STATE OF NEW JERSEY

In the Matter of Darren Headen
Ancora Psychiatric Hospital,
Department of Health

CSC DKT. NOS. 2017-2467, 2017-2466 AND 2017-2465
OAL DKT. NOS. CSV 02154-17, 02160-17 AND 02161-17
(Consolidated)

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: November 4, 2020 BW

The appeals of Darren Headen, Human Services Assistant, Ancora Psychiatric Hospital, Department of Health, three removals effective January 24, 2017, on charges, were heard by Administrative Law Judge Dorothy Incarvito-Garrabrant, who rendered her initial decision on October 6, 2020. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on November 4, 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 affirms the granting of the appointing authority's motion for summary decision and affirms the removals of Darren Headen.

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 4th DAY OF NOVEMBER, 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
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION
OAL DKT. NOS. CSV 02154-17, CSV 02160-17 and CSV 02161-17 (Consolidated)
AGENCY DKT. NOS. 2017-2467, 2017-2466 and 2017-2465

IN THE MATTER OF DARREN HEADEN, DEPARTMENT OF HUMAN SERVICES, ANCORA PSYCHIATRIC HOSPITAL.

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

Elizabeth Davies, Deputy Attorney General, for respondent, Department of Human Services, Ancora Psychiatric Hospital (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: September 29, 2020 Decided: October 6, 2020

BEFORE **DOROTHY INCARVITO-GARRABRANT**, ALJ:

STATEMENT OF THE CASE

In each of these appeals, the Department of Human Services, Ancora Psychiatric Hospital (respondent) seeks to remove the appellant, Darren Headen (appellant), who was employed by respondent as a Human Services Assistant. Respondent contends that appellant has abused his leave time for several years, and charged him with violations of 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, N.J.A.C. 4A:2-2.3(a)12 other sufficient cause, Administrative Order 4:08 A-1.5 absent from work as scheduled without permission and without giving proper notice of intended absence, Administrative Order 4:08 A-2.5 absent from work as scheduled without permission but with giving proper notice of intended absence, Administrative Order 4:08 A-4.3 chronic or excessive absenteeism from work without pay absent, and Administrative Order 4:08 A-1.2 violation of a rule, regulation, policy, procedure, order or administrative decision.

PROCEDURAL HISTORY

Respondent issued three separate disciplinary notices seeking appellant's removal from his position in each. A first Preliminary Notice of Disciplinary Action (PNDA) was issued on September 18, 2015. A departmental hearing was conducted on or about December 7, 2016, and a Final Notice of Disciplinary Action (FNDA) was issued on January 23, 2017. A second PNDA was issued on October 19, 2015. A departmental hearing was conducted on or about December 7, 2016, and a FNDA was issued on January 23, 2017. A third PNDA was issued on December 14, 2015. A departmental hearing was conducted on or about December 7, 2016, and a FNDA was issued on January 23, 2017. Petitioner appealed all three FDNAs to the Civil Service Commission and the matters were filed the Office of Administrative Law (OAL) on February 14, 2017. An Order of Consolidation was entered on May 10, 2017.

Respondent filed the instant motion for summary decision based upon a pattern of chronic and excessive absenteeism, and argued no genuine issues of material fact exist. Appellant opposed the motion and contended that his absences were legitimate

and excusable, that he provided proof of illness documentation (POI), as required, and that respondent failed to properly identified the dates on which he was absent or failed to provide sufficient POI. Finally, to the extent the charges are sustained, the appellant argued that the penalty imposed is unreasonable and excessive.

ARGUMENTS

For Respondent

In support of its motion which addressed each of the three removal actions consolidated herein, respondent made several arguments. First, this matter is ripe for summary decision, because no genuine issues of material fact exist concerning petitioner's excessive absenteeism and related conduct. Respondent's policies and procedures clearly state that failure to follow the absenteeism policy will be cause for "disciplinary action in accordance with the New Jersey Department of Human Services Disciplinary Action Program." (Ra55.) Removal is appropriate "where the charges and proofs include a long-term, consistent, unapproved course of habitual and chronic absenteeism and lateness by appellant." Terrel v. Newark Housing Authority, 92 N.J.A.R. 2d (CSV) 750, 752. Chronic or excessive absenteeism is generally understood to be conduct that continues over a long time or recurs often. Good v. Northern State Prison, 97 N.J.A.R. 2d. 529, 531. The factors to be considered when determining whether absenteeism is chronic or excessive include the number of absences, the time span between the absences and the negative impact on the workplace. An employer has a legitimate right to expect that its employees will attend work as scheduled. Attendance is an essential function of most jobs.

