STATE OF NEW JERSEY

In the Matter of Frederick Doll, III Ancora Psychiatric Hospital, Department of Health	:	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC DKT. NOS. 2018-3258 & 2018-3259 OAL DKT. NOS. CSV 07910-18 & 07911-18 **(Consolidated)**	:	

ISSUED: MAY 22, 2020 BW

The appeal of Frederick Doll, III, Senior Food Service Handler, Ancora Psychiatric Hospital, Department of Health, removal and resignation not in good standing effective October 19, 2017, on charges, was heard by Administrative Law Judge Tricia M. Caliguire, who rendered her initial decision on April 8, 2020. 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 May 20, 2020, 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 actions of the appointing authority in removing and resigning the appellant not in good standing were justified. The Commission therefore affirms those actions and dismisses the appeals of Frederick Doll, III.

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 MAY, 2020

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
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. CSV 07910-18
AND CSV 07911-18
AGENCY DKT. NOS. 2018-3258
AND 2018-3259

IN THE MATTER OF FREDERICK DOLL, III,
NEW JERSEY DEPARTMENT OF HEALTH,
ANCORA PSYCHIATRIC HOSPITAL.

William A. Nash, Esq., for appellant (Nash Law Firm LLC, attorneys)

Alexis F. Fedorchak, Deputy Attorney General, for respondent (Gurbir S. Grewel, Attorney General of the State of New Jersey, attorney)

Record Closed: March 23, 2020 Decided: April 8, 2020

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

STATEMENT OF THE CASE

Appellant Frederick Doll, III (Doll), appeals the decisions of respondent, New Jersey Department of Health (DOH, the Department), to remove him from his position as a Senior Food Handler at Ancora Psychiatric Hospital (Ancora), and to record him as having resigned not in good standing, both effective October 19, 2017.

PROCEDURAL HISTORY

On October 24, 2017, respondent issued to appellant a Preliminary Notice of Disciplinary Action (PNDA) charging him with: chronic or excessive absenteeism or lateness pursuant to N.J.A.C. 4A:2-2.3(a)(4); conduct unbecoming a public employee pursuant to N.J.A.C. 4A:2-2.3(a)(6); other sufficient cause pursuant to N.J.A.C. 4A:2-2.3(a)(12); abandonment of a job as a result of absence from work as scheduled without permission for five consecutive days in violation of Administrative Order 4:08 A-3.1; and violation of a rule, regulation, policy, procedure, order or administrative decision, pursuant to Administrative Order 4:08 E-1.4, as a result of his unauthorized absences of October 15 through 19, 2017.

On November 2, 2017, respondent issued to appellant a second PNDA charging him with: chronic or excessive absenteeism or lateness pursuant to N.J.A.C. 4A:2-2.3(a)(4); conduct unbecoming a public employee pursuant to N.J.A.C. 4A:2-2.3(a)(6); other sufficient cause pursuant to N.J.A.C. 4A:2-2.3(a)(12); absence from work as scheduled without permission but with giving proper notice of intended absence in violation of Administrative Order 4:08 A-2.4; chronic or excessive absenteeism from work without pay in violation of Administrative Order 4:08 A-4.3; and violation of a rule, regulation, policy, procedure, order or administrative decision, pursuant to Administrative Order 4:08 E-1.5, as a result of his unauthorized absences of September 17 through 21, 2017.

Doll requested departmental hearings on both PNDAs, which were held on March 29, 2018. On April 26, 2018, DOH issued two Final Notices of Disciplinary Action (FNDA) to appellant, sustaining all charges against him, with notice that he would be removed from his position at Ancora and recorded as having resigned not in good standing effective October 19, 2018. A third FNDA was issued to Doll on April 26, 2018, the penalty under which was a twenty-day working suspension (Agency Ref. No. 2018-3257). Doll appealed all three FNDAs and the Civil Service Commission transmitted the cases to the Office of Administrative Law (OAL), which filed all three for determination as contested cases on June 1, 2018, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The OAL docketed Doll's appeal of the twenty-day working suspension as CSV 07909-18, his appeal of the resignation not in good standing as CSV 07910-18, and his appeal of the removal as CSV 07911-18. All three matters were assigned to the Honorable Gerald Foley, ALJ (Retired on recall). Judge Foley conducted a settlement conference on August 28, 2018, but the parties were unable to reach agreement on settlement. On August 30, 2018, all three matters were reassigned to the undersigned.

On September 26, 2018, a prehearing telephone conference was scheduled, but a representative of DOH did not appear. Counsel for respondent stated that she did not represent DOH with respect to the matter docketed as CSV 07909-18, and therefore, it was necessary to reschedule. On October 17, 2018, all parties appeared for a telephone prehearing conference following which I issued an order to consolidate CSV 07910-18 with CSV 07911-18, and issued an order of inactivity with respect to CSV 07909-18. The hearing was scheduled for January 7 and 9, 2019, with an inclement weather date of January 14, 2019. At the request of the parties, I executed a Consent Confidentiality and Protective Order on December 18, 2018.

On December 6, 2018, respondent filed a motion for summary decision in its favor claiming that there were no genuine issues of material fact in dispute. Specifically, respondent moved for summary decision to be granted in its favor finding that Doll is guilty of the charges described in the two FNDAs, and the penalties of removal from employment and resignation not in good standing are appropriate. I adjourned the hearings to allow time to address this motion.

On December 24, 2018, respondent submitted a brief in opposition to respondent's motion for summary decision and a cross-motion for summary decision in his favor. Respondent filed a reply brief on January 7, 2019. On February 26, 2019, I held a telephone conference with the parties to discuss issues raised by their papers. On February 27, 2019, counsel for appellant submitted a copy of appellant's affidavit, which had been inadvertently omitted from his filing of December 24, 2018. On March 11, 2019, I issued an order denying summary decision on the grounds that questions remained for resolution at an evidentiary hearing and neither party had yet proved by a preponderance of the competent, relevant and credible evidence that summary decision in its favor was appropriate.

The hearing was held on November 21 and December 12, 2019, after which the parties were permitted to submit post-hearing summations after receipt of the transcripts. Respondent filed its brief on February 25, 2020; appellant filed his brief on March 12, 2020. Both parties filed reply briefs and the record closed on March 23, 2020.

FACTUAL DISCUSSION AND FINDINGS

Positions of the Parties

Respondent's position is simple: the most basic function of any job is for an employee to report to work as scheduled. If, however, an employee cannot report to work on time, he or she is required to follow specific procedures to ensure notice to the employer and Doll failed to do so. Specifically, respondent contends that appellant was absent from work without authorization and without documentation to account for such absences from September 17 through September 21, 2017, and from October 1 through October 23, 2017 (when the second PNDA was issued).

Appellant, too, offers a simple argument: he is a long-time employee who suffered a work-related injury. Although he followed the same procedures he had followed in the past without incident, respondent is now using technical violations of policy as a pretext to remove Doll from employment. Appellant specifically claims that he was not permitted to return to work prior to February 2019 for medical reasons, and he notified respondent on an ongoing basis of the reasons for his absences.

Testimony

Respondent presented the testimony of four witnesses; appellant testified on his own behalf and presented one witness. The following is not meant to be a verbatim recitation of the testimony at hearing but a summary of the testimony I found relevant to the above-described disputed issues.

Respondent's Witnesses

Patricia Blue (Blue) is the food service director (also called quality assurance coordinator) at Ancora, a position she has held since June 2015. Her duties include supervising a staff of 145 persons in food services, training, hiring, discipline, and food safety. Under the heading of "discipline," Blue supervises employee attendance and leaves and files disciplinary citations for inappropriate conduct. She handles "Proof of Illness" procedures: when an employee has exhausted his or her sick leave, has called out sick six or more times within six pay periods, or has called out sick ten or more times within twelve pay periods, he or she must provide a doctor's note to support taking any subsequent sick time.

