states as follows, inter alia:

I. POLICY:

The County of Cumberland strives to provide programs for the public and its employees that are cost effective. In an effort to reduce staff turnover and save on the costs of hiring and training, the County of Cumberland shall provide for a family and medical leave of absence program for its eligible employees. The program shall be in full compliance with applicable and federal state statutes.

II. DEFINITIONS:

....

B. MEDICAL LEAVE OF ABSENCE:

When the employee is unable to perform the functions at his or her position because of a serious health condition.

C. ELIGIBLE EMPLOYEE:

A person who has been employed by the County of Cumberland for one year with at least 1,000 hours of paid service.

....

E. SERIOUS HEALTH CONDITION:

Is an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice or residential medical care facility or continuing treatment by a health care provider. The term serious health condition is not intended to cover short-term conditions such as minor illnesses that last only a few days and surgical procedures that typically do not involve hospitalization and require only a brief recovery period.

....

III. PROCEDURE:

A. SCOPE:

The provisions of this policy shall apply to all family and medical leaves of absence except to the extent that such leaves are covered under other paid employment benefits plans or policies for any part of the leave to which the employee may be entitled under this policy. In other words, if an employee is entitled to paid leave under another benefit plan or policy, the employee must take the paid leave first.

B. BASIC REGULATIONS:

1. The County requires medical certification to support a claim for leave for an employee's own serious health condition or to care for a seriously ill child, spouse or parent.

- a. For the employee's own medical leave, the certification must include a statement that the employee is unable to perform the functions of his or her position.

....

- c. At its discretion, the County may require a second medical opinion and periodic re-certification at its own expense. If the opinions differ, the County, at its own expense, may require the binding opinion of a third health care provider, approved by the County and the employee.

....

C. NOTIFICATION REQUIREMENTS:

....

In cases of illness, the employee will be required to report periodically on his or her status and intention to return to work.

D. EMPLOYEE BENEFITS DURING LEAVE OF ABSENCE:

1. Any employee granted a family & medical leave of absence shall be provided with the group health insurance policy or health care plan at the same level and under the same conditions as before the leave commenced. The health insurance coverage shall be at the expense of the County.

....

E. REQUEST FOR FAMILY AND/OR MEDICAL LEAVE:

1. A request for Family and Medical Leave of Absence form must be originated by the employee. The form shall be:
 - a. Completed in detail
 - b. Signed by the employee
 - c. Submitted to the department head for proper approval
 - d. Forwarded to the County Personnel and Human Resources Department
2. If possible, the form should be submitted thirty (30) days in advance of the effective date of the leave.
3. All requests for Family and Medical Leaves of Absence due to illness shall include the following information attached to a completed Request for Family and Medical Leave of Absence:
 - a. Medical certification stating the date on which the serious health condition commenced; the probable duration of the condition; and the appropriate medical facts regarding the condition.

....

F. DURATION OF LEAVES OF ABSENCE:

An employee may request up to twelve weeks for a Family and Medical Leave of Absence in each twelve month period.

[R-3.]

PROCEDURAL HISTORY

Mitchell first noticed problems with pain in her right hand, ring finger, wrist, and forearm on December 18, 2014. She consulted with L. Michelle Santucci, Ph.D., RN, APN (Santucci), of the office of Jack M. Shields, M.D., P.A. (Shields), Mitchell's primary care physician. On June 17, 2015, Mitchell made an application for Family and Medical Leave by filing a U.S. Department of Labor, Wage and Hour Division, Certification of Health Care Provider for Employee's Serious Health Condition (Federal Family and Medical Leave Act or FMLA) for an approximate ninety-day period allegedly due to psoriatic arthritis. On June 25, 2015, approval for FMLA was given for the period of June 22, 2015, to September 7, 2015. (P-6.)

Mitchell was scheduled for a June 25, 2015, medical evaluation that Cumberland had arranged with Evelyn Balogun, M.D (Balogun) on June 22, 2015. Balogun saw Mitchell on June 25, 2015.

On July 30, 2015, Cumberland planned for Mitchell to be evaluated by Brad Bernardini, M.D. (Bernardini) on August 11, 2015, and on August 11, 2015, Mitchell attended her appointment with Bernardini.

On August 14, 2015, Craig Atkinson, Director of Personnel for the County (Atkinson), telephoned Mitchell and advised her to report to work on Monday, August 17, 2015. On August 18, 2015, Atkinson sent a letter to Mitchell advising her to report to her position immediately or be subject to disciplinary action for job abandonment. Mitchell received the letter on August 22, 2015. (J-8.)

On August 15, 2015, Mitchell was served with two Preliminary Notices of Disciplinary Action (PNDA-1 and PNDA-2) (J-12), dated August 24, 2015, for:

1. Departmental Charges:

(a) Insubordination; and,

Administrative Charges:

(a) Insubordination; and,

(b) Other Sufficient Causes; and,

Bargaining Agreement Violation:

(a) Insubordination

Basis: Miss Mitchell was ordered to return to work on 08/17/2015. She failed to return to work on that date and failed to report for 5 consecutive days thereafter. Miss Mitchell also failed to obey a lawful order issued/given by a superior officer to return to work, in violation of County Rules and Regulations.

2. Departmental Charges:

(a) Absence without leave for 5 consecutive days; and,

Administrative Charges:

(a) Chronic or excessive absenteeism or lateness; and,

Bargaining Agreement Violation:

(a) Absence without notice for 5 days shall constitute a resignation.

Basis: Miss Mitchell was ordered to return to work on 08/17/2015. She failed to return to work on that date and failed to report for 5 consecutive days after. Miss Mitchell also failed to obey a lawful order issued/given by a superior officer to return to work, in violation of County Rules and Regulations.

[J-12.]

A hearing on the charges set forth in PNDA-1 and PNDA-2 was held on September 30, 2015, before Cumberland County Administrator, Ken Mecouch.

On October 29, 2015, Cumberland sent Final Notice(s) of Disciplinary Action (FNDA) to Mitchell indicating that:

- (a) a hearing requested by Mitchell had been held on September 30, 2015;
- (b) Mitchell was removed from her employment position effective August 25, 2015; and,
- (c) Mitchell resigned not in good standing effective August 25, 2015.

Mitchell filed a timely appeal with the New Jersey Civil Service Commission, Division of Merit System Practices and Labor Relations, of:

- (a) her removal from her employment position with Cumberland, effective August 25, 2015; and
- (b) resignation not in good standing effective August 25, 2015.

The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on December 30, 2015, for a hearing as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -23.