Appellant was a part-time worker. Respondent gave appellant several minor disciplines for attendance infractions. However, appellant's conduct did not improve. Relative to the first removal action, appellant was absent ninety-seven times between June 2, 2011 and October 1, 2015. (Ra-35-37.) Relative to the second removal action, appellant was absent nine times in less than a three-week period between October 1, 2015 and October 16, 2015. (Ra57.) Relative to the third removal action, appellant

was absent eleven times in a three-week period between November 14, 2015 and December 1, 2015. (Ra56-57.) Respondent contended that the appellant's behavior was egregious. Appellant was on notice that he had to attend work because he was disciplined previously. Either appellant did not grasp or have any regard for the fact that his job attendance was required.

In response to appellant's opposition to the motion, respondent added the following. Appellant does not deny that he had repetitive violations of excessive absenteeism. The appellant simply disputes the allegation that he did not turn in doctor's notes and asserts that he did turn them in for August 9, 21, 23, 24, 26, and 31, 2015, October 3, 4, 6, and 7, 2015, and November 14, 15, 28, and 29, 2015. However, respondent never accused appellant of not providing doctor's notes for those absences. Instead, respondent maintained that appellant was placed on POI status on June 5, 2015 and required to provide POI for thirteen absences occurring between April 20 through June 2, 2015 and for any future absences. Despite this notice, appellant's absences continued in August, October, and November of 2015. Additionally, appellant's calculations of percentage of absenteeism is incorrect because it was based on a full-time work schedule and not the appellant's part-time schedule.

There was an error in the respondent's moving papers. The respondent indicated that appellant was absent from work on October 3, 2015 and October 6, 2015. The appellant was only disciplined for missing work on October 4, 2015 and October 7, 2015. (Ra38.) Other than the dates of October 3, 2015 and October 6, 2015, appellant does not contest the dates of absence or that he did not always document the medical reasoning for his absences to his employer. In particular, appellant does not dispute that he failed to provide the POI for his November 28, 2015 and November 29, 2015 absences, which are the subject of one of the removal actions. (Ra49.)

Finally, respondent argued that the appellant's documents show that his position was "critical in maintaining a calm and therapeutic milieu." Therefore, the appellant's own documents demonstrate that frequent absences disrupted the flow of operations.

For appellant

Appellant made several arguments in opposition to the motion. First, appellant submits that this matter is not ripe for summary decision because there are genuine issues of material fact.

Second, appellant maintained that the Civil Service Act, N.J.S.A. 11A:1-1 to -12.6 must be liberally construed toward the attainment of merit appointments and broad tenure protection.

Third, appellant contended the respondent has the burden of proof to show that the removal of appellant from his position is justified. Appellant noted that he is listed as absent on the respondent's Time and Leave reporting system on October 3, 2015 and October 6, 2015. (Ra35-37.) However, Exhibit D of appellant's affidavit indicated that appellant worked on October 3, 2015 and October 6, 2015. Based on the discrepancy related to these two dates, summary decision in favor of the respondent should be denied.

Fourth, while appellant conceded that absenteeism rises to the level of chronic and excessive when it continues over a long time or recurs frequently, Good v. N. State Prison, 97 N.J.A.R. 2d. (CSV) 529, 531, there is no definition of what constitutes excessive absenteeism. Therefore, each case is fact specific and requires a hearing to determine the number of absences, the time span between the absences, and the negative impact on the workplace. Although respondent argues that appellant's 100 days absent during his entire time of employment, (eight years or 2,920 days), is egregious, the appellant was absent only 3% of the time. Therefore, appellant reported for work 97% of the time. During this time, appellant was described as an "asset" to his unit. He had a superior work ethic and provided quality care.

Appellant argued that additional facts should be considered. Appellant was an "80 per center." He received no health benefits because he was not full time. During his employment he weighed in excess of 300 lbs. and suffered from resulting health

conditions, which prevented him from responding to work at times. Appellant did not seek medical attention for all of his illnesses because he did not have health insurance. Appellant has since lost weight which has led to an improvement in his health. Appellant submitted that these facts are material and should have been considered by the respondent.

