STATE OF NEW JERSEY

In the Matter of Thomas Coghan Middlesex County, Sheriff's Department	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC DKT. NO. 2017-2569 OAL DKT. NO. CSV 03358-17	

ISSUED: FEBRUARY 22, 2019 BW

The appeal of Thomas Coghan, Sheriff's Officer, Middlesex County, Sheriff's Department, 20 working day suspension, on charges, was heard by Administrative Law Judge Carl V. Buck, III, who rendered his initial decision on January 24, 2019. 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 February 20, 2019, 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 Thomas Coghan.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF FEBRUARY, 2019

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 03358-17
AGENCY DKT. NO. 2017-2569

IN THE MATTER OF
THOMAS COGHAN, MIDDLESEX
COUNTY SHERIFF'S DEPARTMENT.

Peter B. Paris, Esq., for Thomas Coghan, appellant (Law Office of David Beckett, attorney)

Benjamin D. Leibowitz, Senior Deputy County Counsel, Esq., for Middlesex County Sheriff's Department, respondent (Thomas F. Kelso, County Counsel, Middlesex County, attorney)

Record Closed: June 12, 2018 Decided: January 24, 2019

BEFORE **CARL V. BUCK III**, ALJ:

STATEMENT OF THE CASE

Middlesex County Sheriff's Officer Thomas Coghan ("appellant" or "Coghan") appeals the action by Middlesex County ("respondent" or "County") imposing a twenty-working-day suspension on grounds of abuse of leave time. Coghan was charged with chronic and excessive absenteeism other sufficient cause, N.J.A.C. 4A: 2-2.3 (a) 4 and N.J.A.C. 4A: 2-2.3 (a) 12.

Appellant contends that he had available time under the Family and Medical Leave Act (FMLA). He asserts that his absences were all legitimate and that, to the extent the charges are sustained, the penalty imposed is unreasonable and excessive.

PROCEDURAL HISTORY

Middlesex issued a Preliminary Notice of Disciplinary Action (PNDA) to appellant on October 20, 2016, requesting a twenty-working-day suspension. A departmental hearing was conducted on December 19, 2016 and a Final Notice of Disciplinary Action (FNDA) was issued to appellant on February 7, 2017. Coghan appealed the FNDA to the Civil Service Commission on February 10, 2017. The matter was transmitted to the Office of Administrative Law (OAL) where it was filed on March 9, 2017, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The parties appeared before the Honorable Bernard Goldberg, ALJ, t/a on June 6, 2017, for a settlement conference, but were unable to reach a resolution.

On June 20, 2017, this matter was assigned to the Honorable Joseph Ascione, ALJ and was subsequently reassigned to me on August 22, 2017. On October 30, 2017, I held a prehearing telephone conference with the parties and scheduled the hearing for December 11, 2017. The hearing was conducted on December 11, 2017 and the record left open for the parties to submit post-hearing briefs and responses following their receipt of the transcripts of the proceedings. The transcript was delayed, and briefs were submitted by both parties by June 8, 2018. The record closed on June 12, 2018 and extensions were requested by the undersigned and granted for the filing of this Initial Decision.

FACTUAL DISCUSSION

Coughlin had exhausted his[1] 2012, 2014, 2015 and 2016 sick, vacation, and personal time.[2] He was in "dock/suspended" status for these years. He was approved

[1] The Respondent alleged that this also occurred in 2011 but no testimony nor documentation was provided regarding 2011.
[2] This did not occur in 2013.

for, and used, FMLA in 2012, 2014 and 2015. Appellant has been charged with chronic and excessive absenteeism and other sufficient cause.