Blue knows Doll; she observed Doll in the workplace but did not directly supervise him. Even so, Blue described Doll's work as "average to below average, sloppy and not prone to detail." Tr. (November 21, 2019) (T-1), at 66-67. He began at Ancora as a food service handler, was promoted to operations handler, and then returned to food service handler. Blue knows about Doll's disciplinary history, including the discipline involved in the present matter, but stated that she personally never had problems with him. Over appellant's objections, Blue identified a number of documents from Doll's employment file showing discipline he received for infractions of regulations and/or Agency policies between 2014 and 2018. (R-2 at DOH 111-13,115-17, 119, 155-56.) Prior to the disciplines issued in this matter (resignation not in good standing and removal), the maximum discipline Doll had received was a suspension for twenty days.[1]

Blue identified a computer printout showing all the dates and times on which Doll called out sick from work between September 1, 2017 and October 23, 2017. (R-5.) When an employee calls out sick, he or she speaks with an operator who merely records the call and has no information regarding whether the employee has sick time available and/or if the leave has been approved.

If an employee in the Ancora kitchen were to become injured at work, Blue stated that he or she would fill out an injury form and report to his or her supervisor, who would sign the form. The employee would then go to the employee clinic, staffed by Ancora nurses, and then

[1] As discussed at hearing, evidence of prior discipline issued to Doll was introduced not as proof of the current charges but to support respondent's claim that it properly imposed progressive discipline in this matter.

to WorkNet Occupational Medicine (WorkNet), the outside Workers' Compensation (WC) doctor, for treatment or referral to a specialist. WorkNet reports to Ancora's Human Resources Department (HR). Blue receives no information regarding an employee's ongoing medical treatment. She is only notified by HR regarding the return date for the employee.

Bao Duong (Duong) is a personnel aide 2 in the Office of Employee Relations at Ancora. Duong has worked at Ancora since May 2015. He started as a payroll clerk and has since held the positions of senior payroll clerk and principal payroll clerk. In January 2019, he was promoted to his current position, the duties of which include initiating and processing grievances and disciplines. Duong knows Doll only by paperwork; the two have never met.

Duong identified the DOH Administrative Order 40A, the Disciplinary Action Program (DAP), which he described as a guideline for disciplinary charges and appropriate penalties. (R-3 at DOH 122-43.) Duong uses this document in the regular course of his duties.

Duong stated that an E-1 violation is the "[v]iolation of a rule, regulation, policy, procedure, order or administrative decision" and pursuant to the DAP, the penalty for the third infraction is removal. (Id. at DOH 135.) He described an A-2 violation, "[a]bsent from work as scheduled without permission but with giving proper notice of intended absence," and stated that the penalty for the fourth infraction is removal. (Id. at DOH 126.) The DAP further provides:

> All penalties imposed must be within the range of penalties [provided] unless consideration of mitigating factors would cause the penalty to be deemed inappropriate. Mitigating factors can be length of service, disciplinary record or other legitimate reasons.
>
> [T-1 at 90 (quoting R-3 at DOH 125).]

Duong identified the Ancora Attendance and Leave Policy, issued February 1, 2014. (R-4.) This policy, which details the rules as to attendance and absences, applies to all Ancora employees and all employees are given a copy of this policy each year at the annual training fair. Duong uses this policy in the normal course of his duties.

Duong explained that pursuant to this policy, if an employee exhausts his sick leave and then calls out sick, he or she can be subject to discipline if he or she does not provide HR appropriate documentation. (Id. at DOH 22.) The policy further provides that if an employee has been absent for five or more consecutive working days, he or she must provide "acceptable medical documentation" from the treating physician of being cleared to return to work. Ibid. A "resignation not in good standing" includes the following situation:

> An employee who has not returned to duty for five or more consecutive business days following an approved leave of absence shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing.
>
> [Ibid.]

WC leave is not addressed in the Attendance and Leave Policy, but Duong stated that WC leave is an approved absence. Although Duong is not familiar with the Family and Medical Leave Act, 29 U.S.C. 2601 et seq. (FMLA), process, as that is an HR function, he does know that Ancora must follow FMLA policy. He was not aware that the Attendance and Leave Policy provides that Ancora "may designate an employee's paid leave as FMLA leave if the employee provides information to the employer indicating an entitlement to such leave." Id. at DOH 38. Duong is not aware of whether Ancora sent Doll information on taking FMLA leave during the period at issue in this matter.[2]

Alexandra Schantz Ryan (Ryan) is a personnel aide 1 in the Office of HR at Ancora. She has been employed full-time at Ancora for approximately eight years in positions of technical assistant, nursing services clerk, payroll clerk, and clerk typist 1. In her current position, her duties include drafting reports and data entry. At the time of the events at issue here, Ryan was a clerk typist 1 and her duties included handling WC, family leave, and regular leaves of absence.

[2] Appellant argues that respondent failed in its obligation to notify Doll of his rights under the FMLA and that "FMLA leave is triggered once an employee encounters a serious health condition which renders him unable to perform the functions of his job." Br. of Appellant in Summation (March 12, 2020), at 16. Appellant failed to explain, however, how he would have been eligible for FMLA leave during the dates on which Dr. Rosenberg had cleared him to return to work and/or how he would have been eligible for FMLA and WC leave at the same time.

Ryan knows Doll from handling the paperwork related to his employment leaves. She recalled that he worked in Food Services and knows the circumstances of his separation from Ancora. She has never had any personal disputes with Doll.

Ryan described the process by which an employee would take WC leave. After sustaining an injury, the employee would see the doctor at WorkNet, the outside, state-approved WC doctor. The claim would then be sent to the risk management office in Trenton, where it would be reviewed by a claim investigator, who is not an employee of the DOH, to determine if it is compensable. If so, the claim investigator refers the employee to the case manager [in this case, Horizon Casualty (Horizon)]. Horizon handles the case for the employee, setting up all appointments for doctor visits and necessary tests.

Ryan stated that an employee who is injured at work and has seen a doctor through WorkNet is automatically placed on WC after he or she has been out of work seven days. To extend WC, the employee must provide HR with documentation from his or her doctor.

Throughout the WC process, HR works with the claim investigator in Trenton, not the case manager. Ryan stated that she does not know the Horizon case managers. She does not send written requests for information to the case manager but might call them to say that she is missing information regarding an employee.

Ryan identified a printout from POGO, an employee data base used at Ancora to track employee attendance. (R-6.) Based on this printout, Ryan stated that Doll took WC leave from October 3, 2012 to January 4, 2013, and from August 26, 2014 to September 25, 2014. Doll took FMLA leave from January 24, 2015 to April 19, 2015. Ryan knows that Doll suffered an injury on July 25, 2017, for which he took WC leave, and did not suffer a subsequent injury. Based on this printout, Ryan stated that Doll took WC leave between July 26, 2017 and September 15, 2017, and again from September 22, 2017 to September 29, 2017.

Ryan identified the notice she sent to Doll on August 1, 2017, approving his request for WC from July 26, 2017 through August 4, 2017, (R-7), and the five additional notices she sent to Doll on a weekly basis between August 4, 2017 and September 8, 2017, approving his requests

for WC leave from August 4, 2017 through September 15, 2017. (R-8.) Each notice explained that a doctor's note was required to further extend leave and each extension was granted after Doll submitted the appropriate documents. Ryan stated that notice to Stewart would not have been sufficient to obtain an extension of WC leave. Ryan does not know whether Doll requested an extension of WC between September 17 and 22, 2017, but does know that he did not return to work on those dates.

Ryan identified the letter she sent to Doll on September 21, 2017, notifying him that: (1.) he needed to submit a PERS-47 (a request for a leave of absence) and/or disability forms to get paid; (2.) failure to submit these forms could result in discipline; and (3.) without notice of approval, Doll would not be on an approved leave. (R-9.) Doll did not respond to this notice. On September 22, 2017, Ryan sent notice to Doll approving his request for WC from September 22, 2017 through September 29, 2017. (R-10.) In order to obtain this approval, Ryan stated that Doll must have submitted a doctor's note to HR and that this was a new leave of absence, not an extension of the prior leave.

Ryan identified the "Return to Duty Authorization" which Doll signed on September 29, 2017.[3] (R-11.) This document is a standard form that would have been signed at the HR office at Ancora. Ryan believes that the second signature on the document was that of HR Representative Kathy Walker (Walker) and surmised that Walker filled out the form, except for the employee signature. Based on this document, HR understood that Doll was coming back to work full-time without restrictions on or about October 1, 2017, but Doll did not return to work. Ryan stated that Doll would have had to provide HR with a doctor's note stating that he could return to work without restrictions.[4] After signing this document, Doll would not have been able to reactivate his WC leave by simply calling out to the Ancora operator.

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[3] Although both parties acknowledge that Doll's signature appears on this document, appellant disputes its authenticity, as discussed below.