On June 18, 2019, hearings began, and they continued at the New Jersey Office of Administrative Law before the Honorable Jeffery R. Wilson, ALJ. On elevation of Judge Wilson to the Superior Court, the matter was reassigned to me.

The record remained open for the parties to submit additional/revised exhibits, order transcripts, and submit closing written arguments. After assignment to me, I held a number of teleconferences to determine the intentions of the parties on whether they would require a new hearing or proceed on the record and require the undersigned to render a decision on the existing record. They decided to proceed on the existing record.

Under N.J.A.C. 1:1-14.13(b), if the judge who heard a matter can no longer preside over the case or issue an initial decision, another judge shall be assigned to complete the

hearing or issue the initial decision as if he or she had presided over the hearing from its commencement, provided:

1. The judge is able to familiarize himself or herself with the proceedings and all testimony taken by reviewing the transcript, exhibits marked in evidence and any other materials which are contained in the record; and
2. The judge determines that the hearing can be completed with or without recalling witnesses without prejudice to the parties.

This was the methodology taken in this case, and the position of the parties also confirmed moving forward in this manner.

After assignment to me, the record closed on July 31, 2023. The record was reopened on October 27, 2023, for a Zoom conference with counsel and additional submissions, and the record was closed on June 11, 2024. Requests for extensions to issue this Initial Decision were requested and granted.

FACTUAL DISCUSSION AND FINDINGS

From the information submitted and a review of the testimony and the documents before me, I **FIND** the following as **FACT**:

1. Appellant began working for Cumberland on August 13, 2013, as a warrant clerk with the title keyboarding clerk I.
2. She worked for Cumberland until August 25, 2015.
3. She had no prior disciplinary history.

Testimony

Christina Bates (Bates), warrant clerk for Cumberland, testified that she worked for about a year and a half with Mitchell and performed essentially the same job as

Mitchell. Bates explained that a warrant clerk takes information from a warrant and enters it into the National Crime Information Center System (NCICS) computer so that it can be placed in the in-house system at the Sheriff's Department. Bates described the process of entering the information, stating that she was required to review papers and that she was trained to review the documents, spending the majority of the time to ensure accuracy. Bates estimated that she spent approximately fifty percent of her time looking at paperwork and approximately fifty percent of her time doing keyboarding work. Bates said that she was unfamiliar with any physical problems Mitchell was having doing her job.

Bates was unable to say that she heard from third parties about physical difficulties that afflicted Mitchell in connection with her job, but Bates was aware that Mitchell had previously hurt her ankle. Bates was unaware that Mitchell had ever been unable to get her work done. No supervisors or co-employees came to Bates indicating that Mitchell was unable to adequately perform her job. Bates was unaware that Mitchell sought medical leave because Mitchell claimed to be unable to do the job until after she actually went out on leave. Mitchell never complained to Bates that she was unable to do her job because of a physical disability.

On cross-examination, Bates stated that she was unaware that any supervisors had ever made complaints regarding Mitchell's ability to do her job. The only thing that Bates remembered was that Ms. Mitchell had obtained a modified keyboard (i.e., an ergonomic keyboard).

Gina Strittmatter (Strittmatter) is a warrant entry clerk/keyboarding clerk and worked with Bates and Mitchell. She testified that research was the bulk of labor in connection with warrant entry, not typing. She estimated that almost eighty percent or eighty-five percent of the effort was research, and regarding child support warrants, over half of the labor was research. When asked specifically, however, how much of her labor as a warrant clerk would consist of research, she stated that ninety-five percent or more would be research. In other words, typing was a relatively insignificant component of her efforts. She stated "you have to keep looking at – you have to keep looking at your paper, you know, and you have to keep filling in. You just can't keep typing because it is all

different information,” and “it’s really not a lot of keyboarding.” The only difference between her functions and Mitchell’s was that Strittmatter would do the New Jersey Kids Warrants (child support warrants) and Mitchell would do the “final in house.” Strittmatter explained that final entry was “just trying to update (defendants’) pictures, their tattoos, . . . extra birthdays, Social Security numbers, extra names.” She estimated that not even half of that effort would involve keyboarding, only perhaps thirty-five percent.

Strittmatter also said that the job functions performed by her and Mitchell were essentially the same and that she worked with Mitchell throughout her time at the Sheriff’s Office and only recalled Mitchell saying that her hands were sometimes uncomfortable. Strittmatter stated that Mitchell was able to do the work and that no one else, to her recollection, complained about her performance of her work duties or that Mitchell needed help (P 65 L 1-24). Mitchell’s supervisor, Sgt. Scott Uhland, never indicated to any other employees that Mitchell was having complaints about her work performance or unable to do her job. Strittmatter made no such observations on her own, but Mitchell said she felt she could not do her job, and that was based upon her statements, not Strittmatter’s observations of Mitchell’s work performance.

Strittmatter stated on cross-examination that the first time she recalled Mitchell complaining about her physical condition was about five or six months before June 2015 and that Mitchell said she was having trouble writing, but Strittmatter never observed anything to make her aware of that. Mitchell was always able to meet job productivity requirements to Strittmatter’s knowledge.

Strittmatter said that generally around twenty warrants per day would be an average workload for a warrant clerk and that each warrant took about ten to fifteen minutes depending on the amount of information involved. Strittmatter felt that her job duties were essentially the same as Mitchell’s and Bates’. Judge Wilson inquired about typing lengthy narratives and whether or not they were required as part of her job, and Strittmatter stated no.

Michael Santiago (Santiago), undersheriff at the time of the action, testified as to why Cumberland decided that a second opinion was necessary and stated: “We had no

evidence that there was a problem.” Santiago stated that there were no reports that Mitchell was having difficulty performing her job duties and that he was the person who decided that Cumberland wanted to get a second opinion. He confirmed that even though they were getting a second opinion, the employee was entitled to leave until the matter was resolved through medical evaluations.

When the first opinion was received on July 8, 2015, from Dr. Balogun, Mitchell did not return to work. Mitchell got another opinion from Nurse Practitioner Michelle Santucci of Dr. Jack Shields’ office (P-2). Santiago understood that they were entitled to seek a third opinion and understood that Mitchell had agreed to see Dr. Bernardini (R-1). Santiago said he contacted Mitchell about seeing Bernardini, and she never raised an objection. Bernardini did clear Mitchell to return to work (J-7). On August 14, 2015, Human Resources notified the Sheriff’s Office that Mitchell was cleared to return to work, and a letter dated August 18, 2015, (J-8) was sent stating that Mitchell had been directed to report to work on August 17, 2015, by Santiago who had a recorded telephone conversation with her (R-2).

