STATE OF NEW JERSEY

In the Matter of Markita Spellman Atlantic County Department of Human Services	**DECISION OF THE CIVIL SERVICE COMMISSION**
CSC DKT. NOS. 2020-627 & 2020-628 OAL DKT. NOS. CSV 13412-19 & 13413-19 **(Consolidated)**	

ISSUED: MARCH 24, 2021 BW

The appeals of Markita Spellman, Institutional Attendant, Atlantic County, Department of Human Services, 45 working day suspension and removal effective August 15, 2019, on charges, was heard by Administrative Law Judge Tama B. Hughes who rendered her initial decision on February 19, 2021. 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 (Commission), at its meeting of March 24, 2021, accepted and adopted the Findings of Fact as contained in the attached Administrative Law Judge's initial decision and her recommendation to uphold the 45 working day suspension. However, the Commission did not uphold the recommendation to uphold the removal. Rather, the Commission imposed a 60 working day suspension.

DISCUSSION

For both disciplinary matters, the appellant was charged chronic or excessive absenteeism or lateness. For the second matter, she was also charged with neglect of duty. The initial action was for repeated unexcused absences from work between October 21, 2018 and May 4, 2019. For that infraction, the appointing authority imposed a 45 working day suspension. The second action was for 14 unexcused absences between May 5, 2019 and July 19, 2019 as well as several hours of unexcused lateness of leaving work early.

In her initial decision, the ALJ upheld the charges and the disciplinary penalties imposed. After its *de novo* review of the record, the Commission agrees with the upholding of all the charges as well as the ALJ's recommendation to uphold the 45 working day suspension. However, the Commission does not agree that removal is warranted for the second disciplinary action. Rather, the Commission imposed a 60 working day suspension.

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).

The record in this matter indicates that appellant had accrued six prior disciplines in the four years prior to these matters, all for similar infractions, with the last infraction carrying a 25 working day suspension. Accordingly, given this history, the imposition of the 45 working day suspension in this matter was warranted, especially given that the discipline was for her absences over a nearly six-month period. However, there are reasons in the record to modify to the second disciplinary action for removal to a lesser penalty. First, the second disciplinary action is for continued attendance infractions for the two months immediately following the misconduct underlying the 45 working day suspension. As such, while it was warranted for the appointing authority to seek further discipline for such continued infractions, to impose removal after only an additional two months of infractions is heavy-handed. Further, in this case, the record indicates that the appellant had extreme personal difficulties during the relevant time periods. While these difficulties do not wholly absolve her of her absences from work, they are sufficient reason, in this particular matter, to impose a lesser penalty.[1] Accordingly, the Commission finds that the appropriate penalty in this matter is a 60 working day suspension. The Commission notes that it in no way is minimizing the appellant's infractions and emphasizes that that any future similar infractions would warrant imposition of major discipline up to and including removal from employment.

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[1] *See also, N.J.S.A.* 11A:2-6a.

Since the removal has been modified, the appellant is entitled to back pay, benefits and seniority 60 working days from the original date of her removal 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 upheld the charges against the appellant 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 regarding the removal 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 suspending the appellant for 45 working days was justified. The Commission therefore affirms that action. This is the final administrative determination in that matter. Any further review of that matter should be pursued in a judicial forum.

The Commission further finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore modifies the removal to a 60 working suspension. Additionally, the Commission 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 as pertaining to the removal 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 24TH DAY OF MARCH, 2021

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
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Christopher S. Myers
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 13412-19 AND
CSV 13413-19
AGENCY DKT. NO. 2020-627 AND
2020-628
(CONSOLIDATED)

IN THE MATTER OF MARKITA SPELLMAN, ATLANTIC COUNTY, DEPARTMENT OF HUMAN SERVICES.

Yolanda Lawson, Field Representative, AFSCME-NJ 63, for appellant, Markita Spellman, appearing pursuant to N.J.A.C. 1:1-5.4(a)(6).