Testimony

Respondent

Kevin Harris (Harris), testified for respondent. Harris has been employed by the County as Undersheriff since February 2011. Prior to that he was employed at the Piscataway Police Department for twenty-seven years. He began at Piscataway in September 1982. During his employment there, he progressed in seniority and left as Chief of Police. He then worked in a private firm until joining the County in 2011. Harris testified to the following:

Harris' responsibilities as Undersheriff include making recommendations to the Sheriff regarding disciplinary matters. He made recommendations to the Sheriff, and the Sheriff had the final say. He identified the Amended PNDA, dated October 20, 2016 (R-1) as prepared by him. The PNDA charges mirrored the charges as contained in the FNDA, dated February 7, 2017. The FNDA imposed a twenty-working-day suspension.

Harris then identified and testified to the R-2 series of exhibits. He first dealt with the appellant's official record documenting vacation, sick and personal time for 2016. (R-2A). In 2016, appellant's vacation time was exhausted in September. His sick time was exhausted in May. His personal time was exhausted by the end of September. Harris confirmed that officers were responsible for keeping track of their own time. He also testified to R-2B, a detail of each day charged by the appellant to vacation, or sick, or personal, or any dock/suspension days. Appellant was on "dock/suspended" status on nine days in 2016 prior to May 4, 2016, when he had no paid sick time left.

He identified portions of R-2B dealing with appellant's vacation, sick and personal time for 2015 (U-4); dealing with the appellant's vacation, sick and personal time for 2014 (U-5); dealing with the appellant's vacation, sick and personal time for

2013 (U-6); and dealing with the appellant's vacation, sick and personal time for 2012 (U-7).

For 2016, Harris detailed that the appellant exhausted his paid leave time as of September 19, 2016 and his sick time as of May 4, 2016. He was on "dock/suspended" status on eight days.

For 2015, Harris detailed that the appellant exhausted his paid sick and personal time in October and his vacation time in December. He was on "dock/suspended" status on twenty-five days and used one FMLA day.

For 2014, Harris detailed the appellant's approved FMLA dates (November 14, 17–21, 24, December 1- 5, 8, 2014) and military leave dates (January 10, April 10-11, 23-25, 28-30, May 1-2, June 9–10, July 29-31, August 1, October 24, November 25-26, 2014) which were taken for service with the Air National Guard. The appellant exhausted his paid sick time in May and his vacation and personal time in September. He was on "dock/suspended" status on ten days and used FMLA days in November and December.

For 2013, Harris detailed the appellant's military leave dates (April 18-19, June 21-21, July 17, 22-26, 29-31, August 1-2, 2013). The appellant exhausted his paid sick time in May, his personal time in July and saved twenty-five of his paid vacation time through the end of December. He was on "dock/suspended" status on fifteen days.

For 2012, Harris detailed the appellant's FMLA dates (July 19-20, 23-27, 30-31, August 1-3, 6-10, 12-17, 20-24, 2012). The appellant exhausted his paid sick time in May and his vacation and personal time in July. He was on "dock/suspended" status on ten days and used twenty-eight FMLA days in July and August.

Harris also confirmed that the appellant was in dock/suspended status in the years 2011, 2012, 2014, 2015, and 2016, with varying amounts of suspension in each year. Appellant was not in "dock/suspended" status in 2013.

Harris identified R-3, a summary of appellant's discipline for excessive absenteeism from 2008 to 2016. This was based on the appellant's personnel file and the Internal Affairs (IA) file. A handwritten addition referred to an IA investigation regarding attendance and conduct unbecoming which ultimately resulted in a ninety-day suspension. (R-4). The disciplinary actions were documented in:

1. R-3A – September 26, 2008 - Settlement of Charges, Attendance, Verbal warning;

2. R-3B – May 27, 2009 - Absenteeism, Verbal Warning;

3. R-3C - January 13, 2010 – Attendance; and punctuality, written reprimand;

4. R-3D – November 19, 2012 - exhaustion of time for the year "As of July 26, 2012, you've used all of your time for this year, and you are docked – you are on docked time which exhibits a pattern of excessive abuse of time for the days 9/6/12, 10/22/12, 10/31/12, and 11/15/12. You were issued a First Notice 11/2/12. You have been docked a total of 12 days this year. Action to be taken – This will serve as a written reprimand. Any future violations can result in more serious disciplinary action."