Santiago stated that he was unaware of any problems with Ms. Mitchell’s work performance, and when asked whether he had any doubts as to whether Mitchell had a serious medical condition, he stated: “I did because we never really received a formal complaint from her.”

As to a third tiebreaking opinion, Santiago also stated that he made a phone call to Mitchell to verify that she was okay with a third doctor and confirmed that she was. He stated that Ms. Mitchell never indicated that she was willing to come back to work at any time.

Santiago mentioned a letter from Mitchell (J-9) dated August 12, 2015, and another note from Santucci. Santiago also stated that in August 2015 he gave a direct order to Mitchell to report back to work and that she did not, and he said that a certified letter was also sent by Steve Bates from Human Resources, also indicating that Mitchell was required to return to work.

Craig Atkinson (Atkinson) had held the Personnel Human Resources position at Cumberland since February 2013 and testified as to the FMLA and family leave policies of the County (R-3). He related that an employee believing that they had a serious health condition would have to have a form filled out by a healthcare provider, and here, that form was filled out by a nurse from Dr. Jack Shields' office pertaining to Mitchell. Atkinson further indicated that if there was a discrepancy or concern about the application, it would generally be brought to his attention and testified that it was infrequent that the County would determine to obtain a second opinion and that it would happen maybe only ten percent of the time. Atkinson explained why he felt a second opinion was warranted in the case of Mitchell. First, it was a nurse practitioner that signed the form, and there was no physician's note. Second, there were no indications of any problems with Mitchell's job performance, and he stated that no one ever had informed him that Mitchell had difficulty performing her job duties. Santiago also spoke to the Sheriff about Mitchell and about whether she had problems performing her job.

Atkinson indicated that even though there might be a determination that a second opinion of a doctor is necessary, the employee would nonetheless be entitled to use leave in the interim; therefore, the employee would be entitled to use leave provisionally until the County obtained a second opinion or possibly a third opinion. Atkinson stated that employees are familiar with the policy regarding a second and/or third evaluation to determine whether or not the FMLA is justified.

Atkinson further stated that Mitchell was sent to Dr. Balogun at the Department of Occupational Health at Inspira for a second opinion and that job descriptions are provided to Dr. Balogun so that she is aware of the actual duties of the employees. Atkinson stated that Mitchell's job description (J-2) was provided to Dr. Balogun, but medical records were not. Atkinson had no knowledge of what testing was done as part of the evaluation process, and he recalled that the examination was held on or about June 25, 2015, but he received the opinion later, indicating that she could return to work on July 8, 2015. At nearly the same time, he received another note from Santucci (P-3), indicating that Mitchell should remain out of work. Atkinson spoke with the Sheriff, and a determination was made to seek a third opinion. Atkinson gave a recommendation to Mitchell to a third physician, and in Mitchell's case, he recommended Dr. Bernardini, and Mitchell agreed

(J-6). He also related that Sgt. Hoffman also contacted Mitchell, and she agreed with Sgt. Hoffman that she would go, but she needed the date rescheduled (J-6). This was scheduled for August 11, 2015. Mitchell remained on FMLA status and was not coming to work. FMLA is unpaid unless the employee uses leave or vacation.

Bernardini's opinion note to the County is dated August 11, 2015, and was provided to the County soon after. (J-7.) The job description for Mitchell was sent to Bernardini. Atkinson also indicated that the FMLA application would ordinarily be sent to an examining physician, assuming that the protocol would have been followed. Both evaluating doctors for the County Sheriff's Office would know that they were doing a fitness-for-duty evaluation. He informed the Sheriff of the results of the evaluation. He also spoke to Mitchell and advised her that she would need to return to work (P-1). Atkinson's recollection is that Mitchell did not seem open to coming back to work.

When Bernardini's opinion was received, there was still a question between the Sheriff's Office and Mitchell as to whether or not she could perform essential job duties with respect to typing in connection with her work. Atkinson further alluded to the potential that Ms. Mitchell had abandoned her job if she had refused to return to work for a period of five days. He assumed she wasn't returning to work as directed. On the same date Bernardini's opinion was issued, Mitchell went back to see Santucci for another note. Atkinson did not see that and concluded that she was not entitled to continue family medical leave as of that time frame and further indicated that he was unaware of any records or opinion from Sundhar, who also allegedly may have treated Mitchell. No such information was provided to the County with respect to Sundhar's involvement with her care. Atkinson played no role with any decision to discipline or take any steps to terminate Mitchell's employment following the receipt of the medical opinions. Atkinson did write a letter outlining the requirement that Mitchell return to work (J-8).

In reply to questions on cross-examination with regard to accommodating Mitchell's inability to type, Atkinson explained why that would not either be required or possible. It has to do with collective bargaining agreements and the inability to simply change job classifications and essential job duties through Civil Service and collective bargaining agreements. When asked if the Sheriff's Department could have changed job

duties for Ms. Mitchell to a non-keyboarding position, he stated "It would have been nearly impossible, if not impossible."

Atkinson testified that the FMLA form that was submitted by Mitchell (J-3) mentions Sundhar as a treating physician, but there was nothing in the FMLA form attributable to Sundhar that concluded that Mitchell was unable to perform her job duties.

Robert Austino, Cumberland County Sheriff, testified to his recollection that Mitchell was a warrant clerk and that he apparently hired her sometime after 2008. What Mitchell was doing was putting warrant information into the computer system, taking data from the paper warrants, and entering it. One of the most important functions is to make sure that the warrant information is correctly entered because if it is not, warrants could not be served, or they could be served erroneously. Austino assumed that the keyboarding function was only part of the job duty and was not necessarily the primary function, perhaps around fifty percent; this was an estimate, however, and he never actually watched the clerks when they were involved in the process.

As to Mitchell's FMLA request, he recalled talking to Atkinson about it, and he recalled that he asked the Undersheriff to look into the application further. He said that they discussed it and decided to get a second opinion. He further confirmed that he had no knowledge that Mitchell allegedly was having problems with her work or that there were complaints about her work. Similarly, co-employees did not relate that she was having problems performing her job or that she was unable to complete duties. He confirmed that he discussed a second opinion with Atkinson. He stated that because they were somewhat short staffed and had no idea of any job performance difficulties of Mitchell, they felt that a second opinion was in order. All other arrangements with respect to a second or third opinion of the FMLA request were handled through HR. Both the second and third opinions were obtained and confirmed that Mitchell was fit for duty. (J-5 and J-7.) He indicated that Mitchell was ordered back to work after the third opinion because two out of three doctors said she could perform her duties. He also recalled that Mitchell was allowed to use FMLA until the tiebreaking third opinion came in. He also confirmed what Atkinson said: that it would not have been possible to simply to give Mitchell an entirely different job if she were unable to perform the duties of a keyboarding

clerk due to Union contracts and Civil Service regulations. When Mitchell was out, there were backlog issues with the work, and they could not continue her leave indefinitely. He suggested that her request for unpaid leave until November could not be granted because of workflow needs. Sheriff Austino also confirmed that once he had received Bernardini's third opinion regarding Ms. Mitchell, it was decided that she would be ordered back to work.