[4] Ryan explained the difference between "return to work" and "discharge from treatment" is that an employee still under a doctor's care may be able to return to work. See, A-5 at 019, 027, 037. Appellant ignored this distinction when he stated that because he was still under Dr. Rosenberg's care, respondent knew or should have known that Doll "continued to be injured." Ltr. Br. of Appellant in Reply to Respondent's Summation (March 23, 2020), at 2.

Ryan identified the letter she sent to Doll on October 6, 2017, notifying him that: (1.) he needed to submit a PERS-47 (a request for a leave of absence) and/or disability forms to get paid; (2.) failure to submit these forms could result in discipline; and (3.) without notice of approval, Doll would not be on an approved leave. (R-12.) She stated that notice to Stewart would not have been sufficient and Doll did not respond to this notice by the deadline of October 13, 2017, meaning that his absence was unauthorized. Ryan identified the email that she sent to Blue and Nereida Weisback, Employee Relations Coordinator, to inform them that Doll had "not submitted documentation covering his absence from work." (R-13.) As a result, Doll received discipline.

Keith Stewart[5] (Stewart) is with the Department of Treasury, Division of Risk Management, where he holds the position of claims investigator II. He has served two years in this position and for the five years prior to that, held the position of claims investigator I. Stewart's duties include handling of WC claims from start to finish, determining compensability, ensuring an employee is receiving the proper treatment, and paying employees while they are on leave. In 2017, he oversaw approximately 800 claims, specifically for traumatic, non-occupational, injuries. T-1 at 170.

In reviewing claims, Stewart considers first whether a claim is compensable, determines whether the injury requires urgent or ongoing care, and then sends the claimant to Horizon , who handles the appointments. Once Horizon is involved, Stewart supervises to ensure Horizon is doing its job. Stewart is in frequent contact with Ancora HR, from which he obtains injury reports and salary information. Although medical documents are sometimes sent to him by employees and doctors, he does not forward such documents to HR and he does not tell employees not to report directly to HR.

Stewart knows Doll from handling his claim in 2017. The two men had no personal disputes or disagreements. Stewart recalls, based on notes he made at the time, that Doll was unhappy with his treatment because the doctor recommended that Doll return to work on September 15, 2017. His recollection was that Doll had had an injection but was still in pain. Stewart called Horizon on Doll's behalf to move up the follow-up appointment, which was then rescheduled for

[5] In the March 11, 2019 order denying motions for summary decision, Stewart is incorrectly identified as Stuart.

September 22, 2017.[6] He said he would not have told Doll that he did not have to report to work but would have told Doll that he had to return to work as directed by the doctor or call out sick. Further, Stewart stated he does not know if employees have sick time available. T-1 at 174-75.

Stewart conceded that it is difficult to recall the details of any employee case without checking his records and specifically, the on-line diaries where he records notes from calls with employees. He did recall that Doll's claim for WC benefits settled and Doll was paid.

Stewart identified the February 6, 2018, Progress Note issued by Dr. Larry S. Rosenberg (Rosenberg), an orthopedist to whom respondent referred appellant, in which Doll was discharged to regular duty status. Stewart stated that with this discharge, Doll was no longer eligible for WC benefits. If, prior to this date, there had been a break in treatment, Doll would have been ineligible for WC during the break. Stewart recalled such a break in Doll's treatment.

Stewart is familiar with a functional capacity evaluation (FCE), describing it as an evaluation of whether an employee can perform his or her job. Typically, an FCE is ordered when a doctor feels there is nothing more he can do for a patient. Once it has been ordered, an employee cannot return to work until the test has been performed (though Stewart stated that a doctor's note may contradict this usual procedure).

Appellant's Witnesses

Starr Doll (S. Doll), has been married to Doll for thirteen years. She is not employed outside the home, where she cares for their two children.

S. Doll is familiar with the injury her husband suffered on July 25, 2017, while at work. She described how the resulting pain in his back prevented him from engaging in normal activities of daily life, including holding their then-infant son. Doll sought treatment first through WorkNet, went to physical therapy (PT) for a few weeks, and then was referred to Dr. Rosenberg by WorkNet. S. Doll drove her husband to all his appointments, joined him for the examinations,

[6] Stewart stated that Kara Dougherty contacted the doctor's office to reschedule this appointment for Doll.

and spoke with the doctors. (S. Doll stated that her husband was not able to drive himself due to the injury, but that she was used to driving him to work as they share one car.)

S. Doll identified the Progress Note dated September 15, 2017. (A-1.) She attended this appointment and watched as Dr. Rosenberg examined Doll's back. He dictated the information that is found in the Progress Note while the Dolls were present. Dr. Rosenberg injected her husband with Depo-Medrol® as described in the Progress Note, but it did not help and made his condition worse. S. Doll stated that Doll could not return to work after this appointment due to the pain. She acknowledged that Doll's status on this form was "return to work," but stated that he did not do so. (A-1.)

S. Doll identified the Progress Notes dated September 22, 2017, (A-3), and September 29, 2017 (A-5). She also attended these appointments, and Dr. Rosenberg dictated the Notes in front of S. Doll and Doll. She acknowledged that Doll's status on the form dated September 29, 2017, was "return to work," but stated that he did not do so. (A-5.)

S. Doll recalled Dr. Rosenberg prescribing an epidural injection on September 29, 2017. (A-6.) She identified the return to work form which Doll allegedly signed on September 29, 2017, and identified his signature. (R-11.) She stated that none of the writing on the form is in Doll's handwriting except for his signature. Further, S. Doll stated that she did not drive Doll to Ancora on that day and that she first saw this document during the discovery process in this case. She recalls seeing a similar form when Doll was on WC leave from work in 2014.

S. Doll stated that she drove her husband to the epidural procedure on November 6, 2017. (A-7.) S. Doll drove her husband to see Dr. Rosenberg on November 27, 2017, his first appointment after the epidural. (A-8.) Because Doll had not improved, Dr. Rosenberg told them that the next step was an FCE, a test to see if Doll could perform his duties at work. (A-9.) S. Doll understood that Doll was not to return to work until he had the FCE, but she admitted to being very confused as Dr. Rosenberg did not say that Doll had to stay out of work until the FCE was conducted. Tr. (December 12, 2019) (T-2), at 24.

S. Doll described the delay in having the FCE scheduled; since she was authorized by her husband to speak with Horizon, she called Dougherty, the Horizon case manager assigned to Doll's case. When Dougherty finally returned S. Doll's call, Dougherty stated that the FCE had been approved, she was talking to the doctor who would conduct the test to have it scheduled, and that Doll could not return to work until the FCE was completed. According to S. Doll, her husband called Stewart many times to make sure that it was okay that he continued to call out from work and to get appointments scheduled. S. Doll also recalls her husband calling the Ancora operator routinely, including after September 15, 2017.

S. Doll identified the letters Ryan sent to Doll on September 21 and October 6, 2017, notifying him that: (1.) he needed to submit a PERS-47 (a request for a leave of absence) and/or disability forms to get paid; (2.) failure to submit these forms could result in discipline; and (3.) without notice of approval, Doll would not be on an approved leave. (R-9; R-12.)[7] S. Doll did not contact HR in response to these letters and has no recollection of whether Doll did so.

Appellant Doll, began his testimony with a description of the three injuries he suffered while employed at Ancora, an injury to his shoulder while lifting milk crates, burning his foot in 2014, and the injury involved in the present matter, which occurred while Doll was lifting industrial-size food cans on July 25, 2017. In the latter case, Doll immediately reported to the head cook, who filled out paperwork and sent Doll to the infirmary. Staff contacted WorkNet and S. Doll drove Doll to the WorkNet office in Stratford, New Jersey the same day for an exam and x-rays. The WorkNet doctor put Doll on WC leave and prescribed PT. Doll began the course of PT but, once he saw Dr. Rosenberg, he stopped PT on Dr. Rosenberg's advice.

Doll described his treatment and doctor's visits consistent with S. Doll's testimony. He agreed that Dr. Rosenberg's recommendations were confusing as Dr. Rosenberg gave Doll verbal directions that were inconsistent with his written instructions. See, T-2 at 56-57. Despite this confusion, neither Doll (nor S. Doll) described any attempts to get Dr. Rosenberg to clarify the difference between his verbal and written directions.

