Dep't of Correction v. Knupp

OATH Index No. 1774/18 (Jan. 4, 2019), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2019-0314 (Aug. 1, 2019), **appended**

Charges of medical incompetence and excessive absence were sustained in light of captain's lengthy absence from work due to line of duty injuries. Termination of employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
- against -
ALCIDNEA KNUPP
Respondent

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

Petitioner, the Department of Correction ("DOC"), brought this proceeding under Civil Service Law section 75, against respondent Alcidnea Knupp, a captain assigned to the Anna M. Kross Center ("AMKC") on Rikers Island. Petitioner alleges that from July 27, 2016, through the trial date, respondent used an excessive amount of sick leave, demonstrating "an inability/medical incompetence to perform her duties . . ." (ALJ Ex. 1). Petitioner seeks respondent's termination from employment.

At a one-day trial, petitioner presented documentary evidence and the testimony of three witnesses: Ms. Tyther-Lawson, a principal administrative associate in DOC's Health Management Division ("HMD"); Mr. Williams, a DOC timekeeper; and Deputy Warden Cort, the Administrative Deputy Warden at the Robert N. Davoreen Center ("RNDC") on Riker's Island. Respondent testified on her own behalf. The parties submitted post-trial memoranda on whether the matter should be converted to a medical separation case.

For the reasons below, the charges are sustained. I recommend that respondent's employment be terminated.

ANALYSIS

There is very little dispute about the facts. Respondent began her employment with DOC in 2008 and was promoted to the rank of captain in about 2012. After her promotion, respondent was assigned to RNDC. In about 2017 she was transferred to AMKC (Tr. 90-91). According to HMD's medical summary report (Pet. Ex. 4), respondent suffered two on-the-job injuries for which she instituted workers' compensation claims. On September 10, 2015, while restraining an inmate, respondent fell to the floor, injuring her left knee, shoulder, and arm. On September 30, 2016, while restraining an inmate during another use of force, respondent injured her right knee and left wrist. She was also exposed to MK9 gas, which irritated her eyes, face, ears, and neck. (Pet. Ex. 4). Respondent testified about these incidents (Tr. 94-95), as well as two earlier on-the-job injuries, occurring in February 2014 and March 2015, which she indicated resulted in injuries to her lower leg, left wrist, and shoulder (Tr. 92-93).

The period of excessive absence which is alleged in the petition begins on July 27, 2016. There are three types of documents which petitioner relied upon to establish the alleged absences: HMD's medical summary report (Pet. Ex. 4), sick leave requests reports generated by timekeeping (Pet. Exs. 5-7), and an employee sick history (Pet. Ex. 3). The medical summary report shows the dates on which respondent was either absent from work because she was sick, or at work but on modified duty with medically monitored restrictions ("MMR"). The medical summary report also shows the reason for the sick or MMR designation, whether the absences were due to a workers' compensation case, and whether they were documented (Pet. Ex. 4; Tyther-Lawson: Tr. 36). The sick leave requests reports show the dates for which respondent requested sick leave (Pet. Exs. 5-7; Williams: Tr. 58-69). The employee sick history shows the dates on which respondent first called out sick, the sick code used by the sick desk in characterizing her absence, and the date on which she was expected to return (Pet. Ex. 3; Tyther-Lawson: Tr. 25).

The medical summary report, coupled with respondent's testimony, is helpful in understanding the medical conditions underlying her absences. The medical summary report shows that respondent was out sick on a number of one- or two-day occasions beginning in July 27, 2016 due to trauma relating to on-the-job injuries: July 27, 2016, July 30, 2016, August 26, 2016, October 4, 2016, October 5, 2016, November 27, 2016, and December 18, 2016.

Respondent was also out sick on August 18, 2016, because of gastrointestinal issues. The medical summary report does not indicate which absences were attributable to the September 10, 2015, line of duty injury and which to the September 30, 2016, line of duty injury.