FINDINGS OF FACT

The material facts were uncontroverted and I **FIND** as **FACT** the following:

Appellant had been employed as a Human Services Assistant by respondent since June 2008. Appellant received written praise and commendation from three of his co-workers. (A-1, ex.A.) During his employment, appellant had significant health issues related to his 300 lb. weight. Appellant became employed knowing that he was an "80 per center" employee, which meant that he was a part-time employee and was not entitled to health insurance benefits. (A-1.) This employment status did not entitle appellant to additional sick or administrative leave. It did not entitle appellant to be chronically or excessively absent, to fail to produce POI, or excuse appellant's absences.

Employment Discipline Prior To The Instant Appeals

During his employment with respondent, appellant had disciplinary infractions and suspensions, prior to the FDNAs removing him.

A. 2011

In 2011, appellant received employment discipline for eight different events all related to absenteeism.

In this regard, on June 2, 2011, appellant received a written warning charging him with his first violation of Administrative Order 4:08A-1.1, absent from work as

scheduled without permission and without giving proper notice of intended absence. This arose from appellant's absence from work on May 1, 2011, for which appellant did not call and notify respondent of his absence. (Ra1.) Appellant then received two records of counselling on June 2, 2011. The first was for a violation of Administrative Order 4:08 A-2 for being absent from work as scheduled without permission, but with giving proper notice of intended absence, because he called out sick on April 16, 2011 and April 30, 2011, without providing any medical documentation. (Ra2.) The second was for a violation of Administrative Order 4:08A-4 for chronic or excessive absenteeism from work without pay, which arose from absences on April 17, 2011, and April 20, 2011 through April 22, 2011, inclusive.

Subsequently, on June 29, 2011, appellant violated N.J.A.C. 4A:2-2.3(a)6, conduct unbecoming a public employee, N.J.A.C. 4A2-2.3(a)11 other sufficient cause, and, Administrative Order 4:08A-1.1, entitled, absent from work as scheduled without permission and without giving proper notice of intended absence. These charges arose from appellant's absences on June 12, 2011 and June 23, 2011, for which appellant had not provided proper notice or permission. The written warning contained a notice to appellant that a subsequent violation may result in his suspension or removal. (Ra4.) Appellant filed an appeal of this discipline, which he subsequently withdrew on September 20, 2011, accepting the charges as alleged and the notice of suspension or removal for any future violations. (Ra4.) On August 9, 2011, while the that appeal was pending, appellant received a record of counselling for violating Administrative Order 4:08B-4.1 failure or excessive delay in carrying out an order which would not result in danger to persons or property, because he failed to provide necessary documentation for an absence on May 23, 2011. (Ra5.)

Nine days after appellant withdrew that appeal, respondent issued an oral warning to appellant for violating Administrative Order 4:08A-2 because he was absent from work as scheduled without permission but with giving proper notice of intended absence. (Ra6.) Appellant had called out of work on August 8, 2011, and August 13, 2011, identifying the time as administrative leave. However, appellant had no administrative leave time remaining. He also called out sick on August 27, 2011,

August 28, 2011, and September 10, 2011. However, appellant did not have any sick time leave remaining, and he failed to provide a doctor's note for his sick leave. (Ra6.)

Subsequently, on October 8, 2011, appellant was again absent from work and failed to provide proper notice of his absence. As a result, on November 30, 2011, appellant was suspended from duty for five days for violating N.J.A.C. 4A:2-2.3(a)(6) conduct unbecoming a public employee, N.J.A.C. 4A2-2.3(a)11, other sufficient cause, and Administrative Order 4:08A-1.3, absent from work as scheduled without permission and without giving proper notice of intended absence. (Ra7.)

Appellant received a written warning on December 4, 2011, for calling out sick on September 10, 2011, November 5, 2011 and November 6, 2011, without providing medical documentation in violation of Administrative Order 4:08 A-2.1. (Ra8.)

B. <u>2012</u>

In 2012, appellant received employment discipline for four different events all related to absenteeism.

On October 4, 2012, appellant received an oral warning for violating Administrative Order 4:08A-4 chronic or excessive absenteeism from work without pay, for being absent on July 28, 2012, July 29, 2012, August 6, 2012, August 7, 2012, August 8, 2012, August 11, 2012, August 12, 2012, August 25, 2012, August 26, 2012, August 27, 2012, September 4, 2012, September 5, 2012, and September 8, 2012. (Ra9.) The oral warning specifically stated, "[s]ubsequent infractions may lead to further corrective action or discipline."

