STATE OF NEW JERSEY

In the Matter of Vitaly Smirnov
Department of the Treasury, Division of Investment

CSC DKT. NO. 2019-3335
OAL DKT. NO. CSV 07719-19

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: November 22, 2021 (NFA)

The appeal of Vitaly Smirnov, Senior Investment Analyst, Department of the Treasury, Division of Investment, removal effective May 10, 2019, on charges, was heard by Administrative Law Judge Elia A. Pelios, who rendered his initial decision on October 18, 2021. 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 ALJ's initial decision, and having made an independent evaluation of the record, including a thorough review of the submissions of the parties, the Civil Service Commission (Commission), at its meeting of November 17, 2021, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision. However, the Commission did not adopt the recommendation to uphold the removal. Rather, the Commission imposed a six-month suspension.

DISCUSSION

The appellant was served with a Final Notice of Disciplinary Action removing him from employment, effective May 10, 2019, on charges of conduct unbecoming a public employee, chronic or excessive absenteeism or lateness and other sufficient cause. Specifically, the appointing authority asserted that the appellant falsified his timesheets when, over 98 instances, he arrived late or left early from work but reported that he actually worked at those times, totaling 135 hours. Upon the appellant's appeal to the Commission, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In his initial decision, the ALJ found no real dispute regarding the facts underlying the appellant's misconduct. Accordingly, the ALJ recommended upholding the charges.[1] Regarding the penalty, the ALJ did not find that the appellant's "heart-wrenching" circumstances nor his 20 years of prior service with no formal discipline mitigated against his removal. Rather, the ALJ determined that removal was appropriate since the appellant's falsification of his timesheets and improper payment violated the public trust.

In his exceptions, the appellant contends, *inter alia*, that the appointing authority did not meet its burden of proof and violated his due process rights. He also argues that the ALJ improperly excluded evidence regarding other employees who were disciplined for similar misconduct and contends that, even if he were guilty, that removal was too harsh a penalty. He further contends that the appointing authority imposed an improper fine as he worked all of his required hours.

In reply, the appointing authority argues that the evidence in the record clearly supported the charges and that the ALJ properly determined that the charges supported the appellant's removal from employment.

Upon its *de novo* review of the record, including the exceptions and reply,[2] the Commission agrees with the ALJ regarding the charges; however, it does not agree that the proper penalty is removal. In determining the proper penalty, the Commission's review is also *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In assessing the penalty in relation to the employee's conduct, it is important to emphasize that the nature of the offense must be balanced against mitigating circumstances, including any prior disciplinary history. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 *N.J.* 474 (2007).

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[1] Although the ALJ declined to uphold the allegations of "theft."

[2] As the Commission does not find any of the appellant's exceptions to have merit, no discussion is required. However, the Commission notes that the appellant's argument regarding the fine imposed by the appointing authority is misplaced. In this regard, as the Commission has upheld the charges regarding his receipt of improper payment, his reimbursement as a form of restitution was appropriate.

said, the Commission is in no way minimizing the appellant's highly improper conduct. Certainly, his actions in falsifying his timesheets and receiving improper payment for services cannot be condoned and absent any mitigating factors would be worthy of removal from employment. However, the Commission cannot ignore that the appellant was a 20-year employee with no formal disciplinary history, who had apparently performed commendably during that time. Moreover, the extreme circumstances detailed in the initial decision, described as "heart-wrenching" by the ALJ, cannot be ignored. In fact, the evidence in the record indicated that the appellant was actually suffering from "clinical stress" during this time. While this does not excuse the misconduct, it does provide context and coupled with the appellant's prior history, provide reasons to impose a penalty less than removal. In that regard, it would appear that absent the circumstances, the appellant would likely not have engaged in the misconduct, and thus, is unlikely to engage in future misconduct. As such, he is deserving of the opportunity to maintain his employment. Accordingly, the Commission finds that a six-month suspension is the proper penalty. The Commission notes that the six-month suspension is the most severe sanction, absent removal, that can be imposed. This penalty should serve as a warning to the appellant that any future infractions could lead to a more severe disciplinary sanction, including removal from employment.

Since the penalty has been modified, the appellant is entitled to back pay, benefits and seniority six months from the first date of his separation to the actual date of his reinstatement. *See N.J.A.C.* 4A:2-2.10. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), an award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. Mar. 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In this case, the Commission has sustained charges and imposed major discipline. Therefore, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. In light of the Appellate Division's decision in *Dolores Phillips v. Department of Corrections,* Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. However, under no circumstances should the appellant's reinstatement be delayed pending any dispute as to the amount of back pay.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore modifies the removal to a six-month suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority as specified above. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned, and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending any dispute as to the amount of back pay.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 17TH DAY OF NOVEMBER, 2021

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
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Allison Chris Myers
Director
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 07719-2019
AGENCY DKT. NO. 2019-3335

IN THE MATTER OF VITALY SMIRNOV,
NEW JERSEY DEPARTMENT OF THE TREASURY,
DIVISION OF INVESTMENT.