Respondent took extended sick leave from December 27, 2016 to March 20, 2017, attributable to an on-the-job injury. She had surgery on her left knee on January 25, 2017, after which she returned to work on March 21, 2017, on MMR status (Pet. Ex. 4). From March 21 to March 23, March 25 to March 26, and March 28 to April 1, 2017, respondent was placed on modified duty. The medical summary report indicates that she suffered from bursitis, a meniscus tear, a hip labral tear, and a knee sprain (Pet. Ex. 4). On March 24 and March 27, 2017, respondent called out sick for "Trauma." Due to swelling to her left knee, respondent called out sick from April 2 to April 4 and April 21 to May 6, 2017. Except for single-day absences, respondent's sick leave and modified duty were supported with medical documentation. Most, but not all of these absences, were marked in the medical summary report as attributable to on-the-job injuries (Pet. Ex. 4).

The Department suspended respondent from May 7 to May 13, 2017 (Pet. Ex. 4).[1] From May 14, 2017 to present, respondent has been out on sick leave, attributable to an on-the-job injury and supported by medical documentation (Pet. Ex. 4; Tyther-Lawson: Tr. 29-30). On May 24, 2017, respondent had surgery on her right knee. From June 1 to June 3, 2017, she was hospitalized due to a blood clot on her right knee (Pet. Ex. 4; Tr. 95-96). On September 20, 2017, respondent was hospitalized because of deep vein thrombosis in her right leg and other issues. The medical summary report indicates that her injuries include a right wrist ulnar fracture, left radial tear of the lateral meniscus, right hip tear, and cervical spine disc herniation (Pet. Ex. 4). Respondent testified that she still requires surgery on her neck, left ankle, and left wrist, and has a tear and dislocated bone on her right hip (Tr. 92).

In its petition, the Department did not specify the dates on which it claimed that respondent was excessively absent. Petitioner instead represented that these dates were specified in the leave requests reports, about which Mr. Williams, the timekeeper, testified (Pet. Exs. 5-7; Tr. 58-69)[2]. Beyond that, although the leave requests reports upon which petitioner relied were largely reliable, they were not always so. The leave requests reports sometimes characterized

[1] The report does not provide the basis for respondent's suspension.

[2] The better practice, in conformity with OATH Rule of Practice 1-22, would be to enumerate the dates of the alleged absences in the petition itself, or an exhibit to the petition, rather than in an exhibit introduced at trial.

dates as sick leave which were not on the employee's sick leave history (Pet. Ex. 3) and which were characterized on the medical summary report (Pet. Ex. 4) as MMR dates. In addition, the leave requests reports did not quantify the total number of sick days for which respondent sought sick leave, instead listing the duration in hours. Although Mr. Williams calculated the total number of days of sick leave that were requested and approved (Tr. 60), his testimony was somewhat confusing, in part because of the overlapping nature of the sick leave reports.

Mr. Williams testified, based upon the leave requests report covering parts of 2016 and 2017, that respondent was absent from work from July 27, 2016 through April 21, 2017, for 69 work days (Tr. 63-64, 69; Pet. Ex. 5). The calculation should exclude April 21, 2017, because that date appears on the subsequent leave report (Pet. Ex. 6). More seriously, on four days noted in the leave report – March 21, 2017, March 22, 2017, March 23, 2017, and March 28, 2017 – respondent was on MMR status, not sick leave (Pet. Exs. 3, 4). Petitioner, which has the burden of proof, did not clarify this discrepancy, and thus did not establish that respondent was absent from work on these four dates. Excluding these dates, petitioner established that, between July 27, 2016 and April 20, 2017, respondent was absent from work because of sick leave on 65 days.