Jennifer P. Starr, Esq., Assistant County Counsel for respondent Atlantic County, Department of Human Services (James F. Ferguson, County Counsel, attorney)

Record Closed: January 28, 2021 Decided: February 19, 2021

BEFORE **TAMA B. HUGHES,** ALJ:

STATEMENT OF THE CASE

Atlantic County, Department of Human Services ("Atlantic County" or "Respondent"), seeks to impose a forty-five day suspension on Markita Spellman

("Spellman" or "Appellant") under the Final Notice of Disciplinary Action (FNDA), dated August 14, 2019, (OAL Docket No. 13412-19) and termination of Spellman under the FNDA, also dated August 14, 2019, (OAL Docket No. 13413-19). Spellman is employed as a Certified Nurse Aide (CNA) at the Meadowview Nursing and Rehabilitation Center (Meadowview). Atlantic County charges Spellman with chronic absenteeism in violation of N.J.A.C. 4A:2-2.3(a)(4) after failing to come to work on multiple occasions and/or coming to work late and/or leaving work early – all without authorization. Under OAL Docket No. 13413-19, in addition to violation of N.J.A.C. 4A:2-2.3(a)(4), she is also charged with Neglect of Duty in violation of N.J.A.C. 4A:2-2.3(a)(7). Spellman does not dispute the absences, however, contends that they were a result of domestic violence issues that were occurring in her personal life and, to the extent that the charges are sustained, the penalty imposed is unreasonable and excessive.

PROCEDURAL HISTORY

Atlantic County issued a Preliminary Notice of Disciplinary Action (PNDA) on June 11, 2019, charging chronic or excessive absenteeism or lateness in violation of N.J.A.C. 4A:2-2.3(a). The disciplinary action sought was a forty-five-day suspension. A second and separate PNDA was issued on July 23, 2019, which also charged Spellman with chronic or excessive absenteeism or lateness as well as neglect of duty. The disciplinary action sought was removal.

Spellman requested a disciplinary hearing in both matters which was conducted on July 24, 2019. Separate FNDAs were issued in both matters on August 14, 2019, wherein the charges in both actions were sustained and the respective disciplinary action sought granted. Spellman timely appealed the matters to the Civil Service Commission and both matters were transmitted to the Office of Administrative Law (OAL) on September 24, 2019, as contested. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Upon application of the parties, by Order, dated January 2, 2020, the matters were consolidated for purposes of the hearing and disposition. The hearing was originally scheduled for May 1, 2020, however, was adjourned due Covid-19 and the closure of the

Office of Administrative Law for non-emergent matters. On June 8, 2020, a status call was held at which time a new hearing date of November 4, 2020, was set. On November 4, 2020, the matter was heard and thereafter, on January 28, 2021, summation briefs were received, and the record closed.

FACTUAL DISCUSSION

Stacie Bates (Bates), the Director of Nursing at Meadowview testified that she has worked at Meadowview for eighteen years, the last three as the Director of Nursing. She is responsible for everything in the nursing department including staff and residents.

She is familiar with Spellman who was an Institutional Attendant (CNA) at the facility. In describing the job responsibilities of a CNA, Bates stated that CNA's are responsible for the care of the residents of the facility which includes, among other things, bathing and clothing the residents and handling the residents care documentation.

Bates went on to state that she was involved in the disciplinary process against Spellman – both the suspension and termination. (J-1 – J-3.) The first action sought a forty-five day suspension and was based upon Spellman's repeated unexcused absences from work and/or lateness in getting to work, for the time period of October 21, 2018 through May 4, 2019.[1] According to Bates, all absences and tardiness were unauthorized.

The second FNDA sought Spellman's termination. The basis for this action was due to Spellman's accrual of fourteen unexcused absences from work from May 5, 2019, through to July 19, 2019, as well as an additional 12.75 hours of unexcused lateness or unauthorized leaving of work early.