John Kuhn Bleimaier, Esq., for appellant

Elizabeth Davies, Deputy Attorney General, for respondent (Andrew J. Bruck, Acting Attorney General of New Jersey, attorney)

Record Closed: March 29, 2021, Decided: October 18, 2021

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

STATEMENT OF THE CASE

Appellant Vitaly Smirnov (Smirnov) appeals his removal from employment as a Senior Investment Analyst with the Department of Treasury, Division of Investments (respondent) due to his practice of arriving at and leaving the workplace during times which did not coincide with his authorized schedule without consultation with, or approval by his supervisors or the Agency's Human Resources Office.

Appellant was charged with chronic or excessive absenteeism or lateness (N.J.A.C. 4A:2-2.3(a)4); Conduct Unbecoming a public employee (N.J.A.C. 4A:2-2.3(a)6); and Other sufficient cause (N.J.A.C. 4A:2-2.3(a)12), specifically, falsification of time sheets, theft, and violation of the public trust.

PROCEDURAL HISTORY

On or about February 1, 2019, respondent issued Smirnov a Preliminary Notice of Disciplinary Action (PNDA). Following a departmental hearing held April 15, 2019, all charges were sustained. A Final Notice of Disciplinary Action (FNDA) was issued to Smirnov on May 10, 2019, removing him from service effective that same date.

Smirnov appealed, and the matter was transmitted to the Office of Administrative Law (OAL) where it was filed as a contested case on June 7, 2019, pursuant to N.J.S.A 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

Respondent filed a motion for summary decision. On March 3, 2020, the undersigned issued an order granting partial summary decision. Specifically, summary decision was granted as to sustaining the charge of Other Sufficient Cause involving falsification of time sheets and violation of public trust. To the extent that these circumstances support a charge of conduct unbecoming, that charge was also sustained.

A hearing was ordered necessary as to the charge of chronic absenteeism, as to the charges of conduct unbecoming and other sufficient cause to the extent that they are supported by the allegations of theft. As the scope of the wrongdoing was still unsettled, further proceedings were deemed necessary for the determination of appropriate penalty as well. Hearings were scheduled for and held on December 7, 2020, December 16, 2020, January 15, 2021, and February 1, 2021. The record was held open for the submission of post-hearing briefs which were subsequently received. The record closed on March 29, 2021.

During the time period between the closing of the record and issuance of this initial decision, the undersigned experienced an unexpected medical leave. Given the OAL's status as an independent agency "in but not of" the Department of Treasury, many of the OAL's Human Resources functions and activities, including leave management, are managed by the Department of Treasury.

This necessitated the exchange of several email communications between the undersigned and several employees of the Leave Management Unit, including but not limited to its Manager, Lorie Haggerty, who was a witness during the evidentiary hearing of the present matter. The communications were limited to the routine management of the medical leave and no other matters were addressed. The present matter was not discussed or addressed in any way shape or form.

On October 1, 2021, the undersigned convened a telephonic conference call with counsel for the parties in this matter for the purpose of disclosing the occurrence of these communications and offering counsel the opportunity to be heard if they had any concerns or questions. After brief discussion counsel indicated that they had no concerns and were comfortable with the undersigned continuing to preside over this matter and issuing the initial decision. The conference was then put on the record for the purpose of memorializing this discussion. The record was then again closed on that date.

FACTUAL DISCUSSION AND FINDINGS

Charges and Specifications

Appellant was charged with chronic or excessive absenteeism or lateness (N.J.A.C. 4A:2-2.3(a)4); Conduct Unbecoming a public employee (N.J.A.C. 4A:2-2.3(a)6); and Other sufficient cause (N.J.A.C. 4A:2-2.3(a)12), specifically, falsification of time sheets, theft, and violation of the public trust. The PNDA and FNDA reflect the following specifications in support of the charges:

> It was brought to the attention of the Division of Investment Management that you were allegedly arriving to work late and leaving early without notifying your supervisor. Additionally, it was alleged that you were falsifying your timesheet by recording late arrivals and early departures as "Work", rather than charging the appropriate leave time. As a result of the allegation, an investigation was launched.
>
> After investigating the allegations, Management found that you were falsifying your timesheet by failing to record leave time for late arrivals or early departures from the workplace. Specifically, a review of your access cards for 50 West State Street and the Bank Street Garage, between the dates of March 1 and August 30, 2018, revealed 98 separate instances, totaling 135.0 hours, where you failure to properly record your absences in the workplace. As a result of your falsifying your timesheets you were paid approximately $9,400.00 to which you were not entitled.
>
> Your timesheets have been corrected to show 135.0 hours of unauthorized absences and the monies that you were overpaid will be recouped via payroll deductions.
>
> Your actions were inexcusable and constitute conduct unbecoming a public employee. The accrual of unauthorized absences creates discontinuity and inconsistency in the workplace and results in the ineffective use of human resources. Unpaid absences are considered chronic and excessive absenteeism. Your falsification of timesheets resulted in your being paid monies that you were not entitled to and is considered theft. Furthermore, your actions violated the public trust, because the public faith in the administration of government operations would March 25, 2021, Page 5 be severely diminished if such actions were known without recourse taken. It has been determined that the egregiousness of your actions warrants your removal from State employment.