Mr. Williams also testified, based upon the leave requests report for calendar year 2017, that respondent was absent from work for 170 work-days between September 5, 2017 through December 23, 2017 (Pet. Ex. 6: Tr. 62-53). It appears, however, that Mr. Williams meant to refer to the period commencing April 21, 2017, which is the earliest leave date which appears on the report, rather than September 5, 2017, which is the earliest leave date which appears on the first page of the report (Pet. Ex. 6). Additionally, this tribunal's calculation of the leave requests report shows that respondent requested and was approved for sick leave for 146 dates between April 21, 2017 and December 23, 2017 – not 170 days. HMD's medical summary report is consistent with the leave requests report for this period, except for the four dates from May 8, 2017 to May 11, 2017, during which time respondent was suspended, not on sick leave (Pet. Exs. 3, 4). Excluding these four dates, petitioner established that from April 21, 2017 through December 23, 2017, respondent was absent from work because of sick leave on 142 days.

Finally, as to the leave requests report for the period from December 24, 2017, through April 21, 2018 (Pet. Ex. 7), Mr. Williams testified that respondent applied and was approved for 74 days of sick leave (Tr. 62). However, it appears that he did not include dates in 2017, as he testified that the 74 days were "[f]or 2018, all dates included" (Tr. 62). The leave requests report

included at least five days of approved sick leave for 2017 (Pet. Ex. 7), which is consistent with this tribunal's calculation that, from December 24, 2017, through April 21, 2018, respondent requested 79 days of sick leave. The leave requests report is consistent with HMD's medical summary report, dated April 9, 2018 (Pet. Ex. 4), as well as the employee sick history (Pet. Ex. 3), both of which indicate that respondent has been out sick since May 14, 2017 (Pet. Ex. 4). Thus, petitioner established that from December 24, 2017 through April 21, 2018, respondent has been absent from work due to sick leave on 79 days.

In sum, petitioner's documentary evidence, consisting of the leave requests reports, the medical summary report, and the employee sick history, establishes that from July 27, 2016 through April 21, 2018, respondent has been absent for 286 days which were charged to sick leave. In addition, Ms. Tyther-Lawson, an administrative associate at HMD, testified based upon the employee sick history, that as of the date of the trial, which was nine days later, on May 1, 2018, respondent still had not returned to work (Pet. Ex. 3; Tr. 29).

Petitioner asserts that it has established that respondent has been excessively absent and that her employment should be terminated. Conversely, respondent contends that the disciplinary charges should be dismissed and the case should be converted to a section 71 proceeding under the Civil Service Law. Respondent contends that her absences are attributable to on-the-job injuries from which she is currently disabled and is awaiting a decision from the New York City Retirement System ("NYCERS") on her permanent disability retirement application. Respondent and petitioner agree, however, that medical separation is not currently available under section 71 because respondent has not been absent for a two-year period.

As a preliminary matter, section 75 of the Civil Service Law permits an employer to discipline an employee for misconduct or incompetence after a due process trial. Civ. Serv. Law §75(1) (Lexis 2018). Section 71 of the Civil Service Law, by contrast, provides for separation from employment with certain reinstatement rights. Section 71 of the Civil Service Law provides:

> Where an employee has been separated from the service by reason of a disability resulting from occupational injury or disease as defined in the workmen's compensation law, he or she shall be entitled to a leave of absence for at least one year, unless his or her disability is of such a nature as to permanently incapacitate him or her for the performance of the duties of his or her position. Notwithstanding the foregoing, where an employee has been

> separated from the service by reason of a disability resulting from an assault sustained in the course of his or her employment, he or she shall be entitled to a leave of absence for at least two years, unless his or her disability is of such a nature as to permanently incapacitate him or her for the performance of the duties of his or her position.

Civ. Serv. Law §71.

In construing this provision, the Court of Appeals held that the statute "entitles an employee disabled by an occupational injury to a leave of absence for at least one year, unless the injury permanently disables the employee from the performance of work duties . . ." *Allen v. Howe,* 84 N.Y.2d 665, 669 (1994). HMD's medical summary report attributes most of respondent's absences to a work-related assault (Pet. Ex. 4), which under section 71, entitles an employee who is disabled as a result of an assault to a leave of absence for at least two years. But, as the Court noted, section 71 does not apply to employees who are permanently disabled. *See* Civ. Serv. Law § 71 (excluding any employee whose "disability is of such a nature as to permanently incapacitate him or her for the performance of the duties of his or her position"). Respondent has given no indication that she is likely to return to work in the immediate future. Indeed, although she testified that she needs additional surgery, she has submitted an application for permanent disability retirement. Thus, it appears that section 71 is not an available option at this time.