[7] Counsel for respondent asked S. Doll to read a portion of these letters into the record; due to her severe dyslexia, she was uncomfortable doing so. Therefore, the transcript reflects that the undersigned read the letters aloud and S. Doll confirmed her recollection of their content. (T-2 at 35-36, 39.)

Doll stated that he provided HR copies of the doctors' Progress Notes in order to extend his WC leave, including the Note dated September 15, 2017. Id. at 61, 111, 112. But the note dated September 15, 2017, stated that Doll was to return to work on Sunday, September 17, 2017, with no restrictions. (P-2.) Instead, Doll called Stewart after receiving the injection of Depo-Medrol® and asked to obtain a second opinion on treatment. Stewart responded that second opinions are only available when the initial recommendation is for surgery and told Doll to call out from work "using sick time" if he was still in pain because he "wasn't going to get paid from [WC]." T-2 at 113. Doll did call out, following Ancora call-out procedures.

Doll identified the letter from Ryan dated September 21, 2017, notifying him that: (1.) he needed to submit a PERS-47 (a request for a leave of absence) and/or disability forms to get paid; (2.) failure to submit these forms could result in discipline; and (3.) without notice of approval, Doll would not be on an approved leave from September 17-21, 2017. (R-9.) He understood that a PERS-47 was not related to WC and since he was out on WC, he assumed the letter did not apply to him and did not recall submitting any forms to HR. Doll stated that his request to extend WC was approved, so he assumed that Stewart was talking to Ancora on his behalf. T-2 at 70 (referring to R-10, the approval of WC for the week starting September 22, 2017, and A-4, the Quick Note filled out by Dr. Rosenberg on September 22, 2017).

In both his testimony and post-hearing submissions, Doll ignores an important distinction between the approvals of his WC leave, dated August 1, 2017 (R-7), and September 22, 2017 (R-10), and the extensions of WC leave, dated August 4, 11, 18 and 25, 2017, and September 8, 2017. (R-8.) The letters from Ryan clearly notify Doll of the difference; Stewart testified credibly that he told Doll that as of September 15, 2017, Doll was no longer on WC leave. While Doll had already admitted that he gave HR each of the Progress Notes (and/or Quick Notes) drafted by Dr. Rosenberg, he reversed and claimed that he did not submit either the Progress Note or the Quick Note, both dated September 22, 2017, which put him back on WC. T-2 at 69.[8]

During his September 29, 2017, visit with Dr. Rosenberg, Doll recalled being told to "try to return" to work, even though on the Progress Note, Dr. Rosenberg wrote simply "return

[8] Although it is possible that on September 22, 2017, Dr. Rosenberg took the initiative to mail, email or fax the Progress Note and/or Quick Note to respondent, there was no evidence that he did so.

to work." (A-5.) Doll was in too much pain to return to work, so he contacted the operator as Stewart had told him to do on September 15, 2017. T-2 at 74. Doll stated that when on WC for his earlier injuries, he followed this procedure and he was not disciplined. He was given no training on specific call-out policies for WC leave.

Doll identified the return to work form which he allegedly signed at the HR office on September 29, 2017, and identified his signature. (R-11.) He confirmed that none of the writing on the form is in his handwriting except for the signature and stated that he first saw this document during the discovery process in this case. He also noted that the job title on the form, senior food service handler, was incorrect; he held that job in 2007, not in 2017.[9] However, when Doll was shown the sign-in sheet used at HR on September 29, 2017, he admitted that his signature is on that form, indicating that he did go to HR on that day. (R-15.)

Doll did not need an FCE in connection with his earlier workplace injuries; he was not familiar with the procedure prior to it being recommended by Dr. Rosenberg. After receiving the prescription for the FCE on November 27, 2017 (A-8), Doll initially waited for Dougherty to contact him to schedule the procedure. He did not call the Ancora operator as he had already been suspended for failure to call-out. Doll and his wife both called Dougherty to inquire as to the delay in scheduling the FCE; Doll wanted it done so he could return to work.[10] His financial situation by that time was dire due to the absence of income and health care insurance. He and S. Doll were evicted from their home.

DISCUSSION

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See, Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality,

[9] Neither party offered any evidence that Doll took leave of any type in 2007.

[10] In the Progress Note dated November 27, 2017, Dr. Rosenberg stated that he "advised that FCE prior to discharge" and that Doll was on "regular duty status" at work. (A-8.)

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). Also, "[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).

After carefully considering the testimonial and documentary evidence presented and having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, I make the following observations.

First, although there was much testimony regarding Doll's medical condition and the care he was receiving through February 2018, the relevant time period is only from the date of Doll's injury, July 25, 2017, through October 19, 2017, the effective date of Doll's removal from employment. Further, testimony was given on the use of an FCE and the inability of an employee to return to work until an FCE was conducted, but as of September 29, 2017, when Dr. Rosenberg cleared Doll to return to work the second time, an FCE was not yet warranted or prescribed for Doll. The FCE would only be prescribed after Doll had an epidural and Dr. Rosenberg determined that the epidural failed to alleviate Doll's pain. (A-5.) Doll admitted that Dr. Rosenberg did not write the prescription for the FCE until after Doll was removed from employment. See, T-2 at 82-83. There was no evidence presented by either party that Doll could not return to work pending the epidural and Dr. Rosenberg described the epidural procedure as a diagnostic test more than treatment. (A-5.) Even though Dr. Rosenberg gave Doll a prescription for an FCE on November 27, 2017, on that same date, Dr. Rosenberg also stated that Doll was on "regular duty status." (A-8.)

Prior to September 15, 2017, on behalf of respondent, Ryan sent six notices to Doll approving extensions of his WC leave and directing Doll to "report to HR with a doctor's note" to request further extensions of WC leave. (R-7; R-8.) Ryan also stated that such documents must have been received by HR (other than for the week of September 17-21, 2017). Doll went back and forth on this issue, stating that he never responded to Ryan's letters requesting medical documentation of his continued WC leave, that the only action he took to notify respondent of his ongoing absences was to call the Ancora operator, that he presumed Stewart was contacting

HR on his behalf, and that he provided HR copies of the doctors' Progress Notes in order to extend his WC leave. T-2 at 61, 68-70, 112.

Neither party offered documentary evidence of the treatment that Doll received between the date of his injury and September 15, 2017. After the examination on September 15, 2017, Dr. Rosenberg issued a Progress Note stating that Doll would "return to work." (A-1.) Doll contacted Stewart, stated that he suffered from continuing pain and complained that he was required to return to work on September 17, 2017. In response, Stewart moved Doll's next appointment with Dr. Rosenberg up one week and told Doll to follow his doctor's instructions and return to work or call out sick. Stewart testified credibly that he does not have information about the amount of sick time available to any employee and Doll presented no plausible reason to presume that Stewart could approve sick leave. Further, Doll stated that Stewart told him he had to use sick time as of September 17, 2017, as he was not going to be paid WC benefits. T-2 at 113.

Doll did not return to work on September 17, 2017, but did call out sick, as confirmed by the printout showing the dates on which Doll called out to the Ancora operator. (R-5.) This document also confirms Doll's testimony that he called out only after being so instructed by Stewart or Dr. Rosenberg; he did not call out every day that he was out on WC leave. T-2 at 58, 60. In other words, Doll called out only after submitting the letters to HR from Dr. Rosenberg stating that he was to return to work. Even though Doll was still under Dr. Rosenberg's care, he no longer had medical approval to continue his WC leave and so called out sick. The reason for this case is that earlier in the year, Doll had exhausted his sick leave.

Ancora notified Doll that he was required to supply a doctor's note verifying the basis for his absence from September 17 through 21, 2017, and that failure to do so could subject him to discipline. (R-9.) Doll did not respond; he explained that he did not think the requirement of a PERS-47 applied to him as he was on WC leave and that no one from Ancora had notified him that he was no longer on WC leave. T-2 at 67-68. That may be technically correct, but, as noted above, Doll testified that Stewart told him he would not be paid WC benefits as of September 17, 2017.

On September 22, 2017, Doll returned to Dr. Rosenberg, who then determined that Doll could not work for another week. Inexplicably, Doll insisted that he did not provide the Progress Note with this information to HR; somehow, HR got this information and Doll was placed on WC leave for the week of September 25 through 29, 2017. (R-10.)

