A-7

STATE OF NEW JERSEY

In the Matter of Barbara James
Mercer County,
Department of Public Safety

CSC DKT. NO. 2015-764
OAL DKT. NO. CSV 12210-14

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 20, 2016 BW

The appeal of Barbara James, County Correction Officer, Mercer County, Department of Public Safety, 10 working day suspension, on charges, was heard by Administrative Law Judge Elia A. Pelios, who rendered his initial decision on May 12, 2016. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on October 19, 2016, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Barbara James.

Re: Barbara James

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
OCTOBER 19, 2016

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
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Nicholas F. Angiulo
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Attachment

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 12210-14

AGENCY DKT. NO. 2015-764

IN THE MATTER OF
BARBARA JAMES, MERCER COUNTY
DEPARTMENT OF PUBLIC SAFETY.

David B. Beckett, Esq., for appellant Barbara James (Law Office of David Beckett, attorney)

Kristina Chubenko, Assistant County Counsel, for respondent Mercer County Department of Public Safety (Arthur R. Sypek, Jr., County Counsel)

Record Closed: September 25, 2015 Decided: May 12, 2016

BEFORE **ELIA A. PELIOS**, ALJ:

STATEMENT OF THE CASE

Appellant, county corrections officer Barbara James (James), appeals her suspension by Mercer County Department of Public Safety (MCDPS, Appointing Authority, respondent), for a period of ten days, effective September 21, 2014. MCDPS sustained charges of chronic or excessive absenteeism or lateness in violation of N.J.A.C. 4A:2-2.3(a)(4) and Other Sufficient Cause - Chronic or excessive absenteeism from work without pay identified as A-4 on the Mercer County Public Safety Table of Offenses and Penalties.

PROCEDURAL HISTORY

On July 8, 2013, the Appointing Authority issued a preliminary notice of disciplinary action setting forth the charges and specifications made against appellant. On or about August 27, 2014, a final notice of disciplinary action sustained the charges set forth in the preliminary notice of disciplinary action, excluding conduct unbecoming a public employee, and imposed a ten-working day suspension. Appellant appealed, and the matter was filed at the Office of Administrative Law (OAL) on September 23, 2014, for a hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was heard on August 6, 2015. The record was held open to allow the parties to submit closing briefs, and the record closed on September 25, 2015. Orders were entered in this matter to allow for an extension of time in which to file the initial decision.

FACTUAL DISCUSSION

The parties stipulated that the docking of appellant's pay occurred and that there is no unresolved issue of fact regarding this issue before this tribunal.

The appointing authority called Captain Richard Bearden (Bearden). He is employed by Mercer County as a captain of the Correction Center. He has worked twenty-eight years with Corrections. He assists the warden on administration and custody, and administers discipline. He identified the final notice of disciplinary action (R-1) and explained that he initiated the charges. He also identified a request by appellant for leave for June 26, 2013, which was granted on June 25, 2013 (R-2).

Captain Bearden reviewed the matter in his official capacity. He stated that the appellant's pay was docked, as there was no vacation time available to her. Bearden described the procedure by which leave is requested. He noted that this was an emergency call, and that such requests are usually vetted before they are granted. In the current instance, however, the request was called in one shift prior to the shift for which leave was sought.

Bearden explained that Time and Attendance are located in the center of the facility, and their hours are Monday through Friday 7:00 a.m. to 4:30 p.m. The appellant's telephone call came in while the center was closed. The witness then identified a Kronos printout (R-3) which showed that the appellant was docked eight hours. Bearden then identified a time and attendance calendar for 2013 (R-4), which also showed the end of the previous year.

The appellant began the year with 17.25 hours of compensatory (comp) time, 120 hours of sick leave, 200 hours vacation, and 24 personal hours. Bearden indicated that comp time carries over, but that an employee does not accrue time while they are suspended. He then explained how time is calculated.

Bearden identified standard operating procedure 130 (R-5), which governs vacation requests. Items number 4 and 5 address immediate vacation time, and number 7 states that the employee is to keep track of their time. The official record is the time and attendance record. Although the regulation identifies and refers to an administrative sergeant, there currently is no one serving in such a role. Bearden identified a Table of Offenses and Penalties (R-6), which he states describes the current matter as a Step 3 Violation of item A4. He also identified the appellant's disciplinary history (R-7).