Respondent urges, however, that if her application for permanent disability is denied, DOC should wait until respondent has been absent for two cumulative years, and then bring an action under section 71 to medically separate her, rather than seek termination now under section 75.

Respondent's argument is unavailing. There is some support for the premise that section 71, rather than section 75, should be utilized when an employee is absent from work for an extended period of time because of an injury sustained at work. *See Dep't of Environmental Protection v. Gavnoudias,* OATH Index No. 648/17 at 3 (July 11, 2017), *adopted*, Comm'r Dec. (Sept. 12, 2018) (converting a disciplinary charge under section 75 to a medical separation charge under section 71 where the employee, a construction laborer, had been absent for more than one year due to a single work-related injury, because of the legislative intent behind section 71 "to avoid penalizing an employee who was absent from work due to an injury or disability");

see also Dep't of Environmental Protection v. D'Amore, OATH Index No. 1307/17 (May 4, 2017) (dismissing section 75 charges where long-term absence was due to delay in workers' compensation process and employer's failure to restore employee to duty after he submitted letter from his doctor confirming he could return to work with no restrictions).

However, at this juncture, respondent has not asserted, much less established, that she expects to be able to return to work. Absent some indication that she is likely to be able to return to work in the foreseeable future, petitioner should not be compelled to wait to medically separate her under section 71. Petitioner may instead proceed under section 75, which has been held to permit discipline of employees for excessive absence on an incompetence theory, even where employees were absent for legitimate reasons, including work-related injuries, and where their absences were authorized. *See, e.g., Wallis v. Sandy Central Dist. Bd. Of Educ.*, 79 A.D.3d 1813, 1814 (4th Dep't 2010) (". . . the issue is whether the employee's excessive absences 'and their disruptive and burdensome effect on the employer rendered [her] incompetent to continue her employment'") (citations omitted); *Dep't of Correction v. Givens*, OATH Index No. 393/09 at 4 (Dec. 29, 2008) (disciplinary action against an employee for excessive absenteeism permitted even if the absences result from verified illnesses or work-related injuries covered by workers' compensation).

Petitioner may also rely upon its absence control directive, which provides that an employee who reports sick on 40 or more work days, or on 15 or more occasions, "may be subject to termination." (Pet. Ex. 1, Directive 2258R-A §§ III(D), III(E)). This case presents an unusual use of this directive. The directive provides that the use of sick leave as a result of a line of duty injury which was the result of a use of force incident is a mitigating factor to be considered before disciplinary action is taken (Pet. Ex. 1, Directive 2258R-A § III(F).[3] Moreover, the vast majority of medical incompetence cases adjudicated at this tribunal arise from absences attributable to a range of different illnesses, rather than a disability attributable to an inmate assault or line of duty injury. *See, e.g, Dep't of Correction v. N.C.,* OATH Index No. 1907/18 (July 20, 2018) (medical incompetence due to use of 260 sick days in a one-year period attributable to non-work-related medical issues, including anxiety, depression, and trauma);

[3] Under the directive, an officer's initial absence due to injuries sustained during a use of force incident is excluded from the calculation of the officer's use of sick leave. But after the officer returns to duty, any additional absences attributable to the use of force are included in the calculation of sick leave (Pet. Ex. 1, Directive 2258R-A § II(B)(2)).

Dep't of Correction v. Swannick, OATH Index No. 899/07 (Feb. 16, 2007), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 07 87-SA (Aug. 14, 2007) (medical incompetence due to use of 180 sick days over two years attributable to miscellaneous issues such as depression, stress, anxiety, knee and lower back pain); *Dep't of Correction v. Van-Osten,* OATH Index No. 1793/05 at 2 (Nov. 18, 2005) (medical incompetence due to use of 185 sick days over 18 months attributable to "a wide variety of different physical and psychological conditions," including chest pains, cold, flu, hypertension, depression, stress, vertigo and high blood pressure).