Previously Found Facts

As previously discussed, on March 3, 2020, the undersigned issued an order granting partial summary decision. That order remains in effect and the law of the case. The following factual findings were made pursuant to that order and continue to be **FOUND** as **FACT**:

Appellant, Vitaly Smirnov, is a former Senior Investment Analyst with the Division who was removed from his position for cause following a Final Notice of Disciplinary Action, dated May 10, 2019. It is not denied that he had served with this Agency for twenty years, and that this service had been unmarred by any formal history of discipline.

The employment dilemma in which appellant now finds himself started with a self-initiated work-hour pattern. He had begun a practice of arriving at and leaving the workplace during times which did not coincide with his authorized schedule. This departure from the norm was begun without consultation with, or approval by his supervisors or the Agency's Human Resources Office (hereinafter Human Resources). Appellant had not applied for family leave beforehand, described by the Division as an option set forth in the Department's Guide to Employment.

In time, appellant's supervisors learned of this change. They discovered also that his timesheets did not match the times of his actual presence. An investigation followed. Comparing the times appellant himself had recorded on his timesheets with those times clocked on his access cards used when entering the offices at 50 West State Street in Trenton and with the Bank Street parking garage, considerable discrepancies were discovered. The mismatch continued without abatement from March 1, 2018, through August 31, 2018. A meeting of appellant with Division officials Gina Costello, Chief of Staff, and Gary Terwilliger was the result, where appellant attributed his behavior to the pressures of caring for a mother who had been ill during the previous year. He added that she was now in a nursing home. In view of appellant's reasons for absence and lateness, Ms. Costello told him of the Family and Medical Leave Act (FMLA), intended to cover such emergencies. Appellant submitted the needed application. Intermittent leave time was granted. It was to extend from October 3, 2018, through April 2, 2019.

Notwithstanding the intermittent FMLA leave covering future dates, appellant found himself facing discipline for late arrivals and absences in the past. Chief of Staff Costello now wrote to appellant on November 13, 2018, alerting him to her request of the Office of Employee Relations and Development (OERD) that he be disciplined. Her justification was that the Division had found he had falsified his timesheets to the extent of 137 hours, or approximately twenty days. In the following month, on December 17, Ms. Costello required appellant to correct the inaccurate times listed in an attached chart.

Disciplinary action did follow. A Preliminary Notice of Disciplinary Action (PNDA) issued on February 1, 2019, charging appellant with falsifying his timesheets. Specifically, the Agency contended that appellant had, in ninety-eight separate instances, failed to properly record 135 hours of workplace absences. Consequently, he had received $9,400 in compensation to which he was not entitled. Further, it described these actions as chronic and excessive absenteeism, theft, conduct unbecoming a public employee and violation of the public trust.

After a departmental hearing held on April 15, 2019, the charges were upheld in their entirety, and appellant was removed from his position. A stay was sought before the Civil Service Commission, which denied the motion. As above noted, the Commission forwarded the appeal to the Office of Administrative Law for plenary hearing before an administrative law judge.

Appellant purposefully did not disclose on his worksheets that some of the time listed thereon was not passed in the workplace. Appellant admitted that he did some of his work from home in the evenings and frequently worked through his lunch breaks. His timesheets did not specifically say that some of his time worked was done at home.

Appellant chose to alter his timesheets in a fashion which prevented his employer from being aware of his absence. They were designed to cause one to believe he was present in the office, as required by workplace rules. He did this knowingly. Medical documentation provided by his family medicine physician, Dr. Jass, who apparently is not a specialist in psychology or psychiatry, does not suggest that he lacked understanding of right and wrong. The doctor notes only that appellant was given medications to counter his anxious state. The letter states further: "At my visit with him 9/28/18 I expressed concern about the level of stress he was experiencing affecting his judgment and memory." Appellant's lack of judgment in the matter of his timesheets is patent. A lack of understanding that this was wrong is not. Appellant knew that his timesheets did not reflect his lateness and absences and has since said so. They were therefore false.

Summary of Testimony

Respondent presented four witnesses at the OAL hearing: Lorie Haggerty, Corey Amon, Gina Costello, and Gary Terwilliger. Appellant presented three witnesses: Dr. Daniel Jass, Brian Arena, and himself.

Respondent's Witnesses

Lorie Haggerty

Lorie Haggerty manager of the Department of Treasury, the leave management unit testified on behalf of respondent. She states that Department employees are provided with a copy of the Department of Treasury Guide to Employment upon hire. Appellant signed a receipt form to acknowledge receipt of this document on June 28, 2005, as reflected by his Learner Transcript Report.

Employees must accurately record their attendance using the Department's electronic timekeeping system, "ECATS". Paychecks are based upon ECATS submissions. Upon submission, employees that the information in their timesheet is accurate and correct by entering their password. Employees must work their predetermined seven hours a day absent any approved leaves of absence or time off and indicate such on their ECATS submission. In 2018, the Department did not have flextime or work from home policies.