5. R-3E – July 18, 2013 - chronic/excessive absenteeism; references issuance of a written warning on 5/30/2013 for excessive use of sick time; as of 5/15/2013 Coghan exhausted his annual allotment of sick days, he then called out sick on 5/29/13 and 7/16/2013 – suspension of one day;

6. R-3F - August 29, 2013 – chronic/excessive absenteeism; references prior discipline of written warning on 5/30/2013 for excessive use of sick time; and prior disciplinary reference that of 5/15/2013 Coghan exhausted his annual allotment of sick days, he then called out sick on 5/29/2013 and on 7/16/2013, for which he was suspended on 7/18/2013 for one day for chronic/excessive absenteeism, and on 8/29/2013 he "called out .5 am sick" for which Coghan received a three (3) day suspension without pay;

7. R-3G – June 5, 2014 – "excessive use of sick time. Any further abuse will result in more progressive discipline" –

oral warning (referred to by Harris (sic) as an "oral reprimand");

8. R-3H - July 15, 2014 – "you received an oral warning on 06 – 05 – 14 due to your excessive use of sick time. You are now receiving a written warning. As of this notice you have zero sick days, 1 personal day, and 2 ¼ vacation days remaining. Any further abuse will result in more progressive discipline" - second written warning;

9. R-3I - October 15, 2014 – excessive absenteeism. "On 6 – 4 – 2014 you were given an oral reprimand for excessive absenteeism. On 7 – 15 – 2014 you were given a written reprimand for the same violation. On 10 – 6 – 2014 and 10 – 7 – 2014 you called out sick after exhausting all of your allotted 2014 sick time" – one day suspension;

10. R-3J (1) - January 20, 2016 – settlement agreement relating to charges dated December 15, 2015. The agreement states in pertinent part through the last five (5) of eleven (11) numbered paragraphs the following:

> 1. The Sheriff agrees to dismiss the following charges against Coghan as part of this settlement agreement – Conduct in becoming a public employee, attendance and punctuality, and other sufficient cause.
>
> 2. The Sheriff also agrees as to part of the settlement agreement to reduce the discipline charge from a 20 day suspension without pay to a 10 day suspension without pay, of which 5 days shall be served in 5 days shall be stayed for the period of up to one year to January 20, 2017, provided that Coghan does not repeat within the time period being in a "dock" situation due to having exhausted all of his available paid leave time and pre—authorized unpaid leave time that he may have applied for and been granted by the Sheriff.
>
> 3. In the event that Coghan is absent in the aforesaid one year period without having any paid leave time or any pre-authorized unpaid leave time granted by the Sheriff, then the 5 suspended days shall be subject to being imposed upon him for the instant charge of chronic/excessive absenteeism, in addition to any other disciplined that the circumstances may warrant.

4. Coghan shall be reimbursed at this time for 17 days (for 15 of the 20 days that he was suspended without pay, plus 2 additional days, one day for the holiday of Christmas and one day for the holiday of New Year, 2016.

5 In return for the Sheriff agreeing to the above terms and conditions, Coghan agrees to plead to the charge of chronic/excessive absenteeism for being absent without paid leave time or pre—authorized unpaid leave time on December 3, 4, 7, 8, 9, 10, 11 and 14, 2015 and to the aforesaid ten-day suspension without pay, of which 5 days shall be served at this time in 5 days shall be stayed pursuant to the terms and conditions set forth above.