Although the absence control directive considers absences due to a line of duty injury to be a mitigating factor, it does not preclude the initiation of disciplinary action where an employee's use of sick leave is attributable to such a line of duty injury. And medical incompetence charges have been sustained based upon correction officers' excessive use of sick leave, even when they attributed their absences to line of duty injuries. *See Dep't of Correction v. Hodge,* OATH Index No. 264/14 at 3 (Apr. 11, 2014) (correction officer absent for more than 300 consecutive days, the bulk of which she claimed were due to injuries sustained when she used force to restrain inmates); *Dep't of Correction v. Givens,* OATH Index No. 393/09 (Dec. 29, 2008) (correction officer used more than 135 sick days over 14 months which she attributed to line of duty incident); *Dep't of Correction v. Cherry*, OATH Index No. 184/07 at 6 (Feb. 28, 2007), *aff'd*, 66 A.D.3d 556 (1st Dep't 2009) (correction officer was out sick for more than 80 days in a year, after returning from absences immediately following a use of force; absences immediately following the use of force not considered).

In this case, respondent has used almost 300 sick days over a 21 month period. Respondent has not indicated that she will be able to return to work and is seeking a disability pension. Under these circumstances, respondent's use of sick leave, although attributable to injuries resulting from inmate assaults, is sufficient to establish an excessive use of sick leave and medical incompetence under Directive 2258R-A. The charges are sustained.

FINDINGS AND CONCLUSIONS

Petitioner demonstrated that from July 27, 2016 through May 1, 2018, respondent has been excessively absent, reporting sick on almost 300 days and demonstrating medical incompetence to perform her duties.

RECOMMENDATION

Upon making this finding, I requested and reviewed respondent's personnel abstract. She has been employed by the Department since 2008. She has two prior disciplinary cases. In 2015, she forfeited 8 days of compensation or vacation time as a result of charges relating to use of force reporting. In 2017, she was suspended for seven days for conduct unbecoming. The disciplinary abstract does not specify the nature of these charges.

As discussed above, petitioner seeks respondent's termination, while respondent contends the appropriate remedy is a leave under section 71. Respondent's case is extremely sympathetic. She was involved in multiple uses of force with inmates, and as a result underwent two knee surgeries. Soon after one of the surgeries, she was hospitalized because of a blood clot on her knee, and about three months after that she was again hospitalized, because of deep vein thrombosis in her leg. In addition to the knee surgeries, respondent has suffered injuries to her hip, neck, spine, ankle, and wrist. The better course of action, given these serious injuries, stemming from inmate assaults, is to medically separate respondent under section 71. That option, however, is not available to employees who are permanently disabled. Respondent has an application for permanent disability retirement pending, and has not represented that she believes that she will be able to return to work.

Accordingly, I recommend termination of respondent's employment.

Faye Lewis
Administrative Law Judge

January 4, 2019

SUBMITTED TO:

CYNTHIA BRANN
Commissioner

APPEARANCES:

JOHN MCNIFF, ESQ.
Attorney for Petitioner

FRANKIE & GENTILE, P.C.
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BY: JAMES G. FRANKIE, ESQ.

THE CITY OF NEW YORK
CITY CIVIL SERVICE COMMISSION

In the Matter of the Appeal of

ALCIDNEA KNUPP
Appellant

-against-

DEPARTMENT OF CORRECTION
Respondent

Pursuant to Section 76 of the New York State Civil Service Law

CSC Index No: 2019-0314

DECISION

ALCIDNEA KNUPP ("Appellant") appealed from a determination of the Department of Correction ("DOC") finding Appellant, a Captain, guilty of incompetence and/or misconduct and imposing a penalty of termination following proceedings conducted pursuant to Civil Service Law ("CSL") Section 75. For the reasons discussed below, the Civil Service Commission ("Commission") finds that termination of Appellant's employment is supported by the record.