After examining Doll on September 29, 2017, Dr. Rosenberg issued a Progress Note stating (A-5):

1. Doll would "return to regular duty status";

2. Rosenberg recommended a "single thoracic epidural injection" for temporary pain relief that would be "more as a diagnostic test rather than as an intended treatment";

3. Doll understood that Dr. Rosenberg had no other treatment to offer; and

4. Doll "may need to undergo FCE if he fails to improve from the epidural injection."

This document, which was introduced into evidence by appellant, makes clear that as of September 29, 2017, Dr. Rosenberg cleared Doll to return to work. An FCE was not yet warranted, or prescribed, for Doll. First, Doll would have to have an epidural and that treatment would have to fail. (A-5.)

On September 29, 2017, Doll appeared at Ancora HR, signed in, and then signed the return to work form. (R-11; R-15.)[11] His next scheduled work date was October 1, 2017; Ancora reasonably relied on the information provided by Doll on September 29, 2017, that he would return to work on October 1, 2017. Doll did not return to work on October 1, 2017, but again called out sick to the Ancora operator. (R-5.) As stated above, earlier that year, Doll had exhausted his sick leave.

[11] Counsel makes much of Doll's testimony that he does not recall signing this form, going so far as to imply that respondent falsified the form. See, Reply Br. of Appellant, at 3. Given that respondent also produced the HR sign-in sheet from September 29, 2017, which Doll admitted he signed, there is no need to consider this theory.

Ancora notified Doll that he was required to supply a doctor's note verifying the basis for his absence from October 1 through 6, 2017. (R-12.) Doll did not respond by the deadline of October 13, 2017. Doll continued to call out sick every day he was scheduled to work until October 23, 2017, about the time when he would have received the first PNDA. (R-1; R-5.; R-14.)

There was no evidence presented that Doll received additional medical treatment between September 29, 2017 and November 6, 2017. (A-7.) The next Progress Note from Dr. Rosenberg was not issued until November 27, 2017, after the effective date of Doll's removal from employment. (A-8.) In this Progress Note, Dr. Rosenberg both stated that he would advise Doll to have an FCE and that Doll was on "regular duty status" at work. Ibid.

Appellant faults internal inconsistencies in the Progress Notes written by Dr. Rosenberg and contends that Stewart could have cleared up the misunderstanding by contacting Dr. Rosenberg. Br. of Appellant in Summation (March 12, 2020), at 15. Dr. Rosenberg's reports were not inconsistent; Dr. Rosenberg's verbal instructions as recounted by the Dolls were inconsistent with what Dr. Rosenberg wrote on the Progress Notes. There is no evidence that Doll raised this issue with Stewart, only that Doll complained about Dr. Rosenberg's decision to return him to work on September 17, 2017, and then requested a second opinion. Stewart did what he could, he moved up Doll's next appointment with Dr. Rosenberg by a week. Stewart testified credibly that he would have told Doll to return to work as directed by the doctor or call out sick. Appellant cannot fault Stewart for not knowing that Doll had no sick leave available. Doll did not even attempt to claim that he was unaware that he had exhausted his own sick leave balance. Further, as noted by respondent, appellant did not call Dr. Rosenberg to testify or even present an affidavit from Dr. Rosenberg to "explain any alleged discrepancy."[12] See, Ltr. Br. of Respondent in Response to Appellant's Summation (March 23, 2020), at 2.

[12] It bears noting that a prior order in this matter includes the following: "Rosenberg may testify that he told appellant and his wife that he could not provide appellant with the necessary documentation to support his continuing absence from work [and] on the other hand, Rosenberg may state that he told appellant that he would (or did) send the requisite report to Ancora. . . . Rosenberg [has not] supplied [an] affidavit to support the motion for summary decision and, therefore, the answers [to these questions] will not be known without a hearing." Order Denying Summary Decision, OAL Docket Nos. CSV 07910-18 and 07911-18 (March 11, 2019), at 12.

Appellant is critical of respondent for failure to properly train or notify Doll regarding the procedures necessary to comply with WC and/or FMLA leave requirements. Ibid. This argument would be more convincing if Doll were not a long-time employee who had previously taken two WC leaves of three months and one month (2012-2013 and 2014), and an FMLA leave of seven months (2015). Respondent's Br. in Summation, at 10, citing T-1 at 110, 111; R-6. As noted by respondent, every letter Ryan sent to Doll gave Doll the option of contacting Ryan with questions and Doll "did not avail himself of that option"; his argument that he was "unaware of HR's involvement in the WC process is without merit." Reply Br. of Respondent, at 3. After all, he admitted to submitting doctors' reports to HR to extend his WC leave.

Based on the above, I **FIND** the following **FACTS:**

Appellant is a twenty-nine-year old man. He began working at Ancora as a senior food handler on September 17, 2007. His duties included picking up cans and supplies.

Prior to July 2017, appellant's disciplinary history includes the following (R-2):

1. Official reprimand for violations of N.J.A.C. 4A:2-2.3(a)(6) and (a)(12), and of Administrative Order 4:08 A-2.2, for absence from work on two dates while on Proof of Illness (POI) status[13] (November 17, 2014);

2. Counseling for violations of N.J.A.C. 4A:2-2.3(a)(1) and (a)(6), and of Administrative Order 4:08 C-9, for insubordinate action toward a supervisor (October 14, 2015);

3. Counseling for violations of Administrative Orders 4:08 A-11 and C-8, for leaving assigned work area without permission and making false statements (November 31, 2015);

[13] "Proof of Illness" status requires an employee to submit "medical evidence to support the use of each [subsequent] sick day" within five days of such leave for a period of six months. (See, R-2 at DOH 116.)

4. Suspension of twenty days for alleged violations of N.J.A.C. 4A:2-2.3(a)(6) and (a)(12), and of Administrative Orders 4:08 B-2.1, B-33.1, and E-1.1 (January 12, 2017) (settlement agreement reached prior to hearing);

5. Notice of POI status as a result of appellant taking ten sick days between January 1, 2017 and February 11, 2017 (February 23, 2017);

6. Notice of Official Reprimand for violations of N.J.A.C. 4A:2-2.3(a)(4), (a)(6), and (a)(12), and of Administrative Orders 4:08 A-2.1 and A-9.1, for calling out sick four times while on POI status but failing to submit medical evidence to support the use of sick time (April 19, 2017)[14];

7. Suspension without Pay for Five Days for violations of N.J.A.C. 4A:2-2.3(a)(4), (a)(6), and (a)(12), and of Administrative Orders 4:08 A-2.2 and A-4.1, and E-1.2, for calling out sick from work on six consecutive workdays with no sick leave available (May 4, 2017)[15];

8. FNDA sustaining charges of violations of N.J.A.C. 4A:2-2.3(a)(4), (a)(6), and (a)(12), and of Administrative Orders 4:08 A-2.3 and A-4.2, and E-1.3, for calling out sick from work on five workdays with no sick leave available, and suspending Doll from work for twenty working days (April 26, 2018).[16]

On July 25, 2017, while picking up industrial-sized cans used in the preparation of food at Ancora, appellant injured his back. As a result of this injury, appellant was placed on Temporary Disability Leave and received WC benefits. By letter from respondent dated August 1, 2017, appellant was notified that:

[14] This Notice included the statement that a subsequent offense would subject appellant to disciplinary action ranging from a five-day suspension to removal. (R-2.)

[15] This Notice included the statement that a subsequent offense would subject appellant to disciplinary action ranging from a six-day suspension to removal. Ibid.

[16] As discussed in the Procedural History, appellant appealed this FNDA and that matter, OAL Docket No. CSV 07909-18, is on inactive status.

> If your time away from work is being extended by your treating physician after 8/4/17, you must submit a doctor's note to the Office of Human Resources requesting an extension for Worker's [sic] Compensation. If you are unable to submit a doctor's note due to difficulties with referrals, a written statement must be submitted from you with your Horizon Case manager's name, time and dates you tried to contact them. No time will be granted without documentation and Risk Management's confirmation of delay.
>
> [(R-7.)]

Ryan sent similar letters to Doll on a weekly basis through September 8, 2017; appellant submitted reports on his medical condition to HR as required and his WC leave was extended on a weekly basis through September 15, 2017. On September 15, 2017, Dr. Rosenberg cleared appellant to return to work "next week" and asked appellant to return "for final evaluation in 2 weeks(') time." (A-1.) Doll submitted this documentation to HR and, as of September 15, 2017, respondent understood that Doll would return to work the next day he was scheduled.