This notice reflects a sustained charge of chronic/excessive absenteeism arising from incidents of being in "...[A]bsent/sick/doc from work for 8 continuous days. The days were December 3, 4, 7, 8, 9, 10, 11 and 14, 2015. This is a continued pattern of excessive and chronic abuse of sick time." The discipline was originally listed as a suspension for 20 days. However, pursuant to the settlement agreement, it was settled for a 10-day suspension, with 5 days to be served immediately and the remaining 5 days to be held in abeyance for the period of up to one year (to January 20, 2017). Provided that Coghan did not repeat within this time period being in a "dock" situation due to having exhausted all of his available paid leave time and pre-authorized unpaid leave time that he may have applied for and been granted by the sheriff. If Coghan failed to satisfy this requirement, the 5 suspended days were to be imposed on Coghan for that charge of chronic/excessive absenteeism in addition to the other disciplined that the circumstances warranted. This information was contained in R-3J (2).

11. R-3K (1) and R-3L (1) – September 23, 2016. These were 2 related notices of minor disciplinary action.

a. The first (R-3K (1)) charged chronic/excessive absenteeism dealing with an event on 9 – 19 – 2016 in violation of the settlement agreement of 1 – 20 – 2016. This was to require that the 5 days held in abeyance be served;

> b. The second, (R-3L (1)), also charged excessive absenteeism stating that "On 5-4-2016 you exhausted all your sick time." A three-day suspension was imposed for that violation. The total suspension for these two violations being eight (8) days on October 4 - 6, and 17-21, 2016.

Harris then provided information on the County's FMLA processes. FMLA had been previously handled through the County's Human Resources (HR) Department but is currently contracted out to "FMLA Source" which is an independent provider retained by the County.

On cross-examination Harris stated that he, in conjunction with the Sheriff, picked the twenty-day period for the suspension. Harris was aware that the appellant had prior back injuries from an incident in 2012. Neither he nor anyone else interviewed Coghan when Coghan missed work on September 19, 2016 or October 7, 2016.

Appellant's counsel asked for clarification on whether appellant was being punished multiple times for the same violation. Harris stated that his interpretation was that the violations constituted separate issues. Specifically, the concept of progressive discipline gave the County the ability to look at appellant's entire history of absenteeism or to impose a progressive twenty-day suspension in R-1. He reviewed the appellant's attendance problems back to 2008. Coghan had also violated the terms of his settlement agreement of January 20, 2016; thus, triggering the penalty which had been held in abeyance through the terms of that agreement. Thus, Coghan was not being disciplined multiple times for the same offense, but that the prior disciplinary history was used for the progressive discipline imposed here.

Harris was questioned regarding why the minor disciplinary charges in R-3K (1) and R-3L (1) were not removed from Coghan's personnel file. The reason was, as there were pending charges against Coghan (in R-1) at the time Coghan sent a written request, the policy of the sheriff's office was that the charges in the file at that time would remain in the file and would not be removed.

Harris also identified R-4 and the FNDA, dated June 29, 2015, for which Coghan received a ninety-day suspension. This was related to prior sustained charges of absence from duty and other charges from 2013. R-5 was identified by Harris as a summary of Coghan's entire disciplinary record from 2008 through 2016

Harris did not recall Coghan ever speaking to Harris regarding his (Coghan's) absences.

Through extensive questioning, Harris further explained the terms and conditions of P-1. This explained the understanding whereby the agreement would be expunged if there was not a repetition of the same infraction within the same year. He did recall that the appellant had approval for FMLA but did not recall the year. Further, use of FMLA time would not constitute a violation of the agreement terms. Harris also stated that he did recall that the appellant was out on October 7, 2016 and that that absence was due to an injury necessitating appellant's thumb being drained from an abscess.

Exhibits R-3, R-3a and R-5 were then admitted, noting objection by counsel for the appellant.

Appellant

Thomas Coghan testified on his own behalf to the following: He detailed his prior work experience, stating that he was in his eleventh year with the sheriff's office. He was previously employed by Bristol-Myers Squibb as a captain of security, as a store detective with ShopRite and had served in the US Marine Corps from 1995 through 2004. He joined the United States Air Force Reserves and subsequently the New Jersey Air National Guard as security forces.