When Atkinson from Human Resources sent a letter advising Mitchell that she would have to return to work, he was doing so with the Sheriff's concurrence and agreement (J-8). The filing of disciplinary charges was coordinated between Undersheriff Santiago and himself. The Sheriff signed the PNDAs (J-10).

As to finding Ms. Mitchell a different job that didn't involve typing, the Sheriff testified that it would not "fit under her job title," stating "We had to reasonably accommodate her, not change her job title." The Sheriff believed that even if Mitchell could not type for extended periods of time, she could still do her job duties because her duties were not all typing. Mitchell was a classified Civil Service employee, and her job was noncompetitive, and if somebody is not on the Civil Service list, you cannot hire that person, and you cannot accommodate someone by giving them a completely different job outside of their classification. Giving Mitchell additional leave without pay until November 2015 would not have been practical because of workflow needs, and it was necessary to have a temporary person brought in to help with productivity. The Sheriff also corroborated that the Sheriff's Office would not ask an employee for their complete medical records in connection with an FMLA request, and if it were done at all, Human Resources would do that. In addition, the Sheriff stated that he had no information anecdotally or otherwise that Ms. Mitchell was unable to or was having trouble with the performance of her job duties. In fact, he said that he did not recall that any doctor, including Nurse Santucci, stated that Ms. Mitchell could not perform her job duties. The Sheriff also referred to a letter from Mitchell (J-9). That handwriting should be analyzed because there is no suggestion from the handwriting itself that Ms. Mitchell was unable to write. Even so, she could still be accommodated if difficulty with handwriting was an obstacle in connection with her work.

The Sheriff also addressed whether or not the office would have sent Ms. Mitchell back to Dr. Balogun if additional information had been brought to her attention (see Exhibit J-9). Dr. Balogun's report (Exhibit J-5) was rendered sometime in late June or early July 2015, and Exhibit J-9 consists of another opinion from Nurse Santucci. The Sheriff, however, indicated that there was no additional information in Santucci's June 11, 2015, note (J-4). It was to excuse Mitchell from work without a reason. The Sheriff also confirmed that the County policy (R-3) with regard to FMLA was followed by the Sheriff's Office. That is the policy that would have allowed a tiebreaking process with regard to disputes over eligibility for FMLA. When questioned by the tribunal, the Sheriff also indicated that the PNDAs (J-10) were issued for insubordination due to Mitchell's refusal to follow a direct order to return to work and also for abandonment of her job for being absent without authorization for at least five consecutive days. He stated these are two separate offenses and that they were both included.

Stephen Bates is a Human Resource Personnel technician at the County of Cumberland and took Mitchell's FMLA application in the spring 2015. She also was given an Unemployment Temporary Disability Application form. Bates says he gave the application to Mitchell with general instructions to have her physician fill out the form. Bates stated that he gave her the application (J-3) and then verified that she had enough time to qualify for the leave. Bates also indicated that unless a physician's response to the application questions was unclear or illegible, he generally would not ask for more information.

Sometime after receiving the application, Bates received an email from Sgt. Elizabeth Hoffman of the Sheriff's Office asking to see a copy of the paperwork regarding the FMLA application. Because her doctor was sick, Mitchell was going to use sick time between June 15, 2015, and June 19, 2015, as well as vacation days so that her unpaid FMLA leave would then begin on June 22, 2015. It was after that that he learned Ms. Mitchell was going to be scheduled for a second opinion with Balogun.

Stephen Bates is the husband of Christina Bates, who was one of Ms. Mitchell's co-workers. Stephen Bates never discussed Mitchell's FMLA application with his wife.

Bates' next involvement (P-8) was in August 2015, when he learned that Mitchell had been instructed to return to work.¹ Bates prepared the letter as requested by Atkinson instructing Mitchell that she was required to return to work on the date indicated. Bates had no further involvement with Mitchell regarding her FMLA application or the discipline that was filed with regard to her refusal to return to work. Bates also confirmed on cross-examination that FMLA was governed by, as he understood it, federal law and required 1250 hours of time worked in the previous twelve months. Bates also indicated that he played no role in determining whether a second or third opinion from a medical provider regarding Mitchell's condition was necessary.

He also confirmed that if an employee or the County wants to get a second or third opinion, the employee remains out of work on an unpaid basis just as if their FMLA had been approved and continued.

Bates also indicated that the County (and Sheriff's Office) would allow an employee to submit additional medical information, even if a second and third opinion were obtained by the Employer. No additional medical information was provided.

Bates confirmed, as did Atkinson, that the application for FMLA, when initially approved, is conditional until and unless the County wants to obtain a second opinion. Even where they do, the unpaid leave status continues until the second or tiebreaking third opinion is received.

As to the two examining physicians on behalf of the Sheriff's Office, Bates indicated that Balogun was an occupational health physician who regularly evaluated County employees, pre-employment and otherwise, and Bernardini did not, to his knowledge, have any affiliation with the County, unlike Balogun (J-5).

Elizabeth Hoffman, a sergeant at Gloucester, worked in ID and Communications at the Sheriff's Office and had no supervisory responsibilities with respect to Mitchell. She

¹ The date per the transcript of P-8 is identified as 10/17/15 but the events related in the email took place in August.

initially learned about Mitchell's FMLA application from Undersheriff Santiago. She also kept the paperwork for the office because she was in Internal Affairs. She was aware of the scheduling of a tiebreaking third medical opinion from Bernardini. Sgt. Hoffman knew that the employee would be consulted. (R-1 and J-6.) Mitchell was consulted and agreed to the third tiebreaking exam by Dr. Bernardini.

Joshua B. Sundhar, M.D., a rheumatologist, testified that he saw Mitchell on May 15, 2015, and to his treatment records of that visit (P-9.) Mitchell indicated complaints with her hand, specifically pain and swelling of her left 4th PIP, which is the ring finger knuckle. She stated she had a family history of autoimmune disease. His observations were no abnormalities. In the physical examination of her hands, diagnostic studies such as blood work and x-rays revealed intermittent synovitis of the left 4th PIP. This is indicative of autoimmune arthritis—as opposed to osteoarthritis. He sent results of his evaluation to Shield's office on May 15, 2015 (P-10).