On cross-examination, the witness explained that CE on document R-4 meant comp time earned. He noted there were 60 hours of comp time earned, plus 17.6 hours carried over, for a total of 76.6 hours. Appellant took 8 days or 64 hours, leaving 13.26 hours of compensatory time as of June 4, 2013. He explained that suspension counts against the vacation allotment, and that since the appellant started with 25 days, due to her suspension she lost 1.9 days. This is because vacation time does not accrue during the time in which an employee is serving suspension. It was noted that the appellant on June 20, 2013, took part vacation/part comp time. Bearden explained that he often will send a notice to an employee when they were close to the end of their sick time, but did not need to do the same for vacation time. A policy does allow for immediate vacation to be granted, and that policy was followed. The appellant called the master control sergeant. Time and Attendance notified Bearden that the appellant's vacation time allotment was exceeded.

Bearden explained that comp time can cover vacation, but he does not know who wrote "docked" on the request (R-2), or when.

Barbara James, the appellant in this matter, testified on her own behalf. James stated that in 1996, she began employment as a corrections officer, and has served for nineteen years, minus layoff time. With regard to her time and attendance records (R-4), James stated that she was only given notice of her leave-time allowances at the start of the year. On June 25, 2013, she called to request an immediate vacation day. James works from 11:00 p.m. to 7:00 a.m., which is why she needed to make an immediate request. Sergeant Williams approved her request. Appellant checked to see if the slot was open to take the time, and had received no notification that her time was exhausted, or that time was taken away during her suspension. James knew that she had compensatory time available. As of June 19, 2013, she had taken twenty-two days, and believed that in the timeframe of June 20 to 23, 2013, she had plus or minus two days left.

Appellant did not know, or believe, that a suspension freezes the accrual of vacation time. Appellant did not know this was an issue until she received the preliminary notice of disciplinary action, which was attached to the transmittal documents dated on July 8, 2013.

The appellant also called Ray Peterson (Peterson), who is a corrections officer with twenty-five years of experience. Peterson is the president of Local 167, which is the appellant's bargaining unit, and is familiar with attendance policies and practices. He stated that time and attendance will, on occasion, combine types of leave to make a full day, and that there was no prohibition on that practice in 2013. Peterson further explained that comp time is earned by receiving comp time for overtime instead of pay. On cross-examination, Peterson stated he became the president of the bargaining unit in June 2014, and that he has never worked for the Time and Attendance department. He has served twice as vice president of the bargaining unit, from 2003 through 2006, accounting for two terms. He has always been active in the bargaining unit, and in 2013, he was an executive board member. Peterson acknowledged that he does not work the 11:00 p.m. to 7:00 a.m. shift as the appellant does.

Considering the testimony and evidence presented to me, I **FIND** that appellant requested an immediate vacation day for June 26, 2013. I further **FIND** that when she made such request, petitioner had no vacation time available to her. I further find that Standard Operating Procedure 130 places the responsibility on an employee to keep track of their leave time balances.

I further **FIND** that it is the policy of the Appointing Authority that vacation time does not accrue during a served period of suspension. Appellant states that she was unaware of this policy. Credibility is the value that a fact-finder gives to the testimony of a witness. The word contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963). The term has been defined as testimony, which must proceed from the mouth of the credible witness and must be such as our common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955); see also, Gilson v. Gilson, 116 N.J. Eq. 556, 560 (E. & A. 1934). A fact-finder is expected to base decisions on credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837 (1973). Credibility does not depend on the number of witnesses and the finder of fact is not bound to believe the testimony of any witness. In re Perrone, 5 N.J. 514 (1950). Considering the foregoing, it is noted that there is nothing inherently unbelievable about appellant's testimony and she appears to be sincere and straightforward in conducting her testimony. Accordingly, I **FIND** that petitioner was not aware of the Appointing Authority's policy that vacation time does not accrue during a served period of suspension and was therefore unaware of her vacation time balance when she made the vacation request.

CONCLUSION OF LAW

In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:-2.21; N.J.A.C. 4A:2-1.4(a). The authority must show 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, 90 N.J. 550 (1982).

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); West New York v. Bock, 38 N.J. 500 (1962).

Appellant has been charged with chronic or excessive absenteeism or lateness in violation of N.J.A.C. 4A:2-2.3(a)(4). Conduct that occurs over a period of time, or frequently recurs, is considered "chronic," and may be the basis of discipline or dismissal. N.J.A.C. 4A:2-2.3(a)(4).

"Just cause for dismissal can be found in habitual tardiness or similar chronic conduct." West New York v. Bock, 38 N.J. 500, 522 (1962). While a single instance may not be sufficient, "numerous occurrences over a reasonably short space of time, even though sporadic, may evidence an attitude of indifference amounting to neglect of duty." Ibid.

"There is no constitutional or statutory right to a government job. Our laws, as they relate to discharges or removal, are designed to promote efficient public service, not to benefit errant employees." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). However, approval of an absence shall not be unreasonably denied. N.J.A.C. 4A:2-6.2(b).