Haggerty described the Department's leave policies, specifically, the New Jersey Family Leave Act (FLA), and the Federal Family and Medical Leave Act (FMLA). If an employee must leave early or is arriving late to work and does not have prior approval, such as in the case of an emergency, they must contact their supervisor. Smirnov applied for FMLA on or about October 3, 2018. His request was approved for the period of October 3, 2018, through April 2, 2019. He did not apply for or inquire about taking a leave of absence for the six-month period at issue, March 1, 2018, to August 31, 2018.

In emergencies up to ten days of family leave can be granted retroactively, but retroactivity cannot be determined before the family medical emergency is documented.

Corey Amon

Corey Amon, the Director of the Division of Investment since March 2019, also testified on behalf of respondent. He previously served as both Acting Director and Deputy Director of the Division.

The Division did not have flextime or work from home policies in 2018. If an employee needed to come into the office late or leave early, they must expend their allotted leave time in accordance with Department procedures. When an employee's ECATS submission reflects that they worked seven hours, it is understood to mean that they worked their seven predetermined, scheduled hours.

Appellant was a portfolio manager for the US Equity portfolio. In that role he was responsible for conducting investment research and making determinations regarding which investments to buy, sell, and hold. Amon believes appellant's job could not be performed effectively nor could trades be affected outside of the Division's core business hours as the market would not be open.

The genesis of the present disciplinary matter occurred when the Treasurer's Office called regarding a media inquiry related to a company for which Smirnov was responsible. Amon attempted to locate appellant to gather information to address the inquiry but could not find him. Appellant was not in his office, nor could he be located at the work location. Amon was told by another employee that this was normal for appellant and that he left early with great frequency.

Amon asked Gina Costello the Division's Chief of Staff, and Gary Terwilliger, its deputy director, to investigate appellant's attendance practices. The reviewed employee entries to the building and the garage for the US Equity team. They then did the same for the entire Division. Regarding appellant, ninety-eight instances were identified

between March 1 and August 31, 2018, where he failed to properly record his absences from the workplace for a total of approximately 135 hours.

Amon never made any promises that Smirnov would not face disciplinary action once the money he was overpaid was recouped or for any other reason.

Amon was the person who made the decision to terminate appellant's employment. He did not review appellant's personnel file before making this decision. On the stand he could not immediately recall the number of years appellant was employed or the specifics of his disciplinary history. Amon does not recall if he was aware of appellant's mother's terminal illness at the time appellant was terminated. After appellant was confronted, there were no further timesheet issues.

Gina Costello

Gina Costello, the Division of Investment's Chief of Staff, testified on behalf of respondent. She also serves as the Division's ethics liaison coordinator, procurement specialist, and travel coordinator. In 2018, appellant's set hours were 8:30 a.m. to 4:30 p.m. Neither the Department nor the Division had flextime or work from home policies in 2018. An employee is required to secure permission from their supervisor to work hours other than their scheduled hours.

Shortly before Labor Day in 2018, Costello was contacted while on vacation by the Division's Assistant Director, Gary Terwilliger, regarding appellant's whereabouts. Terwilliger advised Costello that a request came in from the Treasurer's Office that would require appellant's assistance. Costello informed Terwilliger that appellant was not out of the office pursuant to an ethics request. Smirnov's supervisor, George Mykytyn advised that appellant had not requested to use sick, vacation, or personal time. Terwilliger walked the floor looking for appellant but was unable to locate him.

After consulting with the Office of Employee Relations, Costello ran a report of the garage and building passes for the prior six months. The same report would eventually be run for all Division employees. Appellant's report showed that he had unauthorized absences totaling approximately 137 hours, or twenty days over that six-month period.

On September 28, 2018, Costello and Terwilliger met with appellant to inform him that an investigation was being conducted into his absences and to allow him to explain the discrepancies that were identified. He explained that the discrepancies were a result of his need to take care of his mother, who was elderly and terminally ill. He was straightforward, forthright, and honest in admitting the discrepancy between his time sheets and his hours worked within the physical confines of the office. Costello advised him of the availability of FMLA and followed up with an email.

Following the September 28, 2018, meeting, Costello compiled a spreadsheet to outline all of appellant's unauthorized absences. Costello and Terwilliger spoke with appellant's direct supervisors, Mykytyn and Brian Arena. Neither had approved appellant's absences or flexed schedule.

On November 13, 2018, Costello and Terwilliger again met with appellant and informed him the investigation concluded that he had falsified his timesheets over the six-month period of March 1, 2018, to August 31, 2018, in the amount of 137 hours, or approximately twenty days. Appellant was provided with a letter advising him of the findings and informing him that the matter would be forwarded to the Office of Employee Relations and Development for disciplinary action. The investigation did not examine the health or any medical condition of appellant or his mother.

On December 17, 2018, Costello directed appellant via email to correct his timesheets for the six-month period at issue to ensure that his attendance was properly coded. Costello provided appellant with an excel spreadsheet to advise him of the details of each date that required correction. Costello made no representations that appellant's corrections would settle the matter or shield him from any discipline in this matter. She

made no written or verbal promises or settlement offers to appellant stating that he would no longer face disciplinary action once the money he was improperly paid was recouped and/or his timesheets were corrected to properly reflect his attendance.