[1] The FNDA stated that for the time period of October 21, 2018, to May 4, 2019, Spellman was absent from work eighteen days and was late to work a total of 4.05 hours. A workday is defined as an eight-hour shift. In review of J-1, page 2 ("Unpaid Time Off – "W" Time"), Spellman was absent a total of seventeen days. It appears that the respondent included in the eighteen-day tally, the October 30, 2018, date wherein the Spellman was noted to have missed 7.0 hours of her eight-hour shift. Additionally, the FNDA stated that during this same time period, Spellman was late 4.05 hours. In review of the list attached to the FNDA, the hours which Spellman was late adds up to 5.17 hours, not the 4.05 hours identified in the FNDA.

According to Bates, under the county's policy, unauthorized absences are called "W-time". (J-4.) W-time does not include pre-approved leave. Bates went on to state that she had spoken to the Spellman on multiple occasions about her absenteeism. Each time Spellman informed her that she was making changes in her life and as a result would no longer be dilatory. Spellman however, never told her what those changes involved.

Bates went on to state that when an employee fails to show up to work, there is a significant impact on the facility but more importantly on the residents. When an employee does not come to work, the facility scrambles to find a replacement who gets paid at a rate of time and a half and becomes very expensive if it happens frequently. If they can't fill the spot, the other caretakers must pick up the additional beds which means less care for all the residents as the staff is stretched thin. The more the facility relies upon its employees to pick up shifts for their absent co-worker, the higher the burnout rate is, and then those employees start calling out. The residents are impacted because they rely on their caretakers with whom they have forged an emotional bond, rely upon and feel comfortable and safe.

In discussing why termination was sought, Bates stated that Spellman has been subject to progressive discipline as a result of her absenteeism. In the past, she had received verbal warnings, writeups and suspensions. At no time from October 2018, through July 2019, did the Spellman request time off to handle any personal issues that she may have had. Nor was she denied leave that had been accrued if requested. However, her absenteeism became so chronic that they were never sure if she would show up for work. According to Bates, they always questioned whether back-up staff should be put in place just in case Spellman called out - which from the pattern that had emerged, was typically after her scheduled days off.

On cross-examination, Bates was asked whether she would have helped Spellman if she had been made aware that she (Spellman) was having domestic violence issues at home. In response, Bates stated that she had suspected that that was the case, however, Spellman never confided such to her. Had Spellman confided the issue with her, she would have absolutely assisted her – noting that on more than one occasion in the past, she had assisted other employees who had domestic violence concerns.

Bates was also questioned whether there was a way to mitigate the "W-time" to which she stated yes, by bringing in a doctor's note. Anyone who has chronic absenteeism is required to bring in a doctor's note to receive their sick time. Failure to do so will result in W-time. Spellman did not do so.

Michelle Savage (Savage), the Licensed Nursing Home Administrator for Meadowview testified that she has been employed at Meadowview for eleven years and is the final authority on disciplinary matters at the facility. She is familiar with the duties and responsibilities of a CNA – noting that their role is extremely important in the care of the facilities residents as they provide both physical and emotional support to the facilities residents.

She is familiar with Spellman and was the one who determined what disciplinary action was to be taken against the her. The two disciplinary actions which were levied against Spellman – forty-five-day suspension and termination, were because of Spellman's history of chronic absenteeism. She noted that the reason discipline is imposed is to change behavior. In Spellman's case, the discipline failed as Spellman's conduct did not change even after progressive discipline had been imposed. Spellman kept promising to change her behavior and but failed to do so. Based upon Spellman's ongoing course of conduct in this regard, it was her belief that it would have been negligent on her part, and unfair to both the residents and the facility, if Spellman was not terminated.

Spellman was terminated not for failure to call out, which an employee is required to do two hours before their shift starts, but because she repeatedly called out, came to work late or left early – all without authorization.