Appellant did not return to work on Monday, September 17, 2017, or the rest of that week, but called out sick each day. (R-5.) Doll had previously exhausted his sick leave and was recorded by respondent as being absent without authorization between September 17 and 21, 2017. By letter dated September 21, 2017, respondent notified appellant that he was required to submit documentation regarding his "time away from work," specifically a PERS-47 and/or disability forms, and that pursuant to Agency policy, such documentation was due on or before September 28, 2017. (R-9.) Further, in this letter, respondent stated that failure to comply with this policy would subject appellant to discipline, up to and including removal. Ibid. By his own testimony, Doll did not respond to this letter.

Appellant was evaluated by Dr. Rosenberg on September 22, 2017; by letter dated September 22, 2017, Dr. Rosenberg directed appellant to remain out of work until Monday, October 1, 2017. (A-3.) Respondent approved appellant's WC leave between September 22 and September 29, 2017. (R-10.) In this letter, respondent states that any further absences after September 29, 2017, must be supported by a doctor's note. Ibid.

Appellant was again treated for his work-related injury by Dr. Rosenberg on September 29, 2017. In a Progress Note dated September 29, 2017, Dr. Rosenberg cleared appellant to return to regular duty status. Doll submitted this Progress Note to HR on September 29, 2017. While at HR, Doll also signed the HR sign-in sheet at 10:35 a.m., wrote that the reason for his visit was "WC," and then signed the return to work form. (R-11; R-15.) His next scheduled work date was October 1, 2017; Ancora reasonably relied on the information provided by Doll on September 29, 2017, that he would return to work on October 1, 2017. Doll did not return to work on October 1, 2017, but again called out sick to the Ancora operator. (R-5.) Earlier that year, Doll had exhausted his sick leave.

By letter dated October 6, 2017, respondent notified appellant that he was required to submit documentation regarding his "time away from work," specifically a PERS-47 and/or disability forms, and that pursuant to Agency policy, such documentation was due on or before October 13, 2017. (R-12.) Further, in this letter, respondent stated that failure to comply with this policy would subject appellant to discipline, up to and including removal. Ibid. Appellant failed to submit the required documentation. (R-13.)

Between the date of his injury, July 25, 2017, and September 15, 2017, and between September 22 and 29, 2017, Doll was on approved WC leave from his employment at Ancora. He provided medical documentation to Ancora HR to support extensions of his WC leave on a weekly basis. Between September 17 and 21, 2017, Doll was cleared by Dr. Rosenberg to return to work and he was not eligible for WC leave. Doll did not return to work but called out sick to the Ancora operator each work day between September 17 and 21, 2017, even though he had no sick leave available. On October 1, 2017, Doll was cleared by Dr. Rosenberg to return to work and he was not eligible for WC leave. Doll did not return to work but called out sick to the Ancora operator each work date between October 1 and 24, 2017, even though he had no sick leave available.

On October 24, 2017, respondent issued a PNDA to appellant charging him with violations of regulations and Agency policies as a result of unauthorized absences beginning October 15, 2017, even though he was absent without authorization beginning October 1, 2017. (R-1.) On November 2, 2017, respondent issued a second PNDA to appellant charging him with violations of regulations and agency policies as a result of unauthorized absences from

September 17, 2017, through September 21, 2017. Ibid. Following a departmental hearing, the hearing officer sustained all charges and penalties against appellant, and respondent issued two FNDAs to appellant on April 26, 2018, removing appellant from service and recording him as having resigned not in good standing, effective October 19, 2017. Ibid.

LEGAL ANALYSIS AND CONCLUSIONS

The Civil Service Act, N.J.S.A. 11A:1-1 to -12-6 (Act), and its implementing regulations, N.J.A.C. 4A:1-1.1 to -10-3.2, are designed in part "to encourage and reward meritorious performance by employees in the public service and to retain and separate employees on the basis of the adequacy of their performance." N.J.S.A. 11A:1-2(c). The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her duties. N.J.S.A. 11A:1-2(a). Such an employee may be subject to major discipline, including removal and/or resignation not in good standing. 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).

At the same time, the Act protects classified employees from partisanship, favoritism, arbitrary dismissal and other onerous sanctions. See, Investigators Ass'n v. Hudson Cty. Bd. of Freeholders, 130 N.J. Super. 30, 41 (App. Div. 1974); Scancarella v. Dep't of Civil Serv., 24 N.J. Super. 65, 70 (App. Div. 1952). In attempting to determine if a penalty is reasonable, the employee's past record may be reviewed for guidance in determining the appropriate penalty for the current specific offense. In re Shavers-Johnson, CSV 10838-13, Initial Decision (July 30, 2014), adopted, Comm'n. (September 3, 2014), https://njlaw.rutgers.edu/collections/oal/;. "The evidence presented and the credibility of the witnesses will assist in resolving whether the charges and discipline imposed should be sustained; or whether there are mitigating circumstances, which . . . must be taken into consideration when determining whether there is just cause for the penalty imposed." Ibid. Depending upon the incident complained of and the employee's past record, major discipline may include suspension or removal. See, West New York v. Bock, 38 N.J. 500, 523-24 (1962) (describing use of progressive discipline). If the current

charges against Doll are sustained, the appropriate penalty will be determined with due consideration of his disciplinary record.

The burden of proof falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The appointing authority must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson v. Parsekian, 37 N.J. 143 (1962). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such "as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 275 (1958) (citations omitted). Preponderance may also be described as the greater weight of credible evidence in the case, the evidence which carries the greater convincing power. State v. Lewis, 67 N.J. 47, 49 (1975).

With respect to Doll's absences of September 17 through 21, 2017, respondent charges appellant with violations of the following:

1. Chronic or excessive absenteeism or lateness pursuant to N.J.A.C. 4A:2-2.3(a)(4);

2. Conduct unbecoming a public employee pursuant to N.J.A.C. 4A:2-2.3(a)(6);

3. Other sufficient cause pursuant to N.J.A.C. 4A:2-2(a)(12);

4. Absent from work as scheduled without permission but with giving proper notice of intended absence in violation of Administrative Order 4:08 A-2.4;

5. Chronic or excessive absenteeism from work without pay in violation of Administrative Order 4:08 A-4.3; and

6. Violation of a rule, regulation, policy, procedure, order or administrative decision, pursuant to Administrative Order 4:08 E-1.5.

With respect to Doll's absences of October 15 through 19, 2017, respondent charges appellant with violations of the following:

1. Chronic or excessive absenteeism or lateness pursuant to N.J.A.C. 4A:2-2.3(a)(4);

2. Conduct unbecoming a public employee pursuant to N.J.A.C. 4A:2-2.3(a)(6);

3. Other sufficient cause pursuant to N.J.A.C. 4A:2-2(a)(12);

4. Abandonment of a job as a result of absence from work as scheduled without permission for five consecutive days in violation of Administrative Order 4:08 A-3.1; and

5. Violation of a rule, regulation, policy, procedure, order or administrative decision, pursuant to Administrative Order 4:08 E-1.4.

Chronic or Excessive Absenteeism

A civil service employee may be subject to discipline, including removal, for chronic or excessive absenteeism or lateness. 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. at 522. 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.

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 was initially granted a leave of absence and while still hospitalized, applied for an extension of that leave (without pay). Although the appointing authority had discretion to deny her application, the Civil Service Commission correctly found the denial to be an abuse of discretion under the circumstances. Cf. In re Bishop, 2009 N.J. Super Unpub. LEXIS 152 (App.

Div. 2009) (removal of incarcerated employee upheld for excessive absenteeism even though employer had notice of incarceration unrelated to employment).

Here the parties do not dispute that Doll did not report for work between July 26, 2017, and October 19, 2017, the effective date of his removal. The undisputed facts show that twice, on September 15, 2017, and on September 29, 2017, Dr. Rosenberg cleared Doll to return to work, meaning that he was not on an approved WC leave as of both of those dates. Nor did Doll otherwise have sick time available; twice already that year, Doll had been disciplined for calling out sick without sick leave available. There was no evidence that Doll had since accrued sick time sufficient to cover the above dates.