Costello recommended to Amon that appellant be terminated based on a recommendation from Human Resources. She did not know who at Human Resource had made that recommendation.

Gary Terwilliger

Gary Terwilliger, the Division's Assistant Director and Chief Technology Officer, testified on behalf of respondent. Appellant was part of the Division's Domestic Equities team and was responsible for approximately ten percent of the overall Domestic Equity fund, which ranged from eighteen to twenty-two billion dollars. In 2018, appellant's job duties made him responsible for developing investment opportunities within their assigned sector. In 2018, a Senior Investment Analyst would not be able to effectively do their job outside of the Division's core business hours or remotely because the trade system was not able to be accessed remotely, and the market is open only between 9:30 a.m. and 4:00 p.m.

In 2018, an employee was not permitted to work outside of the core business hours of the Division, and there existed no flextime or work from home policies. If an employee would be arriving to the office late or needed to leave early, they would need to get permission from their supervisor and submit a slip in the ECATS timekeeping system.

On or about August 29, 2018, Terwilliger received a call from the Division Director asking that he locate appellant as his assistance was required to respond to an inquiry from the Treasurer's Office. Unable to locate him, Terwilliger contacted Costello to see if appellant was out of the office on any approved business-related matters. He also checked with both of appellant's supervisors who indicated that he was supposed to be

in the office on that day. Terwilliger called appellant on his State-issued cell phone and when he did not answer he left a voicemail. He emailed appellant.

Terwilliger discussed the matter with Costello and consulted with Employee Relations. An investigation was commenced. The building and garage access reports were reviewed and eventually an audit was conducted for the entire Division. Regarding appellant, the investigation showed there were approximately 135 hours, or twenty days' worth of time, which were unaccounted for.

At the conclusion of the investigation, Terwilliger and Costello met with appellant on September 28, 2018, to review the findings. Appellant did not deny the results of the investigation. Appellant advised them that his mother was ill. At no point did Terwilliger make appellant any promises or offers to settle this matter. Terwilliger supported the decision to terminate appellant, which was based on a recommendation from Human Resource. Terwilliger did not know who at Human Resource had made that recommendation.

Appellant's immediate supervisors, Brian Arena and George Mytykyn had known of Smirnov's mother's illness. Terwilliger felt that appellant's unit was known for its "leniency." Another employee with a timesheet issue from the same unit was suspended, but not terminated. To Terwilliger's knowledge, neither of the unit supervisors received any warning or discipline for what he described as the unit's leniency.

Appellant's Witnesses

Dr. Daniel Jass

Daniel Jass, M.D. testified on behalf of appellant. He is appellant's personal physician. He treated appellant for clinical stress during the relevant period. He was qualified as an expert witness. Dr. Jass treated appellant for severe stress with medication and counseling during the time of his mother's terminal illness. In addition to

his mother's illness, appellant faced several other stressors, including work and family obligations which led him to seek medical care. It is common for people suffering from severe stress to be reluctant to share their struggle with colleagues at work. Dr. Jass prepared a medical report which was submitted to the state prior to appellant's termination. The report expressed that appellant's condition at the time in question could have impacted his memory and judgment. No one from the state ever contacted Dr. Jass to inquire as to appellant's medical history.

Brian Arena

Brian Arena, who was appellant's supervisor at the relevant time, was called to testify by the appellant. Arena supervised Smirnov's direct supervisor, George Mykytyn. Appellant's performance was always satisfactory as reflected by twenty years of positive performance reviews. Arena personally knew of Smirnov's mother's illness. Appellant's work product did not change during his mother's illness and remained satisfactory. He believed that Mytykyn, felt the same.

Securities trades can be and are effected remotely by an analyst with his or her supervisor's cooperation. This practice was established division-wide with the COVID 19 crisis, as virtually all the employees in the Division of Investment are working full time from their homes.

Arena was not consulted regarding's appellant's discipline. When told that appellant was to be terminated, he voiced his disagreement. Arena had no recollection of Smirnov ever requesting permission to work from home or to utilize flextime.

Vitaly Smirnov

Appellant testified on his own behalf. He was employed by the State of New Jersey from 1998 until his removal. He described his mother's terminal illness and his having been her healthcare proxy and next of kin during her hospitalization and hospice care

prior to her death. Appellant was a salaried "NL" employee who is not paid by the hour. He always filled out his timesheets as required.

During his mother's illness he frequently arrived at the office late and/or left early to interact with his mother's healthcare providers. They often called him and frequently requested his presence due to difficulties in communication with his mother. He believes he continued to produce his usual satisfactory work product by working additional hours from home and during his lunch hour. He did not reflect these conditions on his time sheets nor was he given specific authorization to conduct his work in this manner. Appellant was aware that he was expected to be in the physical workplace during his scheduled hours of 8:30 a.m. to 4:30 p.m. He understood that if an employee is unable to be in the office for their scheduled hours, they are required to use leave time.

When confronted with the fact that his timesheets did not correspond to his time spent in the office, appellant readily admitted his practice. When he was informed that he should have requested family leave he immediately did so. His family leave was approved prospectively from his request, and his past timesheets were conformed to reflect his actual time spent in the office and to properly reflect his unauthorized absences. He hoped, and based on email correspondence was optimistic, that the family leave might be approved retroactively as well.