In Cumberland County Welfare Board v. Jordan, 81 N.J. Super. 406 (App. Div. 1963), a classified employee who was granted a leave of absence was improperly denied an extension of that leave because of the appointing authority's failure to provide proper notice of the denial; the appointing authority knew she was absent, was aware that she was confined to a hospital, and had previously granted the leave.

The record reflects that appellant had exhausted her vacation allotment as of June 20, 2013, and therefore had no vacation leave available to her when she requested approval for use of a vacation day on June 26, 2013. While the record reflects that appellant was unaware that vacation time does not accrue during a served period of suspension, and was therefore unaware of her actual leave balance, it has also been demonstrated that it is policy of the

MCDPS that petitioner is responsible to keep track of her leave time balance (R-5), and as such, appellant should have been aware of her available leave time. A review of the records would have informed her as to her balance even if she was unaware of the policy. Accordingly, I **CONCLUDE** that the Appointing Authority has met its burden in demonstrating, by a preponderance of credible evidence, that petitioner is **GUILTY** of a violation of N.J.A.C. 4A:2-2.3(a)(4). The charge of chronic or excessive absenteeism or lateness is **SUSTAINED**.

Appellant has also been charged with a violation of N.J.A.C. 4A:2-2.3(a)(11), Other Sufficient Cause. Specifically, appellant is charged with a step-three violation of A-4 on the Mercer County Public Safety Table of Offenses and Penalties which involves chronic or excessive absenteeism from work without pay. Item A-4 on that document appears to merely be suggested penalties for chronic or excessive absenteeism. As such, the analysis would likely be similar to that performed for the previous charge. Accordingly, I **CONCLUDE** that the charge of a violation of N.J.A.C. 4A:2-2.3(a)(11), Other Sufficient Cause, is redundant and is hereby **DISMISSED**.

PENALTY

N.J.S.A. 11A:2-19 and N.J.A.C. 4A:2-2.9(d) specifically grant the Commission authority to increase or decrease the penalty imposed by the appointing authority. Typically, the Board considers numerous factors, including the nature of the 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. Removal shall not be substituted for a lesser penalty. See, Sabia v. City of Elizabeth, 132 N.J. Super. 6, 15-16 (App. Div. 1974), certif. denied, Elizabeth v. Sabia, 67 N.J. 97 (1975).

"Although we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Bock, 38 N.J. 500, 523 (1962), that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990).

Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

In re Carter, 191 N.J. 474, 484 (2007), citing Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197-98 (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense); see also, In re Herrmann, 192 N.J. 19, 33 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline):

> . . . 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.
>
> Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

The record reflects that appellant has had a charge of chronic or excessive absenteeism or lateness in violation of N.J.A.C. 4A:2-2.3(a)(4) sustained. A review of appellant's disciplinary history informs that this would be at least a third such infraction. A-4 on the Mercer County Public Safety Table of Offenses and Penalties, although not binding upon this tribunal, recommends a ten-day suspension for a step-three violation. In consideration of the foregoing, along with appellant's disciplinary records, this appears to be a reasonable penalty consistent with progressive discipline.

ORDER

I **ORDER** that the charge of chronic or excessive absenteeism or lateness in violation of N.J.A.C. 4A:2-2.3(a)(4) be **SUSTAINED**. I further **ORDER** that the charge of N.J.A.C. 4A:2-2.3(a)(11) Other Sufficient Cause, specifically chronic or excessive absenteeism from

work without pay identified as A-4 on the Mercer County Public Safety Table of Offenses and Penalties be **REVERSED**. I finally **ORDER** that appellant's ten-working-day suspension also be **SUSTAINED.**

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

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

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

May 12, 2016
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: May 12, 2016

Date Mailed to Parties: May 12, 2016

EAP/nd

APPENDIX

WITNESSES

For Appellant:

Barbara James

Ray Peterson

For Respondent:

Captain Richard Bearden

EXHIBITS

For Appellant:

None

For Respondent:

R-1 Final Notice of Disciplinary Action (31-B), Civil Service Commission, State of New Jersey

R-2 Mercer County Correction Center, Request for Leave, dated June 25, 2013

R-3 Mercer County Correction Center, Administration, iSeries Timekeeper, Pay Period from June 14, 2013 to June 28, 2013

R-4 Mercer County Correction Center, Time and Attendance, End of Year Balance 2012

R-5 Standards and Operating Procedures, Mercer County Correction Center, Department of Public Safety, Effective Date: May 27, 1998

R-6 Mercer County Public Safety Table of Offenses and Penalties - Correction Center

R-7 Mercer County, New Jersey, User Defined Miscellaneous Information, dated June 6, 2014