Appellant argues that "this case is not about excessive absences but rather it is about Appellant not providing the precise documentation in the manner and format that the [HR] office would have liked to receive it." Reply Br. of Appellant, at 4. Appellant is not quite correct in stating that if Doll had only replied to respondent's letters of September 21, 2017, and October 13, 2017, the within charges would not have been filed. Ibid. The only reply by Doll to those letters that would have prevented the within charges would have had to include medical documentation of his inability to work. As Stewart told him, because Dr. Rosenberg cleared him to return to work, Doll was not eligible for WC, but would have to use sick time. Doll could not use sick time because he did not have any left.

The circumstances surrounding the alleged violations of September 17 through 21, and October 15 through 19, 2017, are in most respects similar. With respect to Doll's absences from September 17 through 21, 2017, both Doll and S. Doll testified credibly that the injection Doll received on September 15, 2017 made his condition worse, not better. Even so, Doll submitted Dr. Rosenberg's Progress Note to HR, and respondent expected Doll to return to work on September 17, 2017. Doll did not return to work on September 17, 2017; he called out sick that day and each day following through September 21, 2017, even though he had no sick time available. Respondent notified Doll in writing that he needed to provide medical documentation supporting his absence from September 17 through 21, 2017, but Doll did not respond to this notice. Doll's failure to report for work or to provide medical documentation supporting his inability

to report to work between September 17 through 21, 2017, is a violation of N.J.A.C. 4A:2-2.3(a)(4), chronic or excessive absenteeism or lateness.

With respect to the alleged violations of October 15-19, 2017, Dr. Rosenberg released Doll to return to work on September 29, 2017, but he did not return to work at any time after that date. Although Doll (and S. Doll) tried to assert that he did not appear at Ancora HR on September 29, 2017, the documents bearing his signature are credible evidence that he took positive steps to return to work on October 1, 2017, and that respondent acted reasonably in expecting Doll to report for work as scheduled. In the Progress Note dated September 29, 2017, Dr. Rosenberg stated that: (1.) the recommended epidural would be "more as a diagnostic test rather than as an intended treatment"; (2.) Doll understood that Dr. Rosenberg had no other treatment to offer; and (3.) Dr. Rosenberg was recommending Doll return to work. (A-5.) Much testimony was given on the use of an FCE and the inability of an employee to return to work until an FCE was conducted, but as of September 29, 2017, the FCE was not yet warranted or prescribed for Doll as he would first have to have an epidural and that treatment would have to fail. (A-5.)

Doll did call out sick on October 1 through 6, October 8 through 12, October 15 through 19, and October 22 through 23, 2017, but he did not have sick leave available. (R-5.) At this point, Doll did not contact Stewart and his next appointment with Dr. Rosenberg was not until November 27, 2017 (and there was no testimony that it had been scheduled as of October 1, 2017). When Doll received the same request from respondent for medical documentation to support his failure to report to work, Doll could have contacted HR or Stewart or Dr. Rosenberg. He contacted no one and did not report to work again. Doll's failure to report for work or to provide medical documentation supporting his inability to report to work between October 1 through 23, 2017, is a violation of N.J.A.C. 4A:2-2.3(a)(4), chronic or excessive absenteeism or lateness (but respondent only charged Doll for his absences from October 15 through 19, 2017).

Appellants claims "there is no evidence in the record to suggest that [Doll] was non-compliant with the instructions provided him by his treating doctor[.]" Ltr. Br. of Appellant in Response to Respondent's Summation (March 23, 2020), at 1. I disagree. As detailed above, Doll disregarded the written instructions of his treating doctor to return to work on two separate occasions. Doll submitted the Progress Notes to respondent and, on at least one occasion,

consistent with Dr. Rosenberg's instructions, Doll signed a return to work form in the HR office. Doll did not, at any time, attempt to explain to his employer that he had any reason to disregard his doctor's written instructions.

I **CONCLUDE** that Doll knew he was not eligible for WC leave between September 17 through 21, 2017, and after October 1, 2017. At the same time, Doll knew or should have known he had no sick time available but he continued to call out sick and then failed to provide medical documentation supporting his use of sick time. I **CONCLUDE** that respondent has met its burden of proof by a preponderance of the evidence that Doll violated N.J.A.C. 4A:2-2.3(a)(4), chronic or excessive absenteeism or lateness.

Conduct Unbecoming a Public Employee

There is no precise definition for "conduct unbecoming a public employee," and the phrase is an elastic one. In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). Conduct unbecoming a public employee encompasses "conduct which 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. Atl. City, 152 N.J. 532, 554 (1998). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 [quoting In re Zeber, 156 A.2d 821, 825 (1959)]. Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) [quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)]. Unbecoming conduct on the part of a public employee may be less serious than a violation of the law, but is inappropriate as it is disrespectful and discourteous to one's fellow employees or others and it is disruptive of governmental operations. In re King, CSV 2768-02, Initial Decision (February 24, 2003), adopted, Merit Sys. Bd. (April 9, 2003), http://njlaw.rutgers.edu/collections/oal/.

Doll's failure to report to work on September 17 through 21, 2017, and his failure to return to work on October 1, 2017, and his specific absences between October 15 and 19, 2017, were

disruptive of governmental operations because, simply, Doll had given respondent reason to rely on his return to work. As respondent noted, Ancora had "a legitimate right to expect that its employees will attend work as scheduled," attendance being "an essential function of most jobs." Br. of Respondent (February 21, 2020), at 18 (citations omitted). I **CONCLUDE** that respondent has met its burden of proof by a preponderance of the evidence that Doll violated N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee.

Other Sufficient Cause

There is no definition in the New Jersey Administrative Code for other sufficient cause; it is generally defined as all other offense caused and derived as a result of all other charges against appellant. There have been cases when the charge of other sufficient cause has been dismissed when "[r]espondent has not given any substance to the allegation." Simmons v. City of Newark, CSV 09122-99, Initial Decision (February 22, 2006), adopted, Merit System Bd., (April 5, 2006), https://njlaw.rutgers.edu/collections/oal/.

With respect to the FNDA issued as a result of Doll's absence from work from September 15 through 19, 2017, respondent determined that sufficient cause charges are attributable to appellant for his alleged violation of Administrative Order 4:08 A-2.4 (absent from work as scheduled without permission but with giving proper notice of intended absence); of Administrative Order 4:08 A-4.3 (chronic or excessive absenteeism from work without pay); and of Administrative Order 4:08 E-1.5 (violation of a rule, regulation, policy, procedure, order or administrative decision).

With respect to the FNDA issued as a result of Doll's absence from work from October 15 through 19, 2017, respondent determined that sufficient cause charges are attributable to appellant for his alleged violation of Administrative Order 4:08 A-3.1 (abandonment of a job as a result of absence from work as scheduled without permission for five consecutive days) and his alleged violation of Administrative Order 4:08 E-1.4. (violation of a rule, regulation, policy, procedure, order or administrative decision).

Respondent contends that appellant violated written Agency policies by calling out sick without sick leave available and failing to support such action with appropriate medical documentation. Given Doll's work history since 2014, the notices he had already received in 2017 (prior to his injury) warning him of the potential for significant discipline should he continue to miss work without approval, and the reasonable expectation that anyone in his position should have of being under strict scrutiny, it is surprising that Doll did not take extra steps to ensure documentation of his eligibility for sick leave.

I **CONCLUDE** that respondent proved by a preponderance of credible evidence that appellant's violations of DHS Administrative Orders provided respondent sufficient cause to impose discipline on Doll, pursuant to N.J.A.C. 4A:2-2.3(a)(12).

PENALTY

The Civil Service Commission's review of penalty is de novo. 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. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. West New York v. Bock, 38 N.J. at 523-24. Major discipline may include removal, disciplinary demotion, suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

The concept of progressive discipline is related to an employee's past record. The core of this concept is the nature, number and proximity of prior disciplinary infractions evaluated by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential. 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).

Respondent seeks a discipline penalty of removal for the violations occurring between September 17 through 21, 2017, and resignation not in good standing for the violations occurring between October 15 through 19, 2017. Appellant argues that "removal for not responding to two letters is grossly inappropriate and inconsistent with the spirit and purpose of the Civil Service Act." Br. of Appellant, at 18. Here, appellant mischaracterizes the infraction. It is not that Doll did not respond to respondent's letters of September 21, 2017, and October 13, 2017. Doll was absent from work as scheduled after being deemed fit to return to work by his doctor. Even if Doll had replied to respondent's letters, unless those replies included medical documentation supporting his absences, he would not have been excused.