He detailed what led to his injury in July 2012, while working with the Edison Police Department setting up a traffic pattern. He was out on Worker's Compensation for approximately two months because of that injury, which had a residual effect of

tightness, cramping and difficulty with day-to-day functions. He also discussed his continuing pain from that injury.

Coghan stated that although the Sheriff's Office does many things, he is mostly assigned to a Civil Judge. He suffered from Lyme's disease. This was contracted while he was under a termination[3], in July 2016. He exhibited symptoms of Lyme disease beginning at that time. He also discussed how he deals with the continuing effects of the Lyme disease.

Coghan detailed his experiences with FMLA beginning in 2012. He stated that "they" were very helpful in assisting him with the documentation and the process, as he was not knowledgeable about FMLA. At that time the FMLA process was "shepherded" by the HR department.

In January 2016, the county retained the services of "FMLA Source", a company to handle FMLA and Worker's Compensation matters. From that point forward there was not a physical packet of documents to complete and the process was done via computer (through an App). Coghan was not aware how the process worked and stated that, "I had asked around to some of the Officers. They really didn't point me in the right direction." (Transcript p. 87, l. 13). He reviewed R-1 and testified as to the disciplinary notice on September 19, 2016, which stated that he had exhausted all his paid time off. Coghan believed he was out for his back and a note for this time was provided. He did not have FMLA available at that time. He subsequently had FMLA coverage later in the Fall of 2016 as, "Later in the fall I did go online and get the APP and was taught how to access it and I did put in my request with my doctor." (Transcript p. 88, l. 7).

He was out of work on October 7, 2016, because he had dropped a block on his finger the day before while working in his yard. He identified the bill for the procedure where his swollen finger was drained. (P-2).

[3] This termination was the subject of a prior disciplinary action and was subsequently modified to a ninety-day suspension.

He testified as to his back injuries and 2013 and 2014 and stated that at least ninety percent of his absences and 2016 were related to his back injuries.

He spoke about his first Worker's Comp injury, occurring on July 4, 2012, and to a second injury occurring, he believed, in September 2013. He also spoke about a number of absences over a two-year period for military leave; other absences for worker's compensation; and absences related to temporary disability including his contracting Lyme disease in September 2015.

When discussing his military leave, he stated, "...you submit a Military Leave Request Form and you enter the days on Infoshare if able. And also on ESS, Employer Self Service." (Transcript p. 91, l. 6). Appellant also clarified an occurrence from his involvement with the Middlesex County Search and Rescue Team. He had (Military) Drill on a Thursday through Sunday. He requested vacation Monday to Wednesday pending a decision from his unit to allow him time off from Drill. He received a last-minute decision and intended to attend the class on Monday but was not allowed to sign in as he arrived late, so he did not attend the course. He indicated, "When I came back to work, maybe a couple days later, maybe a week or so later when I was reviewing Infoshare, the system that documents everything. I noticed that they were still entered as Military days, therefore I was excused from the Military. So I called Chief Mackowitz (sp.) to take 2 of his vacation days in lieu of the Military because the Military had released him for those 2 days."

On cross-examination the appellant testified that in 2012 he received a packet to apply for FMLA. He gave a brief description as to what was in the packet and the necessity for a doctor's certification. In 2012 and at least one other time (2014 into 2015) he was received leave under FMLA. Having FMLA available was beneficial to someone with a back condition but he had not applied for FMLA for the case at hand until after he had received the charges detailed in the FNDA.

He thought that he would not be penalized if he provided doctor's notes for visits when an absence involved a medical issue.

The appellant was also questioned on R-3J(1), the Settlement Agreement signed on January 20, 2016, and the eight-day absence which led to the disciplinary action of January 20, 2016. Coghan did not know why he was absent for those eight days; if it related to back issues, the flu, or something else.