Spellman's absenteeism caused a significant impact across the board. For the facility, there was a financial impact as the person who was brought in to cover Spellman's shift was paid time and a half. Then there was the staffing issue – trying to find staff members who can cover the shift and if that is not possible, having other shift members split the beds. If the latter occurred, instead of the CNA's handling ten residents, they

would now have to handle twelve to fifteen residents during their shift. This results in decreased services to the clients and causes issues among staff members - one of which is burn-out. On top of all of that, and most importantly, is the break in continuity of care to the residents. Savage opined that the residents depend on the CNA's who are their primary caregivers. When someone calls out, the residents are the ones who suffer the most as they now have a stranger assisting them - someone who they do not know and are uncomfortable with.

On cross-examination, Savage was asked whether the Spellman was a good worker when she came to work. Savage responded affirmatively, stating that Spellman was a good worker and appeared to enjoy her job and had a nice rapport with the residents.

When questioned whether she had asked Spellman why her attendance was poor, Savage stated that she had not. When Spellman was spoken to about her attendance, the only thing that she would state was that it would get better and things would be different going forward. While she sounded sincere when she said it, things did not change. Had she disclosed that there were domestic issues, she would have attempted to help her. Bringing her back to work is not an option at this time – her termination was a result of ongoing conduct which impacted the facility and its residents.

When questioned how the facility was impacted when employees are entitled to vacation and sick time and the facility has to schedule for those absences, Savage stated that scheduled time off is done in advance and they have the ability to cover with staff. When an employee calls out two hours ahead of their shift, it is a different story and they have to scramble to find staff to fill the spot.

Markita Spellman (Spellman), testified that she started working at Meadowview in 2014 as a CNA. When she first started, she did not have poor attendance – however, in 2017, things started to slip. She became pregnant which caused her to become so sick that she started calling out. When she received her first suspension of thirty days, the facility combined it with her maternity leave.

When she came back from her pregnancy, she spoke to Bates and told her that things were going to get better with her absences. Around 2018/2019, her boyfriend – the father of her baby, started drinking and becoming violent. At the time, she said something to Bates along the lines that she was having domestic issues at home but did not go into specifics. The conversation was supposed to be in confidence, however, she found out later that Bates had shared the conversation with one of her co-workers. After that she never said anything in confidence to Bates. At no time did Bates offer her any assistance, provide names of any programs that the county offered or any guidance for that matter. Spellman went on to state that contrary to what Bates had testified to, she did not go to her to request a day off to have a procedure done. She had presented the facility with a doctor's note two days prior to the procedure and had the procedure done on a scheduled day off.

According to Spellman, attendance became even more problematic when she asked to go back to school. She had noticed that two other people with less seniority were picked to go back to school and their schedules were changed. When she questioned Bates why her schedule could not be accommodated, Bates handed her a forty-five day suspension for her absenteeism and told her that the suspension could be broken up and that she could attend school on the days that she was suspended. She could not fathom how Bates or the facility, thought she would accept a forty-five-day suspension without pay, just to go to school. She had children to feed and wasn't calling out for "recreational purposes". Additionally, given how Savage acted at work, she felt it was disingenuous of Savage when she stated that her heart was aching for her because of her domestic issues.

Spellman went on to state that she obtained the Temporary Restraining Order (TRO) in July 2019, because she had had enough and needed to get away from the father of her child. (P-1.) She did not get it finalized because he went to jail and was still there. If she got her job back, there would be no attendance issues because she was in a different place now.

On cross-examination, Spellman was asked why she did not speak to Bates about her domestic violence issues at home. In response, Spellman stated that at one time she

would have, but after Bates breached her confidence and repeated a conversation, she stopped speaking to her regarding personal matters. When asked if she ever reached out to the Equal Employment Opportunity (EEO) Officer, or her union representative regarding her domestic violence situation, she said that she had not. She did, however, reach out to the EEO officer regarding the issue of schooling and how she was passed over.[2] She handled the domestic violence issue on her own.

