A-4

STATE OF NEW JERSEY

In the Matter of Curtis Diaz
Mercer County,
Department of Public Safety

CSC DKT. NO. 2012-3507
OAL DKT. NO. CSV 08038-12

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 22, 2017 BW

The appeal of Curtis Diaz, County Correction Officer, Mercer County, Department of Public Safety, six working day suspension, on charges, was heard by Administrative Law Judge Elia A. Pelios, who rendered his initial decision on July 12, 2017. No exceptions were filed.

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 August 16, 2017, 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 Curtis Diaz.

Re: Curtis Diaz

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
AUGUST 16, 2017

Robert M. Czech, Chairperson
Civil Service Commission

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and
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. CSV 08038-12
AGENCY DKT. NO. 2012-3507

IN THE MATTER OF
CURTIS DIAZ, MERCER COUNTY
DEPARTMENT OF PUBLIC SAFETY.

Christopher A. Gray, Esq., for appellant (Alterman & Associates, LLC, attorneys)

Kristina Chubenko, Assistant County Counsel of Mercer County, for respondent

Record Closed: October 17, 2013 Decided: July 12, 2017

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

STATEMENT OF THE CASE

Appellant Curtis Diaz (Diaz) appeals a six-day suspension imposed by Respondent Mercer County Department of Public Safety (County), for violations of N.J.A.C. 4A:2-2.3(A) 4. Chronic or excessive absenteeism or lateness; N.J.A.C. 4A:2-2.3(A)6 Conduct unbecoming of public employee; and, N.J.A.C. 4A:2-2.3(A)12 Other sufficient cause, specifically, violating Section A-4 of the Mercer County Table of Offenses and Penalties—chronic or excessive absenteeism from work without pay. The matter arises from appellant allegedly calling off from work December 25, 28, and 29, 2011, without having any available sick time.

PROCEDURAL HISTORY

On January 11, 2012, the County served on appellant a Preliminary Notice of Disciplinary Action suspending him for ten working-days. On May 15, 2012, a departmental hearing was held. The County issued a Final Notice of Disciplinary Action suspending appellant for six working-days to be served July 6 through 8, and July 11 through 13, 2012. Diaz filed an appeal with the Civil Service Commission on or about June 6, 2012. The matter was filed with the Office of Administrative Law (OAL) as a contested case on June 15, 2012, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On June 25, 2013, respondent filed a summary decision motion. The appellant filed his opposition on August 23, 2013, and respondent replied to appellant's opposition to its motion on August 26, 2013. Oral argument was held on October 17, 2013.

FACTUAL DISCUSSION AND FINDINGS

Respondent, in bringing the herein motion, relying upon the certifications of Richard Beardon and Alejandra Silva, and the exhibits attached thereto, asserts the following factual basis:

Diaz is a corrections officer employed by the respondent. Appellant applied for leave pursuant to the Family Medical Leave Act (FMLA), 29 C.F.R. 825.100 et seq. through the County's personnel department and was approved for intermittent leave for the period of June 1, 2011 through December 1, 2011. On or about June 8, 2011, appellant was mailed correspondence advising him that he had been approved for intermittent leave for that specific period. The last day that appellant called off from work that was covered by the FMLA leave period was November 18, 2011. At the time that the approved FMLA period expired the appellant had forty-days of Family Leave time available to him. However, the period had expired December 1, 2011, and such leave is required to be taken during the relevant period. Appellant did not submit additional documentation seeking to extend the FMLA leave period.

Employees of the corrections department are provided fifteen sick-days per year pursuant to the terms of the collective bargaining agreement. Appellant had exhausted his sick-day allotment by June 27, 2011. On December 25, 28, and 29, 2011, appellant called out of work in accordance with the appropriate call-out procedure citing FMLA as his reason. The FMLA period had expired by this time, and appellant had no sick days remaining.

The appellant was charged by the respondent for calling off work those three days. It was noted that this was a step-three infraction, as appellant had been previously found guilty of a step-one infraction for calling off December 9 and 10, 2011, and of a step-two infraction for calling off on December 21, 2011.

The preceding statements appear to not be in dispute and are hereby **FOUND** as **FACT.**

In bringing the herein motion respondent argues that the foregoing constitutes sufficient factual basis to sustain the charges as presented, and that no issues of material fact exist and that summary motion should be granted.

Appellant does not appear to dispute the fact-pattern described above, and offers additionally that petitioner honestly thought that he had been granted a full year FMLA leave. Appellant argues that issues of material fact exist in that appellant disputes the appropriateness of the suspension, and whether his conduct supports sustaining the charges.