Appellant also called out of work October 23, 2012, without permission and without providing proper notice. Initially, appellant was removed from his position. Appellant settled this discipline. He agreed to receive a FDNA which detailed the following sustained charges: N.J.A.C. 4A:2-2.3(a)6, conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)12, other sufficient cause, and Administrative Order

4:08 A-1.4, absent from work as scheduled without permission and without giving proper notice of intended absence. (Ra11.) The appellant received a fifteen-day suspension.

Appellant's absenteeism violations did not cease. He called out on administrative leave on August 3, 2012 and September 9, 2012, when he had already exhausted his administrative leave balance and was absent on September 17, 2012, September 18, 2012, September 22, 2012, and September 23, 2012. For the latter absences, appellant failed to provide any medical documentation in a timely manner. On February 6, 2013, appellant received an FDNA sustaining the following charges, N.J.A.C. 4A:2-2.3(a)6, conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)12, other sufficient cause, Administrative Order 4:08 A-2.3, absent from work as scheduled without permission but with giving proper notice of intended absence, and 4:08E-1.1, violation of a rule, regulation, policy, procedure, order or administrative decision. (Ra12.) Initially, appellant was issued a thirty-day suspension. He settled this disciplinary action and served a ten-day suspension.

On August 7, 2012, appellant was given an official reprimand for being absent without proper documentation. Specifically, appellant was absent on April 16, 2012, April 17, 2012, May 19, 2012, May 28, 2012, May 29, 2012, June 2, 2012, June 4, 2012, and June 11, 2012. (Ra13.) A disciplinary action to remove was instituted. This was settled by the parties. The removal was reduced to a thirty-day suspension. (Ra14.)

C. 2013

In 2013, appellant received employment discipline for two different events all related to absenteeism.

Additionally, appellant received discipline, because he was absent without proper notice on February 12, 2013 and February 17, 2013. On October 29, 2013, appellant entered into another settlement agreement, modifying his forty-five-day suspension to

thirty days. (Ra16.) The second October 29, 2013 settlement agreement stemmed from the FNDA sustaining charges that he had been absent without permission on February 27, 2013, March 2, 2013, March 3, 2013, March 28, 2013, March 30, 2013, and March 31, 2013. (Ra17.)

D. 2014

In 2014, appellant received employment discipline for two different events all related to absenteeism.

On June 19, 2014, appellant received counseling for calling out on March 10, 2014, March 22, 2014, March 23, 2014 and June 16, 2014 without proper notice. (R18.) On September 25, 2014, appellant received a written warning for failing to provide medical documentation for his absence on August 20, 2014. (Ra32.)

E. 2015

In 2015, appellant received employment discipline for five different events, four of which related to absenteeism. This includes the three removal actions contested in the instant consolidated matter.

On May 20, 2015, appellant received two FNDA (Ra20-21.) The first FNDA was based on a violation of N.J.A.C. 4A:2-2.3(a)5 conviction of a crime, N.J.A.C. 4A:2-2.3(a)6, conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)12, other sufficient cause and Administrative Order 4:08 C-19.1, conviction of a criminal offense. (Ra20.) The appellant had pled guilty to N.J.S.A. 2C:33-2.1B, prowling places for controlled dangerous substances. (Ra20.) Appellant entered into a settlement agreement, which modified his fifty-two-day suspension to a twenty-four-day suspension. (Ra22.)

The second FDNA related to appellant being absent from work without providing proper documentation on October 18, 2014, October 27, 2014, November 1, 2014,

December 8, 2014 and December 10, 2014. (Ra21.) Appellant entered into a settlement agreement, modifying his disciplinary action from removal to a thirty-day suspension.

1. First Removal Action

Appellant was placed on POI status on June 5, 2015. (Ra24.) Appellant was required to provide POI for thirteen absences occurring between April 20 through June 2, 2015. Appellant was required to provide POI for the following six months, ending on December 5, 2015. Despite this notice, appellant's absences continued in August 2015, October 2015, and November of 2015. He did not provide proper POI for his absences.

On July 13, 2015, an official reprimand was issued to appellant for excessive absenteeism. (Ra25.) Appellant was absent on June 2, 2015 and June 13, 2015. (Ra25.) On August 19, 2015, appellant received an Oral Warning for being absent on April 15, 2015, May 3, 2015, August 5, 2015. (Ra26.)