When questioned when the problems at home accelerated, Spellman stated that while there were problems in the past, the abuse accelerated in May/June 2018. It started out as verbal abuse and then became physical. Once it became physical, her job was affected. She would stay up late at night to protect her children and then get up early to get to work. Often times, her boyfriend/abuser was gone, and she had no one to either care for her children or take them to school. When she realized that things were not getting any better, she filed for a TRO July 2019. (P-1.) She did not follow through with a Final Restraining Order because her abuser had been incarcerated on other charges and to her knowledge, to this date, is still incarcerated.

When asked again whether she disclosed her domestic violence problems with anyone one at work, she stated no, however, Bates was aware that she was being abused because in July 2019, she came to work with two black eyes. When Bates saw her at work, she asked her (Spellman) if she was ok to which she responded that she was. She (Spellman) did not say anything to Bates for fear that she would repeat it. Spellman went on to add that clearly, she was not ok, but at no time did Bates offer to assist her nor did anyone else for that matter.

[2] Spellman was questioned how she would have attended school if she could not even get to work. She responded by stating that she would have moved in with her mother who would take care of her children. When asked why she hadn't move in with her mother when all of this was occurring, and her work was being affected, she stated that her mother lived in another county and was two hours away. When questioned about the logic of her last answer – work, school and living two hours away – she acknowledged that she hadn't really thought it out.

FINDINGS OF FACT

The following facts were stipulated to by the parties, and therefore, I **FIND** them as **FACT**:

Spellman began employment at Meadowview in 2014 as a CNA.

On June 11, 2019, a PNDA was issued against Spellman charging her with chronic or excessive absenteeism/ lateness in violation of N.J.A.C. 4A:2-2.3(a). The dates of absenteeism and/or lateness ranged from October 21, 2018, through May 4, 2019, and constituted eight days of unauthorized absences and 4.05 hours of lateness. The disciplinary action sought under the PNDA was a forty-five-day suspension. (J-3.)

On July 23, 2019, a second PNDA was issued against Spellman charging her with chronic or excessive absenteeism/lateness in violation of N.J.A.C. 4A:2-2.3(a)(4) and neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7) for the time period of May 5, 2019, through to July 19, 2019, and constituted fourteen days of absences without providing the appropriate doctor's notes and 12.75 hours of unexcused lateness or unauthorized leaving of work early. (J-3.)

On July 24, 2019, a Departmental Hearing was held on both matters. A FNDA was issued on August 14, 2019, in both matters which sustained the charges and imposed the disciplinary action sought – forty-five-day suspension for the first charge and removal effective August 15, 2019, on the second charge. (J-1 and J-2.)

Under the Atlantic County Policy P.S. 5.11 (Unauthorized Absence), and unauthorized absence of seven (7) minutes or more is known as "W-time". (J-4.) Unauthorized absence of one to three occurrences within any six-month period will be subject to disciplinary action. Additional violations will result in progressive discipline.

Spellman does not dispute any of the unauthorized absences. (J-1 and J-2.)

After hearing the testimony presented and review of the documentary evidence submitted, and having had an opportunity to observe the witnesses and assess their credibility, in addition to the findings above, I **FIND** the following as **FACT**:

Spellman credibly testified that she was involved in an abusive relationship during the time period of October 2018, through July 2019.

At no time did Spellman disclose to the nursing home administrators or supervisors, the fact that she was being physically abused or that she had obtained a TRO. At no time did she approach the nursing administrators or supervisors that she needed assistance, guidance, or programs to address the domestic violence issues at home or the childcare issues that she was having as a result of the domestic problems.

While Spellman timely called out in accordance with the call-out policy of the nursing home, over the course of approximately eight months, she took thirty-two days which constitutes over a month of unauthorized leave and was additionally late or left early from work a total of 17.92 hours.

When a staff member takes unauthorized leave, the nursing home is left short personnel. A CNA is an important part of the staff at the nursing home as they are the hands-on caregivers of the residents who place their trust and wellbeing in – physically and emotionally. When a staff member repeatedly takes unauthorized leave, it directly impacts the residents to whom they are assigned, but it also impacts other staff members who must pick up the extra work/shift and the nursing home itself who must scramble to fill the vacant spot and pay time and half to do so.