Finally, the appellant was questioned on the County's ESS (Employer Self Service system) and if he was aware of the County's HR policy (on ESS). He was aware of ESS but not the HR policy. He stated that County policies are on PowerDMS (a website accessible to Sheriff's Officers). He stated that he was unaware of how to access the HR policy on the computer and was told it was online. He then spoke with someone who told him there was an App which could be downloaded to put in a request. He could not say when he found out about the App but spoke with "other officers". He did not notify anyone in the Sherriff's Office that he wanted to apply for FMLA but could not access the system as he had doctor's notes for his absences. He admitted that he had been disciplined for absences notwithstanding he had doctor's notes but did not understand why he was being disciplined.

As a union employee, the appellant was also questioned on whether he had consulted with a union representative on this issue but the appellant demurred. He continued to assert that he did not understand why he was being disciplined even though he had doctor's notes for his absences.

CREDIBILITY

Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950).

A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may reject testimony as "inherently incredible" and may also reject testimony when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Similarly, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the . . . [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Cmty. Affairs Dep't, 182 N.J. Super. 415, 421 (App. Div. 1981).

After reviewing the evidence, I make the following **FINDINGS of FACT:**

1. Coughlin has been employed by Middlesex County as a Sheriff's Officer since approximately 2007. He has had several disciplinary infractions imposed and has been suspended on several occasions; specifically, in 2012, 2013, 2014 and 2016. Those infractions concerned matters including (and other than) absenteeism - the conduct presently at issue.

2. In 2016, appellant exhausted his paid leave time as of September 19, 2016 and his sick time as of May 4, 2016. He was on "dock/suspended" status on eight days.

3. In 2015, appellant exhausted his paid sick and personal time in October and his vacation time in December. He was on "dock/suspended" status on twenty-five days and used one FMLA day.

4. In 2014, appellant had approved FMLA dates (November 14, 17–21, 24, December 1-5, 8, 2014) and military leave dates (January 10, April 10-11, 23-25, 28-30, May 1-2, June 9–10, July 29-31, August 1, October 24, November 25-26, 2014) which were taken for service with the Air National Guard. He exhausted his paid sick time in May and his vacation and personal time in September. He was on "dock/suspended" status on ten days and used FMLA days in November and December.

5. In 2013, the appellant had military leave dates on April 18-19, June 21-21, July 17, 22-26, 29-31 and August 1-2, 2013. He exhausted his paid sick time in May, his personal time in July and saved twenty-five of his paid vacation time through the end of December. He was on "dock/suspended" status on fifteen days.

6. In 2012, the appellant had FMLA dates on July 19-20, 23-27, 30-31, August 1-3, 6-10, 12-17, 20-24, 2012. He exhausted his paid sick time in May and his vacation and personal time in July. He was on "dock/suspended" status on ten days and used twenty-eight FMLA days in July and August.

7. The appellant was in "dock/suspended" status in the years 2012, 2014, 2015, and 2016, with varying amounts of suspension in each year. Appellant was not in 'dock/suspended" status in 2013. Although the County asserts that the appellant was in "dock/suspended" status for 2011, it did not provide any specific testimony or documentation regarding 2011.

CONCLUSIONS OF LAW

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk,

90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Both guilt and penalty are redetermined on appeal from a determination by the appointing authority. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

Here, Middlesex has charged Coghan with chronic/ excessive absenteeism, N.J.A.C. 4A: 2-2.3(a)4 and other sufficient cause, N.J.A.C. 4A: 2-2.3(a)12

As to the charge of chronic/excessive absenteeism, N.J.A.C. 4A: 2-2.3(a)4, 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 work place. See Harris v. Woodbine Developmental Ctr., CSV 4885-02, 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; Bellamy v. Twp. of Aberdeen, Dep't of Pub. Works, 96 N.J.A.R.2d (CSV) 770. It is further recognized that "numerous occurrences" of habitual tardiness or similar chronic conduct "over a reasonably short space of time, even though sporadic, may evidence an attitude of indifference amounting to neglect of duty." West New York, 38 N.J. at 522. And "excessive absenteeism is not necessarily limited to instances of bad faith or lack of justification on the part of the employee who was frequently away from [his or] her job." Terrell v. Newark Hous. Auth., 92 N.J.A.R.2d (CSV) 750, 752; see also Bellamy, 96 N.J.A.R.2d at 772.