Between August 1, 2015 and September 11, 2015, appellant was absent on August 8, 2015, August 9, 2015, August 10, 2015, August 22, 2015, August 23, 2015, August 24, 2015, August 26, 2015, and August 31, 2015. (Ra27-31.) As a result, and based on the foregoing disciplinary history, respondent issued a PDNA on September 18, 2015, seeking appellant's removal. A FDNA issued on January 23, 2017, sustaining the charges and removing appellant from his employment.

Appellant was excessively absent while on POI status on August 8, 2015, August 9, 2015, August 22, 2015, August 23, 2015, August 24, 2015, August 26, 2015, and August 31, 2015. On August 10, 2015, appellant was absent from work without permission and without proper notice.

2. Second Removal Action:

Despite the PDNA issued on September 18, 2015, appellant continued to be absent from work. Appellant was absent on, October 4, 2015, and October 7, 2015. (Ra35-27.) As a result, a PDNA was issued to appellant on October 18, 2015. (Ra43.) A FDNA issued on January 23, 2017, sustaining the charges based on two absences on October 4, 2015 and October 7, 2015 and removing the appellant from his employment.[1]

Appellant's absences while on POI status on October 4, 2015 and October 7, 2015 were excessive.

3. Third Removal Action:

On December 14, 2015, appellant was issued another PDNA. (Ra49.) This arose from appellant's absences on November 14, 2015, November 15, 2015, November 28, 2015, and November 29, 2015. A FDNA issued on January 23, 2017, sustaining the charges and removing appellant from his employment.

Appellant provided POI for his absences on November 14, 2015 and November 15, 2015. (A-1, ex.C.) Appellant was excessively absent while on POI status on, November 28, 2015, and November 29, 2015.

Based on the foregoing, the appellant engaged in a pattern of chronic absenteeism during his employment with respondent. His absences were excessive. Respondent employed progressive discipline to address appellant's conduct. Appellant was aware that his continued conduct could result in removal from his employment. Appellant was subject to at least two previous PDNAs which sought his removal from his position. However, despite this knowledge, appellant continued to be chronically absent. No competent evidence demonstrating a sustainable explanation for his

[1] In error, respondent identified two additional dates of absence by appellant in its moving papers. Those dates were October 3, 2015 and October 6, 2015. Appellant provided employment records showing he was present for work on those two dates in his opposition to the motion. Respondent admitted its error in including these two dates in its reply brief to appellant's opposition. Therefore, October 3, 2015 and October 6, 2015, are not at issue in this appeal. This error was insufficient to create a genuine issue of material fact precluding summary decision in this matter. This error did not demonstrate that respondent's record keeping was systemically flawed.

conduct or proper medical documentation for his absences existed. Appellant's chronic and excessive absenteeism was disruptive to respondent.

CONCLUSIONS OF LAW

The respondent seeks relief pursuant to N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c) which provides that "the judgment or order sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (citing Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, at 540, (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 213 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, 477 U.S. at 251-252, 106 S. Ct. at 2512, 91 L .Ed. 2d at 214.

Here, the charges in each appeal are the same, and therefore, warrant a single analysis. Appellant's argument that the respondent's entire record keeping system and records were inaccurate based on a discrepancy for two days for which he provided POI in his opposition, was unpersuasive. It did not demonstrate respondent's record keeping was systemically flawed. It was insufficient to establish that a genuine issue of material fact existed based on the totality of circumstances presented herein.

Similarly, appellant's argument that his health conditions and lack of employer provided health insurance caused his chronic absences, did not amount to a genuine issue of fact, which required a plenary hearing. To the contrary, it essentially amounted to an admission that the appellant was excessively absent from his position, as respondent had charged in each of the three disciplinary actions. Following the Brill standard, after considering all the papers and evidence filed in support and in opposition to respondent's motion for summary decision, I **CONCLUDE** that there are no genuine issues of material fact that require a plenary hearing and that this matter is ripe for summary decision

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Both guilt and penalty are redetermined on appeal from a determination by the appointing authority. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