LEGAL ANALYSIS AND CONCLUSION

Public employees' rights and duties are governed and protected by the provisions of the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, and the regulations promulgated pursuant thereunder. N.J.A.C. 4A:1-1.1 et seq. However, public employees may be disciplined for a variety of offenses involving their employment, including the general causes for discipline as set forth in N.J.A.C. 4A:2-2.3(a). One such cause is found under

N.J.A.C. 4A:2-2.3(a)(4) - chronic or excessive absenteeism or lateness. If sufficient cause is established, then a determination must be made on what is a reasonable penalty.

In an appeal concerning major disciplinary action, the burden of proof is on the appointing authority to show that the action taken was justified. N.J.S.A. 11:2-21 and N.J.AC. 4A:2-14(a). The burden is to establish 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 License Revocation, 90 N.J. 550 (1982).

Here, under both disciplinary actions, the respondent sustained charges against appellant for chronic or excessive absenteeism or lateness. (N.J.A.C. 4A:2-2.3(a)(4))

Petitioner does not dispute her chronic or excessive absenteeism, however, asks the Tribunal to take into consideration that she was a victim of domestic violence at the time she incurred the infractions and that she is in a different place at this time. As such, she seeks the opportunity to return to work even if it is with conditions such as a Last Chance Agreement.

Atlantic County notes that the two infractions for chronic and excessive absenteeism were not Spellman's first instances of such conduct and that Spellman's credibility was suspect. Even standing alone the sustained charges were sufficient to support the disciplinary action sought.

Additionally, at no time did Spellman disclose that she was in a violent domestic relationship and having childcare issues as a result. While Bates may have suspected that there were issues at home, when asked, Spellman, for her own personal reasons, assured her that everything was ok. Citing to Terrell v. Newark Housing Authority, 92 N.J.A.R2d (CSV) 750, 752, Atlantic County asserts that even assuming arguendo that Spellman's chronic absenteeism was not done in bad faith, a charge of excessive absenteeism is not limited to instances of bad faith or lack of justification on the part of the employee.

In Terrell, the appellant disclosed that she had a severe drug problem after her employer terminated her for chronic absenteeism. On appeal to the OAL, the ALJ found that:

> [E]xcessive 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 her job. After reasonable consideration is given to an employee by an appointing authority, the employer is left with a serious personnel problem, and a point is reached where the absenteeism must be weight against the public right to efficient and economic service. An employer is entitled to be free of excessive disruption and inefficiency due to an inordinate amount of employee absence."

After considering the record in Terrell, the Merit System Board adopted the ALJ's findings in its entirety and affirmed the appellant's dismissal.

Atlantic County is correct in its analysis. At no time was Spellman's employer, supervisor, human resource department or union representative, placed on notice that there was a domestic violence issue which was directly impacting her ability to get to work much less remain at work for her entire shift. While services may have been offered or recommended to Spellman at the time and possibly some leeway in her schedule, for personal reasons she chose not to seek such assistance and belatedly raises the issue after missing multiple days from work, was late to work or left early equally as much.

An employee may be subject to discipline for chronic or excessive absenteeism. N.J.A.C. 4A:2-2.3(a)(4). While there is no precise number that constitutes "chronic," it is generally understood that chronic conduct is conduct that continues over a long time or recurs frequently. Good v. N. State Prison, 97 N.J.A.R.2d (CSV) 529, 531. Courts have consistently held that excessive absenteeism need not be accommodated, and that attendance is an essential function of most jobs. See e.g., Muller v. Exxon Research and Eng'g Co., 345 N.J. Super. 595, 605-06 (App. Div. 2001) (under the Law Against Discrimination (LAD), excess absenteeism need not be accommodated even if it is caused by a disability otherwise protected by the Act); Svarnas v. AT&T Commc'n, 326 N.J. Super. 59, 79 (App. Div. 1999) ([a]n employee who does not come to work cannot

perform any of her job functions, essential or otherwise); see also, Dudley v. Calif. Dep't of Transp., 2000 W.L. 328119 (9th Cir. 2000) (a diabetic with frequent absences who failed to provide adequate medical documentation and could not provide a definite return to work date was not a qualified individual.)