Appellant began working as a Correction Officer in 2008, and was promoted to Captain in 2012. Subsequent to her promotion, Appellant sustained work-related injuries on four occasions:

1. February 2014, with injuries to her lower leg and left wrist;
2. March 2015, with injuries to her left wrist and shoulder;
3. September 2015, with injuries to her left knee, shoulder and arm; and
4. September 2016, with injuries to her right knee and left wrist, as well as irritation to her eyes, face, ears and neck from exposure to MHK9 gas.

Appellant instituted workers' compensation claims for the September 2015 and 2016 incidents.

On December 8, 2017, DOC charged Appellant with "an excessive use of sick leave and/or inability/medical incompetence to perform her duties as a Captain" after being absent for 93 days from February 18, 2016 to December 4, 2017. DOC subsequently amended the charge to "from on or about July 27, 2016 to December 4, 2017, and continuing to the present." In her January 4, 2019 Report and Recommendation ("R&R"), following a May 1, 2018 hearing at the Office of Administrative Trials and Hearings ("OATH"), Administrative Law Judge Faye Lewis ("ALJ" or "ALJ Lewis") determined that, from July 27, 2016, through May 1, 2018, Appellant had been absent from work for 300 days. R&R at 8.

ALJ Lewis noted that there was very "little dispute" about the facts underlying DOC's charging Appellant for violating the agency's Absence Control Directive 2258R-A. R&R at 2. DOC's Absence Control Directive states, in relevant part, that a "member who reports sick forty (40) or more work days in a twelve (12) month period may be subject to termination." In order to determine when an employee who is subject to the Absence Control Directive should be terminated, the Directive provides five mitigating factors the agency must consider:

1. The employee's use of sick leave since joining DOC;
2. Whether the sick leave is a result of a line-of-duty injury that resulted of an unusual incident or a use of force incident;
3. Whether the use of sick leave is associated with pass days and holidays;
4. Whether the use of sick leave is associated with ordered overtime; and
5. The nature of the illness.

Appellant asserted at the hearing below that the most relevant of the factors here is whether the sick leave is a result of a line-of-duty injury that resulted from an unusual incident or a use of force incident. Appellant argued that DOC did not adhere to its own procedures

regarding mitigation before bringing an incompetence charge, given that Appellant's absences were from several line-of-duty injuries and that she had not habitually abused time and leave rules in her career. However, DOC argued that it has given the cause of Appellant's injuries proper consideration, which was evidenced by the fact that Appellant was absent for 300 days before DOC took action, considerably more than the 40 days in the Absence Control Directive. Ultimately the agency reached the point where Appellant's absence affected staffing and morale and they finally had to take the action of separating Appellant from service for medical incompetence.

The applicability of CSL Sec. 71, which provides for medical separation, was not raised or argued by either party at the OATH hearing, but ALJ Lewis on her own initiative directed the parties to submit post-hearing briefs on whether DOC's medical incompetence charge could be unilaterally converted to a CSL Sec. 71 medical separation case by OATH.

CSL Sec. 71 states that

> Where an employee has been separated from the service by reason of a disability resulting from occupational injury or disease as defined in the [Workers Compensation Law], he or she shall be entitled to a leave of absence for at least one year, unless his or her disability is of such a nature as to permanently incapacitate him or her for the performance of the duties of his or her position. Notwithstanding the foregoing, ***where an employee has been separated from the service by reason of a disability resulting from an assault sustained in the course of his or her employment, he or she shall be entitled to a leave of absence for at least two years, unless his or her disability is of such a nature as to permanently incapacitate him or her for the performance of the duties of his or her position.*** (Emphasis added.)

There is no dispute that Appellant's injuries resulted from assaults sustained in the line of duty. There is no dispute that Appellant was a good employee who did not abuse DOC's time and leave policy and was separated from service solely due to her inability to do the job of

Captain due to these injuries. There is no dispute that she had been absent less than two years when DOC took action to separate her under CSL Sec. 75 and, in fact, at the time of the Commission hearing, Appellant still had not been absent for two years.