Respondent has charged appellant with a violation of 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, N.J.A.C. 4A:2-2.3(a)12 other sufficient cause, Administrative Order 4:08 A-1.5 absent from work as scheduled without permission and without giving proper notice of intended absence, Administrative Order 4:08 A-2.5 absent from work as scheduled without permission but with giving proper notice of intended absence, Administrative Order 4:08 A-4.3 chronic or excessive absenteeism from work without pay absent, Administrative Order 4:08 A-1.2 violation of a rule, regulation, policy, procedure, order or administrative decision in each of the three matters consolidated herein. In judging whether an employee's absenteeism is chronic or excessive, relevant factors include, among others, the number of absences, the time span between the absences, and the negative impact on the workplace. See Harris v. Woodbine Developmental Ctr., CSV 4885-02, Initial Decision (February 11, 2003), adopted, Comm'r (March 27, 2003), <http://njlaw.rutgers.edu/collections/oal/>; Hendrix v. City of Asbury, CSV 10042-99, Initial Decision (April 10, 2001), adopted, Comm'r (June 8, 2001), <http://njlaw.rutgers.edu/collections/oal/>; Morgan v. Union Cnty. Runnells Specialized Hosp., 97 N.J.A.R.2d (CSV) 295; Bellamy v. Twp. of Aberdeen, Dep't of Pub. Works, 96 N.J.A.R.2d (CSV) 770. It is further recognized that "numerous occurrences" of habitual tardiness or similar chronic conduct "over a reasonably short space of time, even though sporadic, may evidence an attitude of indifference amounting to neglect of duty." West New York, supra, 38 N.J. at 522. And "excessive absenteeism is not necessarily limited to instances of bad faith or lack of justification on the part of the employee who was frequently away from [his or] her job." Terrell v. Newark Hous. Auth., 92 N.J.A.R.2d (CSV) 750, 752; see also Bellamy, 96 N.J.A.R.2d at 772.

I **CONCLUDE** that the respondent has met its burden of proving the charges of chronic or excessive absenteeism against appellant in each matter.[2] Appellant's pattern of repeatedly being absent without POI documentation while on POI status, being absent from work without permission and without providing required notice, being absent from work without permission but with giving proper was chronic. Appellant was

[2] The charges of conduct unbecoming and other sufficient arise from the same facts, and are subsumed in the charges of chronic absenteeism.

involved in twenty separate instances of discipline relating to absenteeism between 2011 and 2015, including the three removal actions in this matter. Appellant knew he was required to provide POI documentation for each of his absences between June 5, 2015 and December 5, 2015. Appellant failed to comply. Appellant knew he had to go to work as scheduled. Appellant was absent on each of the dates as alleged in the first, second, and third removal actions in violation of N.J.A.C. 4A:2-2.3(a)4, N.J.A.C. 4A:2-2.3(a)6, N.J.A.C. 4A:2-2.3(a)12, Administrative Order 4:08 A-1.5, Administrative Order 4:08 A-2.5, Administrative Order 4:08 A-4.3, and Administrative Order 4:08 A-1.2.

Appellant's conduct was a disruption to the respondent's workplace. The fact that appellant's job performance was respected by his co-workers when he did attend work, did not excuse his excessive absenteeism or remove his obligation to abide by Administrative Orders codifying the attendance and leave policies. Appellant's four-year pattern of violative behavior and conduct, which resulted in the three separate removal cases appealed herein, demonstrated a disregard for his obligations to his employer and his responsibilities to those receiving care in the Ancora Psychiatric Hospital.

Although appellant argued that his health conditions and lack of employer provided health insurance forced him to call out of work and not consult with medical providers, the case law makes it clear that considering his pattern of sick time abuse reflected on this record, his absences from the workplace were excessive. It would have been impossible for appellant with attendance of this sort, not to have neglected his duties and cause a disruption to respondent, which was certainly forced to make personnel staffing changes at the last minute or without notice. I **CONCLUDE** that appellant's conduct and failure to heed and abide by previous discipline and settlements, into which he voluntarily entered, compels me to sustain all of the charges in each appeal related to appellant's chronic or excessive absenteeism, and violations of the absences and leave policies.

PENALTY

In this de novo review of the respondent's disciplinary action I am required to reevaluate the penalty on appeal. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline may include removal, disciplinary demotion, suspension or a fine of no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is not "a fixed and immutable rule to be followed without question." Carter v. Bordentown, 191 N.J. 474, 531 (2007). The question to be answered is "whether such punishment is 'so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness'" Ibid.

Removal is appropriate "where the charges and proofs include a long-term, consistent, unapproved course of habitual and chronic absenteeism and lateness by appellant." Terrel v. Newark Housing Authority, 92 N.J.A.R. 2d (CSV) 750, 752.