He then saw Mitchell on July 10, 2015 (P-15). Her blood work indicated a positive HLA-B27, a genetic marker which can be associated with psoriatic arthritis. Through her x-rays, he found evidence of osteoarthritis in her hands.

He made assessments of spondylopathy inflammatory unspecified, psoriatic arthritis, osteoporosis (based on the results of her bone density scan), and indicated future studies were needed. All three of these conditions can co-exist concurrently. He also indicated she had pitting of her fingernails, which is commonly associated with nails psoriasis and frequently found in patients with psoriatic arthritis. He diagnosed Heberden's Nodes, which occurs when you get bony swelling of the proximal interphalangeal joints in both hands, and it is a characteristic finding of osteoarthritis. He first noticed these nodes on July 10th, 2015, and prescribed non-steroidal anti-inflammatory medications. He did not recall Mitchell stating she was on FMLA or that she was having problems typing.

Kimberly Mitchell first started working for the Sheriff's Office in 2013. She began doing work as a keyboard clerk I, entering warrants that came in from the National Crime Information Center system as well as child support letters, answering calls, typing, filing,

etc. She said she first noticed problems with her hands in December 2014, in her right hand, forearm, and fingers. She went to see Dr. Shields, and Nurse Santucci took x-rays, which did not reveal anything wrong with her hands. She also indicated that she could not type as fast as she otherwise would be able to and let Sgt. Uhland know that. She was also given an ergonomic keyboard.

Ms. Mitchell said that the only difference between entering warrants and doing child support letters was that the computer from which she was taking information to do warrants would “time out” (P 16 L 19 to P 17 L 4). (See, however, Lt. Uhland’s testimony on 6/28/22, *infra*, as to “timing out”).

Ms. Mitchell said she had problems with her shoulders and arms for which she stated she would take Ibuprofen and Aleve (P 17 L 17–21). She saw Dr. Sundhar on a referral, and in May 2015, she was told that she had psoriatic arthritis (generally P 18 L 21 to P 20 L 12).

After Ms. Mitchell initially received the diagnosis and consultation from Dr. Sundhar, she never provided it to her immediate supervisor, Sgt. Uhland (P 21 L 9–14). She still claimed that she was struggling with her job, however, and that she wanted to go on FMLA (P 22 L 8–9; P 23 L 5–11).

Sometime thereafter Ms. Mitchell received communication that the County wanted to schedule another appointment for her to be evaluated by the County’s physician concerning her alleged problems. An appointment was made for June 25, 2015, at Inspira Occupational Health in Bridgeton. She attended that appointment and was seen by Balogun, who did an evaluation (J-5). She had taken a CD of the x-rays with her for that evaluation. Mitchell was aware that Balogun had rendered an opinion that she was to report back to work on July 8, 2015, with no restrictions. Mitchell then went back to Shields’ office and got another note from Santucci (J-4).

At that point, two medical providers had rendered differing opinions, and she received a phone call from Santiago telling her that she had been scheduled to see

Bernardini in August. Mitchell saw Bernardini on August 11, 2015. She claimed that she was "ordered" to see Bernardini.

Mitchell explained to him what she felt her complaints were and said it was difficult for her to use her hands. The doctor evaluated her and examined her hands, arms, and fingers.

Shortly after, Mitchell received a phone call from the Personnel Director, Craig Atkinson, stating that two of the doctors had determined that she was fit for duty. She also received a phone call from Santiago, at which time he gave her a direct order to return to work and advised that if she didn't return, she could be terminated, and implied that she could be disciplined for not following a direct order. She also received a letter in the mail telling her that she was supposed to return to work. She confirmed that she did not show up and she did not call. Her opinion was that she was on Family Medical Leave through September 7th and that she was not going to return until then. She then received a Preliminary Notice of Disciplinary Action. A hearing was held as to that on September 15, 2015. She did not report to work at any point after September 17, 2015.

Mitchell described Heberden's nodes on her fingers using photos that were taken in March 2021, and, in any event, she admitted that in May 2015 she had no such nodes on her fingers and that they didn't appear until July 2015.

Mitchell stated that none of her supervisors complained about the quality or the speed of her work prior to her FMLA application. When Mitchell went to see Santucci in July 2015, Mitchell did not tell her that she could not type seven hours a day and did not tell her that she couldn't type at all. She did tell her that she could not handwrite. Mitchell recalled that she told Nurse Santucci that she typed seven hours a day or that she typed "all day long."

Mitchell wrote a letter to Sheriff Austino (J-9) stating that she would not return to work until her Family Medical Leave was up. However, she did not do that, claiming that she felt that she was terminated. Ms. Mitchell never indicated to anybody at the Sheriff's Office that she intended to return to work at some point.

Kimberly Mitchell—January 9, 2023—Re-examination

I asked to speak with Mitchell again to clarify some issues. She testified to her time with the County and her medical professionals, stating that in 2015 she used Shields and Santucci as her primary care medical providers. She showed her hands to me.

Mitchell reiterated her testimony about the computer, which she used to do work at the Sheriff's Office, "timing out" and acknowledged that the computer system would turn off after a time frame and she would have to reboot the computer if she was not actively involved and working with the computer for a certain period of time. She stated that she wouldn't be disciplined if she "timed out" and said "I would get teased."

Mitchell confirmed that the last day she physically worked at the Sheriff's Office was on June 12, 2015.

L. Michelle Santucci, Ph.D., RN, APN testified to her records from December 2014 regarding Mitchell. X-rays were ordered, and they indicated arthritis and minimal degenerative changes to her second and third "DIP joints," meaning distal interphalangeal joints. Based upon her review, she diagnosed Hashimoto's Thyroiditis and referred Mitchell to Dr. Sundhar, a rheumatologist. The lab work was indicative of a connective tissue disease consistent with rheumatoid arthritis, but she needed to be seen by a rheumatologist. Sundhar diagnosed Mitchell with spondylopathy as well as psoriatic arthritis, and her physical examination showed tenderness in the joints of her fingers. Santucci referred to her note of June 11, 2015, to the Employer requesting that Mitchell be excused from work from June 15, 2015, to September 8, 2015. During a follow-up appointment, Ms. Mitchell indicated she was feeling better (less pain) but stated she could not handwrite (J-9).

Santucci's notes make a reference to "7 hours a day of typing." Mitchell went back to see Santucci on July 7, 2015. Balogun saw Mitchell on June 25, 2015, and rendered a report around July 7, 2017, released to Santucci—not given to Mitchell, who was cleared

for unrestricted work by Balogun as a result of this evaluation. Santucci confirmed that there was no finding of pitting of the fingernails based on her review of Sundhar's records.