What remains in dispute is whether Sec. 71 obligates DOC to retain Appellant (whose injuries have prevented her from returning to work and, who even at the time of the Commission hearing was still unable to return to work) on payroll for two years before separating her for her medical inability to perform her duties. The crux of the issue is whether Appellant's injuries have disabled her to such an extent that she is "permanently incapacitated" from performing the duties of a Captain at DOC.

The parties disagreed in their post-hearing submissions to ALJ Lewis whether Appellant was permanently incapacitated from performing her duties as a Correction Captain. In DOC's undated submission, the agency argued that Appellant has not given any indication that she intended to return to work and, therefore, ALJ Lewis could not convert the case from a CSL Sec. 75 medical incompetence case to a CSL Sec. 71 separation. DOC asserted that Appellant was in violation of the agency's sick leave policy and reiterated its argument about the strain caused by her extended absence:

> For the past year and five months the DOC has ordered replacement Captains to work involuntary overtime shifts to make up for [Appellant's] absences, creating fatigue and resentment by those employees and increasing the likelihood of use of force incidents and security concerns. After weighing the unlikelihood of [Appellant] returning to work against the identified security concern, [DOC] proceeded with this medical incompetence case because it was no longer able to bear the toll [Appellant's] absences have on DOC staff moral and its overall ability to function.

In his October 15, 2018 post-hearing submission, Appellant's attorney revealed that Appellant was "awaiting a decision from the New York City Employees' Retirement System

["NYCERS"] concerning her permanent disability retirement application." Appellant's attorney argued that a conversion to a CSL Sec. 71 separation "would be an appropriate alternative that would remove the stigma of the CSL Sec. 75 termination. However, [Appellant] concurs with [DOC] that such action should not be undertaken until [Appellant] has been absent for a period of two (2) years." Appellant's attorney also asserted that should NYCERS deny Appellant's application for a disability retirement, DOC should wait until the two years have elapsed and then bring a proceeding under CSL Sec. 71 to medically separate Appellant from her employment. Appellant's attorney did not assert at the OATH hearing, or at the Commission hearing, that Appellant was either ready to return to work and reassume her duties as Captain, or had a reasonable expectation of being able to return at any time in the future.

In her January 4, 2019 R&R, ALJ Lewis noted that CSL Sec. 71 provides for separation from employment with certain reinstatement rights in order to avoid penalizing an employee who was absent from work due to a work-related injury or disability. However, the ALJ concluded that a medical separation under CSL Sec. 71 was not an available option to this Appellant under these circumstances. ALJ Lewis stated that although Appellant indisputably was injured while on duty, Appellant never made the argument to DOC or at the OATH hearing that she intended to return to work, but instead testified she was actively seeking to retire on permanent disability.

ALJ Lewis, noting that Appellant had "not asserted, much less established, that she expects to be able to return to work," determined that DOC was within its right under CSL Sec. 75 to seek Appellant's termination from employment. The ALJ held that "[a]bsent some indication that [Appellant] is likely to be able to return to work, [DOC] should not be compelled to wait to medically separate her under section 71." Finally, ALJ Lewis concluded that the agency may also rely on its own Absence Control Directive. Appellant was absent for almost 300

days over a 21-month period, well in excess of the 40-days over a 12-month period referenced in the Directive. The ALJ found that DOC did not ignore the mitigating factor that Appellant had been injured in the line of duty, and that despite the reason for her absence, the agency is not precluded from bringing a CSL Sec. 75 charge based on excessive absences and seeking to terminate her employment. Therefore, noting that CSL Sec. 71 is unavailable to Appellant, who appeared to be permanently disabled, who sought a disability retirement, and who was unable to assert when or if she would be able to return to work, Appellant's 300-day absence was sufficient for DOC to establish that Appellant was properly subject to the agency's Absence Control Directive. ALJ Lewis recommended that Appellant be terminated from employment.