Respondent contends that removal from employment was the appropriate response to appellant's absence from duty for five or more consecutive business days without approval. Under the regulations and DHS policy, such an absence is considered abandonment of the employee's position and is recorded as a resignation not in good standing. N.J.A.C. 4A:2-6.2(b). Further, the violation by an employee of a rule, regulation, policy, procedure, or order, such as the DHS Disciplinary Action Program, provides the employer other sufficient cause to impose discipline, pursuant to N.J.A.C. 4A:2-2.3(a) (12). Respondent notified appellant in writing on more than one occasion that appellant was required to submit written documentation to support the reasons for his absence from work, and respondent gave appellant deadlines within which to make such submissions. Appellant failed to so respond.

Doll's prior disciplinary record includes three separate notices of discipline during the first six months of 2017, and four charges between 2014 and 2016 (the last settled in early 2017). The majority of the charges are similar in nature to the charges in this matter, including that in April 2017, Doll was charged with (among others) abuse of sick leave and chronic or excessive absenteeism or lateness and was officially reprimanded; in May 2017, he was charged with (among others) chronic or excessive absenteeism or lateness and was suspended for five days; and in April 2017, he was charged with (among others) chronic or excessive absenteeism or lateness and was suspended for twenty days (with an appeal pending). Based upon the concept of progressive discipline, I **CONCLUDE** that the penalties of removal from employment and resignation not in good standing are appropriate and should be **SUSTAINED.**

ORDER

For the reasons stated above, I hereby **ORDER** that appellant **FREDERICK DOLL, III,** violated N.J.A.C. 4A:2-2.3(a)(4), chronic or excessive absenteeism; N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, specifically, absence from work as scheduled without permission but with giving proper notice of intended absence in violation of Administrative Order 4:08 A-2.4; chronic or excessive absenteeism from work without pay in violation of Administrative Order 4:08 A-4.3; and violation of a rule, regulation, policy, procedure, order or administrative decision, pursuant to Administrative Order 4:08 E-1.5, as a result of his unauthorized absences of September 17 through 21, 2017.

Further, I hereby **ORDER** that appellant **FREDERICK DOLL, III,** violated N.J.A.C. 4A:2-2.3(a)(4), chronic or excessive absenteeism; N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, specifically, abandonment of a job as a result of absence from work as scheduled without permission for five consecutive days in violation of Administrative Order 4:08 A-3.1; and violation of a rule, regulation, policy, procedure, order or administrative decision, pursuant to Administrative Order 4:08 E-1.4, as a result of his unauthorized absences of October 15 through 19, 2017.

Further, I hereby **ORDER** that the penalties of removal from employment and resignation not in good standing imposed by respondent **NEW JERSEY DEPARTMENT OF HEALTH, ANCORA PSYCHIATRIC HOSPITAL,** against appellant **FREDERICK DOLL, III**, are **AFFIRMED.**

Finally, I hereby **ORDER** that the appeal of appellant **FREDERICK DOLL, III**, is **DENIED.**

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.

April 8, 2020
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

TMC/nd

APPENDIX

WITNESSES

For Appellant:

Frederick Doll

Starr Doll

For Respondent:

Patricia Blue

Bao Duong

Alexandra Ryan Schantz

Keith Stewart

EXHIBITS

For Appellant:

A-1 Dr. Larry S. Rosenberg, M.D., F.A.A.O.S., Orthopaedic & Sports Specialists, P.C., Progress Note, dated September 15, 2017

A-2 Dr. Larry S. Rosenberg, M.D., F.A.A.O.S., Orthopaedic & Sports Specialists, P.C., Quick Note, dated September 15, 2017

A-3 Dr. Larry S. Rosenberg, M.D., F.A.A.O.S., Orthopaedic & Sports Specialists, P.C., Progress Note, dated September 22, 2017

A-4 Dr. Larry S. Rosenberg, M.D., F.A.A.O.S., Orthopaedic & Sports Specialists, P.C., Quick Note, dated September 22, 2017

A-5 Dr. Larry S. Rosenberg, M.D., F.A.A.O.S., Orthopaedic & Sports Specialists, P.C., Progress Note, dated September 29, 2017

A-6 Dr. Larry S. Rosenberg, M.D., F.A.A.O.S., Orthopaedic & Sports Specialists, P.C., Prescription, Thoracic Epidural Steroid Injection, dated September 29, 2017

A-7 Jeffrey Polcer, D.O., Advanced Surgical Institute, Report of Procedure Performed: 1. Thoracic epidural steroid injection, and 2. Fluoroscopy, dated November 6, 2017

A-8 Dr. Larry S. Rosenberg, M.D., F.A.A.O.S., Orthopaedic & Sports Specialists, P.C., Progress Note, dated November 27, 2017

A-9 Dr. Larry S. Rosenberg, M.D., F.A.A.O.S., Orthopaedic & Sports Specialists, P.C., Prescription, FCE, dated November 27, 2017

A-10 Dr. Larry S. Rosenberg, M.D., F.A.A.O.S., Orthopaedic & Sports Specialists, P.C., Progress Note, dated February 6, 2018

A-11 Charles Filippone, DPT, OCS, CIE and Quin Bond, BS, Biokinetics, Functional Capacity Evaluation, dated February 1, 2018

A-12 State of New Jersey, Department of Labor and Workforce Development, Division of Workers' Compensation, Redacted Order Approving Settlement, Case Number 2017-25622, dated November 28, 2018

For Respondent:

R-1 Two Preliminary Notices of Disciplinary Action (PNDA) (31-A), Civil Service Commission, State of New Jersey, dated October 23, 2017; Two Final Notices of Disciplinary Action (FNDA) (31-B), Civil Service Commission, State of New Jersey, dated April 26, 2018

R-2 Disciplinary File of Frederick Doll, State of New Jersey, Department of Human Services, Ancora Psychiatric Hospital, Notices dated November 17, 2014 through April 26, 2018

R-3 New Jersey Department of Human Services, Disciplinary Action Program, Office of Employee Relations

R-4 Ancora Psychiatric Hospital, Executive Policy and Procedure Manual, App. Date October 23, 2013, Issued February 1, 2014

R-5 Ancora Psychiatric Hospital, Report 21-Callouts for Employee Frederick E. Doll, 3rd, Date Range September 1, 2017 through October 23, 2017

R-6 APH Employee Information System-Leave Maintenance, Workers' Compensation and Federal Family Leave for Frederick Doll

R-7 Ancora Psychiatric Hospital, Office of Human Resources, Memorandum, to Appellant, from Alex Schantz, Office of Human Resources, Approval for Worker's [sic] Compensation, dated August 1, 2017

R-8 Ancora Psychiatric Hospital, Office of Human Resources, Memorandum, to Appellant, from Alex Schantz, Office of Human Resources, Worker's [sic] Compensation Extension, dated August 4, 2017 through September 8, 2017

R-9 Letter from Alex Schantz, Office of Human Resources, State of New Jersey, Division of Mental Health and Addiction Services, Ancora Psychiatric Hospital, to Appellant, Requesting a PERS-47 and/or Disability Forms for Absences, dated September 21, 2017

R-10 Ancora Psychiatric Hospital, Office of Human Resources, Memorandum, to Appellant, from Alex Schantz, Office of Human Resources, Approval for Worker's [sic] Compensation, dated September 22, 2017

R-11 Ancora Psychiatric Hospital, Department of Human Resources, Return to Duty Authorization, dated September 29, 2017

R-12 Letter from Alex Schantz, Office of Human Resources, State of New Jersey, Division of Mental Health and Addiction Services, Ancora Psychiatric Hospital, to Appellant, Requesting a PERS-47 and/or Disability Forms for Absences, dated October 6, 2017

R-13 Email from Alexandra Schantz to Patricia Blue, Appellant-Failure to Return, dated October 16, 2017

R-14 Letter from Marc Malfara, Employee Relations Coordinator, Office of Employee Relations, State of New Jersey, Department of Health and Addiction Services, Ancora Psychiatric Hospital, via Regular and Certified, Return-Receipt Mail, to Appellant, Regarding Absent from Duty Without Approval Constituting "Resignation not in good standing," per N.J.A.C. 4A:2-6.2, dated October 23, 2017

R-15 Human Resources Sign-in Sheet, dated September 29, 2017