Santucci said she had no contact with County representatives with regard to Ms. Mitchell's condition (P 41 L 21 to P 42 L 4). Similarly, she had no conversations or communications with Dr. Bernardini (P 42 L 5–8).

Although Santucci said she provided a medical certification saying that Ms. Mitchell could not perform her job functions, she conceded that she never had the opportunity to actually review Ms. Mitchell's job description (P 44 L 13–20). She never even reviewed it to determine what the functions of her position were (P 44 L 21–24). Ms. Mitchell said she typed seven hours a day. For a person who typed only a minimal amount during the day, Santucci conceded she would not find Ms. Mitchell disabled. Mitchell was shown P-20 on cross-examination with regard to a February 10, 2015, visit by Mitchell and indicated at that time that her primary complaint was right shoulder pain radiating to her arm and difficulty sleeping. During that exam, it appears that there was no inflammation of joints based on Santucci's review of the records. During the February 2015, visit, Santucci has no recollection of any difficulties with performance of job duties being mentioned. Nurse Santucci referred to the June 11, 2015, note from Sundhar, which related that Mitchell had psoriatic arthritis, right upper extremity joint pain, psoriasis of the scalp, difficulty sleeping, and a swollen left ring finger. Notably absent is any mention that she was unable to perform work duties. Similarly, Nurse Santucci could not recall Mitchell mentioning her ability to perform her job duties during the June 11, 2015, visit. Nor did she recall Mitchell asking about seeking FMLA because of pain in fingers and joints in her hands (P 55 L 19–22). Nurse Santucci's June 11th notes did not indicate that Ms. Mitchell was unable to work at her current position, and if Nurse Santucci felt that was the case, she said that she would have indicated as much in her notes (P 56 L 17–24). Nurse Santucci was specifically asked about what transpired between June 11, 2015, and the out-of-work note dated June 25, 2015, with respect to Mitchell, and she stated:

Q And what occurred between June 11, 2015 exam and June 25th memo approving her leave from June 22nd till September 7th that you believed she needed to be out of work?

A I don't -- I don't know how to answer that.

Q Well, let me rephrase it. So, on the June 11th note we saw that you didn't recommend that she would need FMLA leave or shouldn't -- or couldn't continue her position due to her fingers and swelling--

A No, I didn't document it.

Q -- do you recall that?

A Okay. Because I didn't document it.

Q Well, I'm just going off what you wrote in your note and you indicated earlier your practice --

A Yes.

Q -- would be to document it if it's raised to you; is that correct?

A Yes.

(6T, p. 58, 59)

Santucci also made reference to her July 7, 2015, examination, during which she noted that Mitchell "feels better since she is not working, the pain in her hands is less." Nurse Santucci also conceded that Sundhar never made a recommendation that Ms. Mitchell was unable to perform her job duties. Santucci stated as well that she was never asked or requested to write a report in response to Dr. Balogun's determination that Mitchell could perform her job duties and return to work. Nurse Santucci also issued the September 7, 2015, note for return-to-work on November 2, 2015, but could not recall any change in Mitchell's condition that occurred in the interim. Mitchell never mentioned that she was seen by Bernardini on August 11, 2015, but if it had been mentioned to Santucci, she would have included it in her notes. She had no recollection that Bernardini felt Mitchell could return to work in mid-August 2015. She was not asked to write a report in response to Bernardini's opinion. Santucci confirmed that she was never asked to write

any reports and that the only information she was providing was in her medical notes. Santucci also had no recollection of being aware that Mitchell had been removed from her position at the Cumberland County Sheriff's Office. She never became aware of that previously.

Scott Uhland, Lieutenant at the time of the hearing and Sergeant at the time of the incident, was Ms. Mitchell's direct supervisor. He was the Sergeant of the ID Communications Division. She was under his direct command until she departed from the Sheriff's Office in 2015. Lt. Uhland was specifically asked about Ms. Mitchell's work performance, and he stated that after she learned her job duties, her job performance was satisfactory and adequate and that she was never disciplined with regard to her job performance. Lt. Uhland explained the NCIC (National Criminal Information Center) and CJIS (Criminal Justice Information System). Ms. Mitchell used those computer programs to research the entry of warrants in child support and criminal matters. She would enter them into CJIS. All of this was done to facilitate arrests. When she did warrants for child support, she would also use a program known as New Jersey Kid.

Lt. Uhland was asked about Ms. Mitchell's testimony concerning "timing out" on the computer. He explained that the NCIC computer requires that you be at the terminal when you are using it, and if you let it sit, it will shut off. He says the fail-safe shut off is approximately twelve to fifteen minutes, and then the system would turn off and you would be required to log back in. Mitchell was never admonished or reprimanded due to "timing out" on the computer. Mitchell was never unable to complete her work in a satisfactory way due to timing out on a computer.

The only accommodation that Mitchell ever requested or needed, according to Uhland, was an ergonomic keyboard, but she never said that she could not complete her work because of any physical limitations. Uhland never had any notion that Mitchell could not perform her job due to physical limitations.

At some point, Ms. Mitchell was transferred because of manpower issues to type child support letters. According to Lt. Uhland, Ms. Mitchell was never unable to do that job either.

As to complaints about her physical condition and problems doing her job, Lt. Uhland indicated that while Ms. Mitchell may have made statements regarding physical problems, he stated as follows: "I don't know that there was ever an actual direct complaint made. I referenced earlier an ergonomic keyboard." He went on to say that she got it herself from somebody she knew at the County and did it of her own accord. He stated that after Ms. Mitchell got the ergonomic keyboard, she seemed to be happy with that and said it was much more comfortable as it was lower and she could adjust it.

In addition, Lt. Uhland said he never heard from anyone else, either the Undersheriff or the Sheriff, that they had issues with Ms. Mitchell's work performance. Lt. Uhland was not aware of any of the specifics of discipline that were being brought against Ms. Mitchell. He was informed after a replacement was being sought. With respect to the discipline, he stated: "I wasn't part of it. I wasn't privy to it. I was told after the fact."

DISCUSSION

A fact finder is obligated to weigh the credibility of witnesses. The fact finder must choose to accept or reject whether a witnesses' testimony is credible. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). Credibility is the value given to a witness' testimony. It is best described as that quality of testimony or evidence that makes it worthy of belief. "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Estate of Perrone, 5 N.J. 514, 522 (1950), (citations omitted).