Appellant was informed to his surprise that he would have to pay the state $8,181.12 for time which he had worked from home and during lunch or face discipline. Wanting to put the matter to rest and recognizing that he failed to secure advance approval for his unconventional schedule, appellant agreed to pay. The money was recouped by the State via payroll deduction. Appellant was subsequently disciplined. Respondent terminated his employment pursuant to charges of theft and unbecoming conduct.

Appellant had not remembered the family leave program during the period of his clinical stress experienced during his mother's terminal illness. A sign describing the

family leave program was posted in the employee lunchroom at work after he applied for the program.

The testimony of the witnesses does not appear to be in conflict. All witnesses presented clear, concise, credible testimony laying out the factual record in this case. The testimony was consistent as to the material facts and is not contradicted by any testimony or documentary evidence in the record. I **FIND** and **ADOPT** as **FACT** the testimony of each witness as offered in their entirety.

CONCLUSIONS OF LAW

Under the Civil Service Act, a public employee may be subject to major discipline for various employment-related offenses, N.J.S.A. 11A:2-6. In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:-2.21; N.J.A.C. 4A:2-1.4(a). The authority must show by a preponderance of the competent, relevant, and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal, based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

In the present matter, appellant was charged with chronic or excessive absenteeism or lateness (N.J.A.C. 4A:2-2.3(a)4); Conduct Unbecoming a public employee (N.J.A.C. 4A:2-2.3(a)6); and Other sufficient cause (N.J.A.C. 4A:2-2.3(a)12), specifically, falsification of time sheets, theft, and violation of the public trust.

Summary decision was granted as to the charges of Other Sufficient Cause and Conduct Unbecoming stemming from allegations of falsification of time sheets and violation of public trust. Pursuant to the March 3, 2020, Order those charges have been **SUSTAINED**.

What remains is determination as to the charge of chronic absenteeism, and as to the charges of conduct unbecoming and other sufficient cause to the extent that they are supported by the allegations of theft.

Conduct that occurs over a period of time, or frequently recurs, is considered "chronic," and may be the basis of discipline or dismissal. N.J.A.C. 4A:2-2.3(a)(4).

"Just cause for dismissal can be found in habitual tardiness or similar chronic conduct." West New York v. Bock, 38 N.J. 500, 522 (1962). While a single instance may not be sufficient, "numerous occurrences over a reasonably short space of time, even though sporadic, may evidence an attitude of indifference amounting to neglect of duty." Ibid.

"There is no constitutional or statutory right to a government job. Our laws, as they relate to discharges or removal, are designed to promote efficient public service, not to benefit errant employees." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998).

However, approval of an absence shall not be unreasonably denied. N.J.A.C. 4A:2-6.2(b).

In Cumberland County Welfare Board v. Jordan, 81 N.J. Super. 406 (App. Div. 1963), a classified employee who was granted a leave of absence was improperly denied an extension of that leave because of the appointing authority's failure to provide proper notice of the denial; the appointing authority knew she was absent, was aware that she was confined to a hospital, and had previously granted the leave.

The record reflects that appellant was absent from work for approximately 137 hours, or twenty days during the period of March 1, 2018, to August 31, 2018. The days of absence taken exceed those allotted and were taken without permission of his supervisors or the appropriate officials. Appellant does not dispute the late arrivals and absences and admits that his timesheets did not reflect his location. He argues that he did conduct his work duties while away from the office and fulfilled the time required of his job. The record reflects that there is no policy or rule permitting such an accommodation at the time relevant to these proceedings. To the extent that appellant has argued that work from home arrangements in place during the recent health emergency demonstrate that jobs can be performed remotely, such arguments are misplaced and unpersuasive. Appellant appears to sincerely believe that his work effort and performance did not suffer. It may even be true. However, that is not appellant's decision to make, and that fact that work may debatably be performed just as efficiently from locations other than those prescribed by the appointing authority is of no moment absent a rule, policy or specific authorization or approval to do so. As the record is devoid of any such policy rule authorization or approval, no other result may be reached. The appellant did not attend his job within the contemplation of the terms and rules governing his employment. He was therefore absent without excuse for a total of twenty days during a six-month period. I **CONCLUDE** that the charge of violating chronic or excessive absenteeism or lateness (N.J.A.C. 4A:2-2.3(a)4 must be **SUSTAINED**.

We turn now to the allegation of theft. In the FNDA and PNDA "theft" is listed as an allegation supporting the charge of violating "Other Sufficient Cause." No specific rule, policy, statute, or regulation is referenced. In the specifications laying out the factual basis for the charges, respondent advised appellant, "Your falsification of timesheets resulted in your being paid monies that you were not entitled to and is considered theft."

Respondent, citing to N.J.S.A. 2C:20-4, asserts in its closing argument that appellant is guilty of theft because he "fail[ed] to correct a false impression which the deceiver previously created or reinforced or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship." Appellant states he cannot be

guilty of theft because he reimbursed appellant. While that argument may be unpersuasive as where instances of theft have occurred the perpetrator is generally not permitted to retain what was obtained inappropriately, broader issues with the analysis emerge which may obviate the need for that analysis.