I **CONCLUDE** that the County has met its burden of proving charges of chronic/excessive absenteeism against Coghan. Coghan has established a pattern of taking all of his time (sick, vacation and personal) before the end of the year - usually

several months before the end of the year.[4] Exhaustion of allotted time several months before the end of the year is understandable in the event of an emergency, or exigent circumstances, or an unknown intervention. Scheduling of vacations and specific time management procedures could also be employed with the result that allotted time would be used before the end of the year; however, the appellant's exhaustion of allotted time several months before the end of the year was a standard practice.

Using the time to which an employee is entitled is not an issue, nor the issue here. However, when exhibiting chronic absenteeism (four out of five years in my opinion constitutes a chronic condition) there is an impact on one's employer. When serving in a paramilitary entity such as a sheriff's office scheduling is critical. It is critical to the appellant's supervisors. It is critical to appellant's coworkers. It is critical to those to whom he is assigned. And, it is critical to the public. Proper planning, scheduling, coverage and time management cannot be achieved when an employee shows a disregard to his employer, his fellow employees and to the public. The appellant had the opportunity to use FMLA in 2016 (as he had done in prior years); however, he stated that he did not understand how to use the App. He testified that he spoke to other officers and that did not provide any benefit. He did not testify that he had spoken with anyone in administration or HR – the places where he should have made inquiries.

Although Coghan states that at least ninety percent of his time used in 2016 was related to his back injuries, he does not support this claim with any documentation, doctors' notes, receipts, treatment plans, etc. Nor, considering that this would use a substantial amount if his allotted time off, did he make an effort to obtain FMLA approval until after a disciplinary charge was made – in October. In considering the pattern of sick time, the absences from the workplace and the imposition of "dock" time it is evident that appellant's time away from work was excessive. It would have been impossible for Coghan, with attendance of this sort, not to have neglected his duties. Further, Coghan's failure to inquire as to FMLA procedures with administration or HR compels me to sustain the charge of chronic/excessive absenteeism.

[4] With the exception of two of the years reviewed where the appellant had vacation time remaining until the end of the year.

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).

Accordingly, I **CONCLUDE** respondent has demonstrated, by a preponderance of credible evidence, that appellant's conduct constitutes with a violation of N.J.A.C. 4A:2-2.3(a) (4) (Chronic and Excessive Absenteeism), and that such charge must be **SUSTAINED.**

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. As detailed above, appellant's conduct was such that he violated a standard of good behavior in allowing himself to fall into a pattern of chronic and excessive absenteeism.

Accordingly, I **CONCLUDE** respondent has demonstrated, by a preponderance of credible evidence, that appellant's conduct constitutes with a violation of N.J.A.C. 4A:2-2.3(a) (12) (Other Sufficient Cause), and that such charge must be **SUSTAINED.**

PENALTY

A civil service employee who commits a wrongful act related to his duties may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). This requires a de novo review of appellant's disciplinary action. 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 West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). The question to be resolved is whether the discipline imposed in this case is appropriate.

The County seeks to suspend the appellant for twenty working days for his actions. In his eleven years as a Sheriff Officer, the appellant has been disciplined twelve times previously – all relating, in some fashion, to attendance or abseentism issues. The details of those actions are contained herein.

After having considered the proofs offered in this matter and the impact of the appellant's behavior upon the Sheriff's Office, the potential impact upon the Sheriff's Office workforce and the potential impact upon the public, and after having given due deference to the principal of progressive discipline, I **CONCLUDE** that appellant's violations are significant enough to warrant a penalty, which, in part, is meant to impress upon him the seriousness of his failure to comply with several important policies. The petitioner did not comply with the policies and did not evidence a meaningful intention to comply.