I **CONCLUDE** that the penalties imposed here were fair and proportionate to the offenses committed by appellant. They were not excessive. Respondent repeatedly sought to instruct, caution, warn, and discipline appellant for his chronic absenteeism. Respondent thoroughly and competently employed progressive discipline, in relation to respondent's conduct. Appellant was warned on several occasions that he could be removed from his employment. Despite this knowledge, appellant continued to be chronically absent from work and shirk his responsibilities to his employer and those he cared for at Ancora Psychiatric Hospital. Appellant's health concerns, co-worker praise, and part-time employment status did not amount to mitigating circumstances warranting a reduction in the penalty of removal. I **CONCLUDE** that the appropriate penalty is removal in each of the three contested disciplinary actions.

ORDER

It is **ORDERED** that the charges in each matter against respondent are **AFFIRMED**. It is further **ORDERED** that the penalty of removal in each matter are **AFFIRMED** as follows:

1st Removal Action-CSV 02154-17: Respondent is removed effective January 24, 2017.

2nd Removal Action-CSV 02160-17: Respondent is removed effective January 24, 2017.

3rd Removal Action-CSV 02161-17: Respondent is removed effective January 24, 2017.

It is hereby **ORDERED** that respondent's motion for summary decision is **GRANTED**. Appellant's appeals are **DISMISSED**.

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.

October 6 , 2020
DATE

DOROTHY INCARVITO-GARRABRANT, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

/lam

EXHIBITS

For petitioner

A-1 Affidavit of Appellant dated October 20, 2017

Ex. A- Reference Letters of K. Vogel, RN, D. Moccio, RN/SNS, and D. Siegrist, Sr. LPN

Ex. B- Attendance and Leave Policy

Ex. C- Personnel Record confirming POI for November 14, 2015 and November 15, 2015

Ex. D- Employment Records

For respondent

Ra1 Written Warning, dated June 2, 2011

Ra2 Record of Counseling, dated June 2, 2011

Ra3 Record of Counseling, dated June 2, 2011

Ra4 Notice of Reprimand, dated July 7, 2011

Ra5 Record of Counseling, dated August 9, 2011

Ra6 Record of Oral Warning, dated September 29, 2011

Ra7 Notice of Suspension, dated December 1, 2011

Ra8 Written Warning dated December 21, 2011

Ra9 Record of Oral Warning, dated October 4, 2012

Ra10 Disciplinary Action Appeal Settlement Agreement for Suspension, dated February 6, 2013

Ra11 FNDA, dated February 6, 2013

Ra12 FNDA, dated February 6, 2013

Ra13 Notice of Reprimand, dated August 7, 2012

Ra14 Disciplinary Action Appeal Settlement Agreement for Suspension, dated October 29, 2013

Ra15 FNDA dated October 29, 2013

Ra16 Disciplinary Action Appeal Settlement Agreement for Suspension, dated October 29, 2013

Ra17 FNDA, dated October 29, 2013

Ra18 Record of Counseling, dated June 19, 2014

Ra19 Duplicate of Ra18

Ra20 FNDA, dated May 21, 2015

Ra21 FNDA, dated May 21, 2015

Ra22 Disciplinary Action Appeal Settlement Agreement for Suspension, dated May 21, 2015

Ra23 Disciplinary Action Appeal Settlement Agreement for Suspension, dated May 21, 2015

Ra24 Notice of Proof of Illness Requirement, dated June 11, 2015

Ra25 Notice of Reprimand, dated July 23, 2015

Ra26 Record of Oral Warning. Dated August 19, 2015

Ra27-Ra31 Employment Records

Ra32 Written Warning, dated September 25, 2014

Ra33 PNDA, dated September 28, 2015

Ra34 Notice of Appeal of Removal, dated October 1, 2015

Ra35-Ra37 Employment Records

Ra38 PNDA, dated October 20, 2015

Ra39 Notice of Appeal of Removal, dated October 21, 2015

Ra40-Ra43 Departmental Hearing Disciplinary Decision, dated December 7, 2016

Ra44-Ra47 Departmental Hearing Disciplinary Decision, dated December 7, 2016

Ra48 Departmental Hearing Sign-in Sheet

Ra49 PNDA, dated December 16, 2015

Ra50-Ra53 Departmental Hearing Disciplinary Decision, dated December 7, 2016

Ra54 Departmental Hearing Sign-in Sheet

Ra55 Attendance and Leave Policy

Ra56-57 Employment Records