A credibility determination requires an overall assessment of the witness' story "in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). The fact finder should also consider the witness' interest in the outcome, or any motive or bias. The fact finder may reject testimony because it is inherently incredible, improbable, inconsistent with common experience, contradicted by other testimony, or it is overborne

by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Christina Bates and Gina Strittmatter testified to their work as warrant entry clerks/ keyboarding clerks in the office. There were some disparities in their testimony, but they were uniform in that they did not type "7 hours a day." Bates was unaware of any issues Mitchell was having, and Strittmatter stated that she became aware of complaints by Mitchell about five or six months before June 2015. They testified plainly as to their duties and responsibilities, and there is no reason to doubt their veracity.

Undersheriff Michael Santiago testified credibly as to the procedures employed by the office in seeking additional medical reviews and that he was unaware of any issues Mitchell had before her application for FMLA. He testified to his conversations with Mitchell and the procedures he employed. He testified plainly as to his involvement and activities, and there is no reason to doubt his veracity.

Human Resources representative Craig Atkinson also testified to the forms, procedures, and actions he and his office took when processing an FMLA application. He stated that the reasons for the need for an additional review included the fact that Mitchell's FMLA form was signed by a nurse practitioner with no physician's note. He also stated that the office had no prior knowledge of any problems Mitchell was experiencing. As to the FMLA, an employee could continue their leave, provisionally, while other investigations occur. Atkinson testified to Mitchell's appointment with Dr. Balogun to obtain a second opinion and Dr. Bernardini for a third opinion after conferring with the Sheriff.

After the examinations of Balogun and Bernardini revealed no disabling issues, Atkinson concluded that Mitchell was no longer eligible for FMLA and informed her that she needed to return to work. He discussed possible accommodation for Mitchell and the impact that collective bargaining and civil service titles would have on potential accommodation. He testified to his activities and involvement with Mitchell's FMLA application and the procedures he employed. He testified plainly as to his involvement and activities, and there is no reason to doubt his veracity, although it appears that the

Human Resources department did not direct or manage this application as would be expected from a Human Resources department.

Sheriff Austino testified to his involvement and recollections regarding the FMLA application, his discussions with Atkinson, and crafting the disciplinary documents. He testified plainly as to his involvement and activities, and there is no reason to doubt his veracity, although it is disconcerting that he expressed his concern that Mitchell's FMLA could not go into November due to manpower concerns rather than arriving at an accurate review and consideration of the FMLA application.

Mitchell testified to the process and her physical issues. She agreed to the evaluations requested by the County notwithstanding her disagreement with their outcome. Subsequent to the evaluations, Undersheriff Santiago directed her to report back to work, and she did not do so. She said that she had advised that she would not be returning to work until her family medical leave was up, and she did not tell the Sheriff's Office that she intended to return to work. She was aware that if she did not return to work, there would be consequences.

Testimony as to her work and responsibilities was contradicted by Bates and Strittmatter, who testified that typing took roughly fifty percent to sixty percent of their time—not seven hours per day. She testified plainly as to her involvement and activities and physical conditions but considering the testimony of Bates and Strittmatter as to their work parameters, I find that Bates and Strittmatter were more persuasive in their testimony than Mitchell.

LEGAL ANALYSIS AND CONCLUSIONS

The Civil Service employee's rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to 11A:12-6. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointment and broad tenure protection. See, Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div.), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1971); Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147

(1965). The Act also recognizes that the public policy of this State is to provide public officials with appropriate appointment, supervisory and other personnel authority in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). A public employee who is thus protected by the provisions of the Civil Service Act may nonetheless be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are enumerated in N.J.A.C. 4A:2-2.3.

In an appeal concerning a major disciplinary action, the burden of proof is on the appointing authority to show that the action taken was justified. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). The State has the burden to establish by a preponderance of the competent, relevant, and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk License Revocation, 90 N.J. 550 (1982).

The first issue in this proceeding is whether a preponderance of the credible evidence establishes that the appellant's actions during the period from June 2015 to August 2015 constitute a violation of the charges set forth in the FNDA. If so, the second issue is whether the violation(s) warrants termination of employment or a lesser penalty, if any.

Mitchell is charged with violating the provisions of N.J.A.C. 4A:2-2.3 relating to insubordination; other sufficient cause; absence without leave for five consecutive days; and chronic or excessive absenteeism or lateness. Specifically, as follows:

1. Departmental Charges:

(a) Insubordination; and,

Administrative Charges:

(a) Insubordination; and,

(b) Other Sufficient Causes; and,

Bargaining Agreement Violation:

(a) Insubordination

....

2. Departmental Charges:

- (a) Absence without leave for 5 consecutive days;
and,

Administrative Charges:

- (a) Chronic or excessive absenteeism or lateness;
and,

Bargaining Agreement Violation:

- (a) Absence without notice for 5 days shall constitute
a resignation.

[J-12.]

"Insubordination" is not defined in N.J.A.C. 4A:2-2.3. Black's Law Dictionary 802 (11th 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." Therefore, the term "insubordination" incorporates not only acts of disobedience, but also acts of non-compliance and non-cooperation, and it can occur even where no specific order or direction has been given to the allegedly insubordinate person.

Here, when Mitchell was directed to return to work by Santiago, she did not do so on the date directed. The testimony and documents show that her approved FMLA period was June 22, 2015, to September 7, 2015. The County scheduled two medical reviews, neither of which found that Mitchell had physical ailments that would preclude her from her duties. The results of those reviews led the Director of Personnel to telephone Mitchell on August 14, 2015, and direct her to report to work on August 17, 2015. On August 18, 2015, Atkinson sent a letter to Mitchell advising her to report immediately or be subject to disciplinary action for job abandonment—the letter was received by Mitchell on August 22, 2015. She did not report on August 17, 2015, or thereafter.

No testimony or documentation contradicted this; therefore, I take that as **FACT**.

Accordingly, I **CONCLUDE** that respondent has demonstrated, by a preponderance of the credible evidence, that Mitchell's conduct on or about August 17, 2015, constituted insubordination in violation of N.J.A.C. 4A:2-2.3(a)(2), and that such charge must be **AFFIRMED**.

Under N.J.A.C. 4A:2-2.3(a)(4), an employee may be subject to discipline for chronic or excessive absenteeism. While there is no precise number that constitutes "chronic," it is generally understood that chronic conduct is conduct that continues over a long time or recurs frequently. Good v. N. State Prison, 97 N.J.A.R.2d (CSV) 529, 531. Courts have consistently held that excessive absenteeism need not be accommodated, and that attendance is an essential function of most jobs. See, e.g., Muller v. Exxon Research and Eng'g Co., 345 N.J. Super. 595, 605–06 (App. Div. 2001); Svarnas v. AT&T Communications, 326 N.J. Super. 59, 78 (App. Div. 1999) ("[a]n employee who does not come to work cannot perform any of her job functions, essential or otherwise").