It is important to note that appellant has neither pleaded nor been adjudged in some other forum to have committed the crime of theft. Respondent is asking this administrative tribunal to determine that appellant's conduct meets the definition of and constitutes the commission of a violation of the criminal theft statute, and that the act of theft supports a conclusion of conduct unbecoming or other sufficient cause. It is not necessary, and I will decline to do so.

In deciding a civil service disciplinary action, an ALJ is called upon to determine if the conduct alleged by the appointing authority occurred. Having determined what actually occurred, we must then determine if what occurred supports the sustaining of the charges proffered. If they do, then we must determine on a de novo basis what the appropriate penalty is. The motion practice and the evidentiary hearing in this matter have a developed a factual record where findings of fact have been made and we now know by preponderance of credible evidence what occurred.

We are now able to measure whether that conduct further supports a sustaining of charges of conduct unbecoming or other sufficient cause, specifically violation of public trust. In the absence of a conviction or a guilty plea whether this tribunal deems the conduct to satisfy the criminal definition of 'theft' is of no moment and not for this forum to determine. In other words, whether we call it theft or not is not essential to the determination of whether the conduct was inappropriate.

Appellant was charged with "[c]onduct unbecoming a public employee." N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that tends to destroy public respect in the delivery of governmental

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

The record reflects that appellant did falsify timesheets, did so in a manner to conceal his whereabouts and that doing so resulted in his being paid monies that he was not entitled to. It also reflects that he repaid those monies. The falsification of timesheets has already been determined pursuant to the March 3, 2020, Summary Decision Order to be sufficient basis upon which to sustain charges of conduct unbecoming and other specific cause, specifically, violation of public trust. That appellant received money he was not entitled to only exacerbates the situation and strengthens the severity of the charges. Appellant's repayment of the money serves to acknowledge that it was received inappropriately and does not undo or erase the conduct from having occurred.

Accordingly, I **CONCLUDE** that allegations that appellant falsified his timesheets which resulted in his being paid monies that he was not entitled to further support and exacerbate the already **SUSTAINED** charges of charges of conduct unbecoming and other specific cause, specifically, violation of public trust.

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.

General principles of progressive discipline apply. Town of W. New York v. Bock, 38 N.J. 500, 523 (1962). 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.

"Although we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Bock, 38 N.J. 500, 523 (1962), that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990).

Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

Some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007), citing Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197–98 (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense); see also In re Herrmann, 192 N.J. 19, 33 (2007) (DYFS worker who snapped lighter in front of five-year-old):

> . . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.

> Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

The Commission has authority to increase the penalty beyond that established by the appointing authority's Final Notice of Disciplinary Action, but not to removal from suspension. N.J.S.A. 11A:2-19. The Civil Service Commission may increase or decrease the penalty imposed by the appointing authority, but removal shall not be substituted for a lesser penalty. See Sabia v. City of Elizabeth, 132 N.J. Super. 6, 15–16 (App. Div. 1974), certif. denied, Elizabeth v. Sabia, 67 N.J. 97 (1975).

In the present matter, respondent has met its burden in **SUSTAINING** charges against appellant of chronic or excessive absenteeism or lateness (N.J.A.C. 4A:2-2.3(a)4); Conduct Unbecoming a public employee (N.J.A.C. 4A:2-2.3(a)6); and Other sufficient cause (N.J.A.C. 4A:2-2.3(a)12), specifically, falsification of time sheets and violation of the public trust.

The record reflects that appellant's disciplinary record was unremarkable prior to the incident that is the subject of this matter. However, despite appellant's lack of significant disciplinary history, the behavior described herein certainly constitutes misconduct that is severe; that is unbecoming to the employee's position. Respondent seeks appellant's removal from his position.

To hear what appellant was experiencing is truly heart-wrenching. Petitioner was caring for an ill parent while knowing that the illness was terminal, and did so without support from other family members, knowing that a language barrier prevented that parent from communicating with her medical providers and having both rely on him to facilitate that communication. It is no wonder that the stress of the situation impacted his health, and it is completely understandable that he decided he needed to be present to serve the role that he did in caring for his dying mother. However, there is a correct way

that could have been accomplished and appellant did not avail himself of it. He could and should have availed himself of the appropriate leave time to accommodate this need.

Appellant truly believes he could and did perform his work without issue. Maybe that is true, but it is not his call to make. The Department and the Division lay out the terms and conditions by which his work is to be accomplished. Appellant did not work in accordance with them. The Division and the Department are responsible for financial decisions that impact the solvency of the retirement funds for the state workforce, in part in reliance upon appellant's work effort. To say it is a large responsibility that must be accomplished with care would be extreme understatement. They must devise policies which create comfort that the work is being done in a manner that is conducive to serving their overarching mission and purpose. It is not for appellant, or any one employee, to decide that it does not apply to them.