The record reflects that appellant has had prior charges of chronic or excessive absenteeism or lateness in violation of N.J.A.C. 4A:2-2.3(a)(4) sustained resulting in oral warnings, written warnings/reprimands, a one-day suspension, a three-day suspension, a ten-day (reduced from twenty day) suspension[5]. A review of appellant's disciplinary history shows that this would be the fourth such infraction. In consideration of the foregoing, along with appellant's disciplinary record, a twenty-working-day suspension appears to be a reasonable penalty consistent with progressive discipline. Appellant's argument that he is being penalized multiple times for the same offense is unpersuasive. Appellant's argument that he thought he was eligible for FMLA is also

[5] The terms of the underlying agreement being violated by the appellant.

unpersuasive. Therefore, I **CONCLUDE** that the action of the County in suspending the appellant for twenty working days is reasonable and consistent with progressive discipline and should be **AFFIRMED.**

DECISION AND ORDER

The appointing authority has proven by a preponderance of credible evidence the charges against Coghan with a violation of charging him with chronic and excessive absenteeism other sufficient cause. N.J.A.C. 4A: 2-2.3 (a) 4 and N.J.A.C. 4A: 2-2.3 (a) 12. I **ORDER** that these charges be and are hereby **SUSTAINED.** Furthermore, I **ORDER** that the penalty of a twenty-working-day suspension is hereby **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, P.O. 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.

January 24, 2019
DATE

CARL V. BUCK III, ALJ

Date Received at Agency: 1/24/19

Date Mailed to Parties: 1/24/19

/lam

LIST OF EXHIBITS

Joint Exhibits:

J-1 R-1
J-2 R-2a
J-3 R-2b
J-4 R-4
R-3 Thomas Coghan Sick Time Record

For appellant:

P-1	Middlesex County Sheriff's Office memo, dated November 23, 2016
P-2	Doctors MediCenter PA itemized Statement for Thomas Coghan, dated November 18, 2016

For respondent:

R-1	Preliminary Notice of Disciplinary Action (31A), dated October 20, 2016
R-2A	Middlesex County HR Summary 2016 for Thomas James Coghan
R-2B	Middlesex County HR Summary for Thomas James Coghan
R-3	Thomas Coghan Sick Time Record
R-3A	Sheriff's Office Middlesex County Settlement of Charges
R-3B	Sheriff's Office Middlesex County Discipline Notice
R-3C	Sheriff's Office Middlesex County Discipline Notice
R-3D	Middlesex County Employee Warning Notice, dated November 19, 2012
R-3E	Notice of Minor Disciplinary Action, dated July 18, 2013
R-3F	Notice of Minor Disciplinary Action, dated August 29, 2013
R-3G	Middlesex County Employee Warning Notice, dated June 5, 2014
R-3H	Middlesex County Employee Warning Notice, dated July 15, 2014
R-3I	Notice of Minor Disciplinary Action, dated October 7, 2014

R-3J(1)	Settlement Agreement
R-3J(2)	Preliminary Notice of Disciplinary Action, dated January 20, 2016
R-3K	Middlesex County Sheriff's Office Memo, dated September 21, 2016
R-3K(1)	Notice of Minor Disciplinary Action, dated September 23, 2016
R-3L(1)	Notice of Minor Disciplinary Action, dated October 7, 2014
R-3L(2)	Middlesex County Sheriff's Office Notice, dated September 23, 2016
R-4	Final Notice of Disciplinary Action, dated June 29, 2015, with attached documents
R-5	Discipline Record 2008 – 2016
U-4	2015 Summary of Time
U-5	2014 Summary of Time
U-6	2013 Summary of Time
U-7	2012 Summary of Time

LIST OF WITNESSES

For appellant:

Thomas Coghan

For respondent:

Kevin Harris, Undersheriff