In a March 15, 2019 letter, DOC informed Appellant that it had accepted the ALJ's January 4, 2019 recommendation and terminated Appellant from its employment. Appellant appealed to the Commission on April 2, 2019, and submitted an additional memorandum on May 2, 2019. DOC submitted its response on May 7, 2019, and both documents were subsumed into the record for Commission review.

The Commission heard arguments from the parties on May 9, 2019. Appellant's attorney asked that the Commission reverse DOC's decision terminating Appellant's employment, or, in the alternative, convert the matter to a medical separation pursuant to CSL Sec. 71.

The Commission's review is limited to the record up to the agency commissioner's March 15, 2019 decision to terminate Appellant's employment. In reviewing the ALJ recommendation as accepted by an agency commissioner, an appellate body is bound to consider only what was before the ALJ at the time she rendered her decision. *Rizzo v. New York State Div. of Housing and Community Renewal*, 6 N.Y.3d 104 (2005); *Yarbough v. Franco*, 95 N.Y.2d 342 (2000); *Eisland v. New York City Campaign Finance Board*, 31 A.D.3d 259 (1st Dept. 2006).

Therefore, the Commission will not consider any additional absences or facts that occurred after March 15, 2019, the date of the DOC commissioner's decision, including the outcome of Appellant's NYCERS application, as those were not before ALJ Lewis when she made her recommendation.

The Commission finds that the record supports ALJ Lewis's conclusions and recommendation. Appellant's argument that OATH or the Commission should reverse Appellant's termination for medical incompetence under CSL Sec. 75 and require that DOC wait until two years have elapsed to medically separate her from employment under CSL Sec. 71 is not supported by the law or the record. CSL Sec. 71 is specifically intended to give employees injured in the line of duty two years to recover,[1] but not if the "disability is not of such a nature as to permanently incapacitate him or her for the performance of the duties of his or her position." It is not an entitlement to two years' pay for employees who have been permanently disabled by a work-related injury. In order to invoke CSL Sec. 71, it was Appellant's obligation to assert that while she needs more time to heal from her serious injuries, at some point she would be able to return to work as a DOC Captain. In this case, however, Appellant, to the contrary, both at the OATH hearing and the Commission hearing, was unable to assert when or if she could ever return to work.

Under these circumstances, DOC was entitled to proceed under the authority of CSL Sec. 75 to bring a proceeding against Appellant alleging incompetence for excessive absence. *See Brockman v. Skidmore*, 39 N.Y.2d 1045, 387 N.Y.S.2d 426 (1976). DOC is singularly placed to determine the effect Appellant's absence has on its staff, even if her absence was caused by line-of-duty injuries. *See Cicero v. Triborough Bridge & Tunnel Auth.*, 264 A.D.2d 334 (1st Dept.

[1] *See Allen v. Howe*, 84 N.Y.2d 665 at 672 (1994), holding that by establishing the point at which injured civil servants may be replaced, CSL Sec. 71 strikes a balance between the recognized substantial State interest in an efficient civil service and the interest of the civil servant in continued employment in the event of disability.

1999) (holding that the employee's 80 percent rate of absence over 19 months was excessive under any standard and that the absences were authorized was irrelevant to the ultimate issue of whether the employee's unreliability and its disruptive and burdensome effect on the employer rendered him incompetent to continue his employment.) Here, the record clearly shows that DOC demonstrated how this Captain's sustained absence forced replacement Captains to work involuntary overtime shifts which created fatigue and resentment by those employees, leading the agency to be concerned about the increasing likelihood of use of force incidents. Therefore, DOC's election of remedies was limited to a proceeding under CSL Sec. 75 and its Absence Control Directive. After weighing the unlikelihood of Appellant returning to work to reassume her duties as a Captain against the identified security concerns, DOC initiated a medical incompetence proceeding.

The Commission has considered the arguments presented on this appeal, and reviewed the record of the OATH proceeding. Based on this review, the Commission concludes that there is sufficient evidence in the record to support the findings of fact and the conclusions of law, and that termination is appropriate. Therefore, DOC's final decision to terminate Appellant remains unchanged.

SO ORDERED

Dated: August 1, 2019