In judging whether an employee's absenteeism is chronic or excessive, relevant factors include, among others, the number of absences, the time span between the absences, and the negative impact on the workplace. See Harris v. Woodbine Developmental Ctr., CSV 04885-02, Initial Decision, (February 11, 2003), adopted, Comm'r (March 27, 2003) <http://njlaw.rutgers.edu/collections/oal/>; Hendrix v. City of Asbury, CSV 10042-99, Initial Decision, (April 10, 2001), adopted, Comm'r (June 8, 2001) <http://njlaw.rutgers.edu/collections/oal/>; Morgan v. Union Cnty. Runnells Specialized Hosp., 97 N.J.A.R.2d (CSV) 295. There was no testimony nor documentation on other instances where appellant had either called out late for being tardy or called out late for being sick from work. Accordingly, I **CONCLUDE** that the respondent has failed to demonstrate, by a preponderance of credible evidence, that the appellant's conduct constitutes a violation of N.J.A.C. 4A:2-2.3(a)(4) (Chronic and Excessive Absenteeism), and that such charge must be **DENIED**.

The appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "other sufficient cause." 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.

Here, the appellant failed to comply with the County's directive concerning return-to-work. As discussed above, the public reasonably expects civil service employees to appear for work as required. The appellant provided no evidence to explain why she did not appear for work as directed. Accordingly, I **CONCLUDE** that respondent has demonstrated, by a preponderance of the credible evidence, that Mitchell's conduct on or about August 17, 2015, constituted other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12), and that such charge must be **AFFIRMED**.

PENALTY

When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); W.N.Y. v. Bock, 38 N.J. 500 (1962). In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to Bock, concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See In re Parlow, 192 N.J. Super. 247 (App. Div. 1983). Depending upon the incident complained of and the employee's past record, major discipline may include suspension, removal, etc. Bock, 38 N.J. at 522-24.

Here, respondent maintains that dismissal is the appropriate penalty. In considering whether dismissal is appropriate given the directives of HR and Mitchell's superiors to return to work on August 17, 2015, and her failure to do so, I took into account the testimony of Atkinson, Santiago, and Mitchell, as well as the report information. Although there is arguably a tighter procedure that could be followed by respondent, Mitchell did not, after appropriate investigation and direction, return to work. I

CONCLUDE that appellant's conduct warrants the discipline called for in the FNDA of dismissal.

ORDER

Based upon the foregoing, I **ORDER** that the charges as to insubordination; other sufficient cause; and absence without leave for five consecutive days embodied in the Final Notice of Disciplinary Action are **SUSTAINED**. It is **ORDERED** that the charges of chronic or excessive absenteeism or lateness are **REVERSED**. It is further **ORDERED** that appellant's removal, effective June 25, 2015, be **AFFIRMED**.

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.



December 9, 2024

DATE

CARL V. BUCK III, ALJ

Date Received at Agency:

Date Mailed to Parties:

CVB/tat

APPENDIX

Witnesses

For appellant:

Elizabeth Hoffman, Sergeant
Joshua Sundhar, M.D.
Kimberly Mitchell
L. Michelle Santucci

For respondent:

Christina Bates
Gina Strittmatter
Michael Santiago
Craig Atkinson
Robert Austino, Sheriff
Stephen Bates
Scott Uhland

Exhibits

Joint:

- J-1 Joint Stipulation of Facts
- J-2 Job Specification - Keyboarding Clerk 1
- J-3 Family and Medical Leave Act Application, dated June 16, 2015
- J-4 Michelle Santucci, PhD, RN, APN-Work Excuse, dated June 11, 2015
- J-5 Evelyn Balogun, MD - Patient Visit Summary and Instructions, dated June 25, 2015
- J-6 Email chain, dated July 30, 2015, to July 31, 2015
- J-7 Brad Bernardini, MD- Fit for Duty Evaluation, dated August 11, 2015

- J-8 Correspondence - Atkinson to Appellant, dated August 18, 2015
- J-9 Correspondence – Appellant to Austino, dated August 12, 2015, with work excuse, dated August 11, 2015
- J-10 Two Preliminary Notices of Disciplinary Action, dated August 24, 2015
- J-11 Cumberland County Sheriff's Office Rules and Regulations, effective April 8, 2013
- J-12 Two Final Notices of Disciplinary Action, dated October 29, 2015

For appellant:

- P-1 Email - Atkinson to Austino and Santiago, dated August 14, 2015, with Santiago's Handwritten Notes, dated August 17, 2015
- P-2 L. Michelle Santucci, PhD, RN, APN - Work Excuses, dated June 11, 2015 and July 7, 2015
- P-3 Email - Hoffman to Austino and Santiago, dated July 9, 2015
- P-4 Email chain, dated June 12, 2015
- P-5 Email - Stephen Bates to Austino, Scott Uhland and Elizabeth Hoffman, dated June 17, 2019
- P-6 Memorandum - Atkinson to Appellant, dated June 25, 2015
- P-7 Email - Atkinson to Elizabeth Hoffman, Austino and Santiago, dated June 22, 2015
- P-8 Email - Stephen Bates to Michael Santiago, dated August 17, 2015
- P-9 Joshua B. Sundhar, MD - Treatment Notes, dated May 15, 2015
- P-10 Joshua Sundhar, MD - Consult Letter, dated May 15, 2015
- P-11 X-ray - Sacroiliac Joint, dated June 9, 2015
- P-12 X-ray- Lumbar Spine, dated June 9, 2015
- P-13 X-ray - Bilateral Hands, dated June 9, 2015
- P-14 DEXA Scan, dated June 9, 2015
- P-15 Joshua B. Sundhar, MD- Treatment Notes, dated July 10, 2015
- P-16 Joshua B. Sundhar, MD- Treatment Notes, dated August 20, 2015
- P-17 Joshua B. Sundhar, MD- Curriculum Vitae
- P-18 Wikipedia printout- Heberden's Node
- P-19 Withdrawn

P-20 Jack M. Shields, MD- Records, December 18, 2014 to October 6, 2015

For respondent:

- R-1 Cumberland County Sheriff's Office Internal Affairs Investigation Report, dated August 26, 2015
- R-2 CDR - Telephone Conversation between Santiago and Appellant, dated August 17, 2015
- R-3 Cumberland County Policy No. 2.07 - Employee Benefits/ Family and Medical Leave of Absence, effective July 1993