LEGAL DISCUSSION

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).

The respondent has sustained charges of violations of N.J.A.C. 4A:2-2.3(A) 4. Chronic or excessive absenteeism or lateness; N.J.A.C. 4A:2-2.3(A)6 Conduct unbecoming of public employee; and N.J.A.C. 4A:2-2.3(A)12 Other sufficient cause, specifically, violating Section A-4 of the Mercer County Table of Offenses and Penalties—chronic or excessive absenteeism from work without pay.

Respondent has brought the herein motion for summary decision. A motion for summary decision shall be granted if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged, and that the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(a). If a motion for "summary decision is made and supported, an adverse party in order to prevail, must by responding affidavit, set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding . . . If the adverse party does not so respond, a summary decision, if appropriate, shall be entered." Ibid. As respondent has brought multiple charges against appellant in this matter, a determination as to whether any genuine issue exists as to material fact must be made for each individual charge, as each charge may require a different set of material facts than another.

Respondent sustained charges against appellant for chronic or excessive absenteeism or lateness, 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 his sick leave allotment as of June 27, 2011, and therefore had no sick leave available to him when he called off work on December 25, 28 and 29, 2011. It further reflects that appellant applied for, and was granted, six-months of FMLA leave, for the period of June 1, 2011 through December 1, 2011. The record also reflects that appellant was provided notice of the period of his FMLA leave in June 2011, and that the period had expired when he called off work on December 25, 28, and 29, 2011. Finally, the record reflects that appellant had not sought to extend the FMLA period, and that employees of the respondent are expected to keep track of their available leave time.

It appears that the essential facts involving the herein motion are not in dispute as to the charge of chronic or excessive absenteeism or lateness, N.J.A.C. 4A:2-2.3(a)(4). To the extent that appellant argues (through attorney assertion rather than the required responding affidavit), that appellant was under a mistaken belief that he had been granted FMLA leave for a period of one year rather than six months. I **CONCLUDE** that such assertion does not constitute a dispute as to material fact, especially in light of undisputed evidence that appellant was given notice of the specific period for which leave had been granted. Additionally, appellant's argument that issues of material fact exist in that appellant disputes the appropriateness of the suspension, and whether his conduct supports sustaining the charges do not suffice, as while resolution of those points may well be fact specific, no question of the underlying facts exist. As such, these issues are resolved by applying facts to law and are not in and of themselves a factual dispute.

Therefore, pursuant to N.J.A.C. 1:12.5(b) and Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 523 (1995), I **FIND** that there are no genuine issues of material fact as to this charge, and that disposition of such is ripe for summary decision. Considering the facts as established, 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.**

Respondent also sustained charges against appellant for conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also, In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 [quoting In re Zeber, 156 A.2d 821, 825 (1959)]. Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) [quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)]. Suspension or removal may be justified where the misconduct occurred while the employee was off-duty. Emmons, supra, 63 N.J. Super. at 140.

In the present matter, the essential facts involving this motion are not in dispute as to the charge of conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6). Therefore, pursuant to N.J.A.C. 1:12.5(b) and Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 523 (1995), I **FIND** that there are no genuine issues of material fact as to this charge and that disposition of such is ripe for summary decision. The record reflects that appellant called off from work, having exhausted all available leave time. While such behavior is not to be encouraged, as evinced by the sustaining of the charge of excessive absenteeism, it can hardly be said to "offend publicly accepted standards of decency" or to otherwise undermine public confidence in the carrying-out of the public's business, especially if done so, as appellant contends, due to honest mistake. I **CONCLUDE** that the record does not support the sustaining of a charge of Conduct Unbecoming, and that charge 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 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, a six-day suspension appears to be a reasonable penalty consistent with progressive discipline. Appellant's argument that appellant is being penalized three times for calling off after the same FMLA period had expired due to what he terms a singular "honest mistake," is unpersuasive. The first and second infractions occurred when appellant called off work for December 9 and 10, 2011, and December 21, 2011, respectively, and only the third infraction is at issue in the current matter) The six-day suspension is **AFFIRMED.**

ORDER

I **ORDER** that respondent's motion for summary decision is hereby **GRANTED**. I further **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 charges of N.J.A.C. 4A:2-2.3(a)(6) Conduct unbecoming, and 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 **DISMISSED.** I finally **ORDER** that appellant's six-day suspension also be **AFFIRMED.**

This order may be reviewed by **CIVIL SERVICE COMMISSION** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

July 12, 2017
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: July 14, 2017

Date Mailed to Parties: July 14, 2017

EAP/nd