The record reflects that no policies were in place in 2018 which would have allowed for appellant's work to be done in the way he chose to do so. On the chance it may have been possible for some accommodation to be made which modified his work expectations appellant denied respondent the opportunity to even consider it, and instead chose to keep them, deliberately, in the dark about what he was doing, in a manner designed to prevent them from knowing about it and to avoid detection. It is ultimately the knowing actions to avoid detection, understanding that they were not what was required that aggravate and overbear any mitigating effect appellant's circumstances may present.

Unrebutted medical expert testimony was presented that appellant suffered from clinical stress that could likely have caused him to exercise poor judgment. That he exercised poor judgment is not in dispute. No evidence was presented that appellant was incapable of knowing right from wrong. In fact, the record demonstrates quite the opposite. Decisions made under impaired judgment do not provide a shield from the consequences of those actions.

Appellant's argument that the recoupment of salary paid while he was absent from work without excuse adds insult to injury is not persuasive. Appellant may have truly believed it was an either/or proposition, but no evidence in the record reflects that or the existence of any agreement that the recoupment was a form of settlement of the issue. He was determined to not have properly reported to work for twenty days, without excuse, and yet was paid as though he had. He received money he was not entitled to, and it was returned. That does not prevent the conduct by which it was obtained from being subject to disciplinary action. That appellant asserts in his closing brief that at worst he should have been able to lose his job and have eight thousand dollars more in his pocket does not reflect the reality of the situation, but also demonstrates at this late stage that appellant still does not fully appreciate the gravity or seriousness of his conduct, or perhaps does not fully understand what it is that he did.

Appellant's argument that the existence of another division employee who was disciplined for time sheet irregularities yet not removed indicates discrimination is equally unpersuasive. Appellant repeatedly asserts that the failure to provide explanation of that employees mitigating circumstances must mean that there were none is speculative at best and ignores the determination to sustain an objection to any discussion of such during hearing. As discussed at length in the motion to reconsider, appellant's hearing was not the time to litigate the appropriateness of another employee's penalty. The two employee's lengths of service and quantum of missed time were vastly different to render the matters not sufficiently similarly situated to warrant the disclosure and perhaps compromise the privacy of another employee.

Considering the foregoing, I **CONCLUDE** that removal is appropriate for the **SUSTAINED** charges against appellant of chronic or excessive absenteeism or lateness (N.J.A.C. 4A:2-2.3(a)4); Conduct Unbecoming a public employee (N.J.A.C. 4A:2-2.3(a)6); and Other sufficient cause (N.J.A.C. 4A:2-2.3(a)12), specifically, falsification of time sheets and violation of the public trust. I further **CONCLUDE** that the original penalty of removal be **AFFIRMED**.

ORDER

The appointing authority has proven by a preponderance of credible evidence the charges against appellant of chronic or excessive absenteeism or lateness (N.J.A.C. 4A:2-2.3(a)4); Conduct Unbecoming a public employee (N.J.A.C. 4A:2-2.3(a)6); and Other sufficient cause (N.J.A.C. 4A:2-2.3(a)12), specifically, falsification of time sheets and violation of the public trust. I therefore **ORDER** that these charges be and are hereby **SUSTAINED.**

To the extent that respondent seeks a determination that appellant committed an act of theft, no such determination was made but the conduct alleged in support of such determination was found to have occurred and concluded to further the sustaining for the charges of Conduct Unbecoming a public employee (N.J.A.C. 4A:2-2.3(a)6); and Other sufficient cause (N.J.A.C. 4A:2-2.3(a)12), specifically, falsification of time sheets and violation of the public trust, which were **SUSTAINED**.

Finally, I **ORDER** that the penalty of removal is hereby **AFFIRMED.**

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, 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 18, 2021
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: October 18, 2021 (emailed)

Date Mailed to Parties:

EAP/mel

APPENDIX

LIST OF WITNESSES

For Appellant:

Daniel Jass
Brian Arena
Vitaly Smirnov

For Respondent:

Lorie Haggerty
Corey Amon
Gina Costello
Gary Terwilliger

LIST OF EXHIBITS

For Appellant:

A-1(A) Daniel K. Jass, MD report
A-2(B) Death Certificate of Lidia P. Smirnova
A-4(D) E-mails
A-5(E) Letter from Deborahann L. Westwood regarding approval of FMLA
A-6(F) E-mail from Gina Costello regarding corrections of timesheets
A-7(G) Letter from Department of Treasury regarding Vitaly Smirnov's payment $8181 to the State

A-10(J) Personnel evaluation: summary of salary increases

For Respondent:

R-1 Preliminary Notice of Disciplinary Action dated 2/1/19; Final Notices of Disciplinary Action dated 5/10/19

R-2 Department of Treasury Guide to Employment

R-3 State of New Jersey Department of the Treasury Guide to Employment Receipt Form

R-4 Learner Transcript Report: Vitaly Smirnov

R-5 Letter from Human Resources to Mr. Smirnov, dated October 10, 2018

R-6 Email from Gina Costello to Adam Stevens with attachment, dated September 28, 2018

R-7 Memorandum from Gina Costello to Vitaly Smirnov, dated November 13, 2018

R-8 Memorandum from Gina Costello to Vitaly Smirnov with attachments, dated December 17, 2018