Furthermore, in Hatcher v. Northern State Prison, CSV 3684-01, Initial Decision (November 18, 2002), http://njlaw.rutgers.edu/collections/oal/, the court held that:

> [T]here is no way to reasonably accommodate the unpredictable aspect of an employee's sporadic and unscheduled absences. Svarnas v. AT&T Communications, 326 N.J. Super. 59, 77 (App. Div. 1999). As noted by the New Jersey Supreme Court, "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. Especially in times of budgetary constraint, it is important that management utilize existing staff efficiently and effectively. "We do not expect heroics," but "being there," i.e., appearing for work on a regular and timely basis is not asking too much. State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 333 (App. Div. 1998).

Here, Spellman's thirty-two unexcused absences in an eight-month period alone warrant disciplinary action under the policy. Add into that another 17.92 hours of either tardiness and/or leaving work early, the picture is startling. When viewed as a whole Spellman's history of unauthorized absences reveals a pattern of chronic unauthorized absences.

Atlantic County, as Spellman's employer, has a right to expect that she would be present at work and ready, willing, and able to work. Certainly, Atlantic County is not obligated to continue to employ a person who either cannot or will not perform her job duties on a regular basis. Frequent absences cause disruption in the workplace and create a hardship for the remaining employees who must absorb the job duties of a person who cannot or will not perform them—regardless of whether they are "key" employees or not.

For the foregoing reasons, I **CONCLUDE** that the respondent has met its burden of proving the charges chronic or excessive absenteeism or lateness. (N.J.A.C. 4A:2-2.3(a)(4)).

Respondent also sustained charges of Neglect of Duty in violation of N.J.A.C. 2.3(a)(4). See Docket No. 13413-2019. "Neglect of duty" has been interpreted to mean that an employee "neglected to perform an act required by his or her job title or was negligent in its discharge." In re Glenn, CSV 5072-07, Initial Decision (February 5, 2009), adopted, Civil Service Commission (March 27, 2009), njlaw.rutgers.edu/collections/oal/. The term "neglect" means a deviation from the normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" means conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (citation omitted). Neglect of duty can arise from omitting to perform a required duty as well as from misconduct or misdoing. State v. Dunphy, 19 N.J. 531, 534 (1955). Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job.

In Hartmann v. Police Department of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992), that court stated that a finding of misconduct need not "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."

Spellman's history of unauthorized absences reveals a pattern of chronic unauthorized absences which were further compounded by multiple instances of tardiness or leaving the job site early. For an employee to perform their job functions, they must first go to work, arrive on time and stay for the entire shift. Clearly that did not happen in this case. As set forth above, "[a]n employee who does not come to work cannot perform any of her job functions, essential or otherwise." Svarnas v. AT&T Commc'n, 326 N.J. Super. 59, 79 (App. Div. 1999)

For all of the reasons previously cited above, I **CONCLUDE** that the respondent has met its burden of proving the charges Neglect of Duty. (N.J.A.C. 4A:2-2.3(a)(7)).

DISCIPLINARY ACTION

Principles of progressive discipline should be considered in the removal actions of civil service employees. Bock at 500. The determination of whether a specific act supports removal requires an evaluation of the conduct in terms of its relationship to the nature of the position itself and an evaluation of the actual or potential impairment of the public interest that may be expected to result from the conduct in question. Golaine v. Cardinale, 142 N.J. Super. 385, 397 (Law Div. 1976). The frequency, number and continuity of the employer's warnings indicate the progression of the discipline. Id. On appeals from disciplinary action, the Civil Service Commission may redetermine guilt or modify a penalty originally imposed. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980). The Commission is empowered to substitute its own judgment on the appropriate penalty, even if the local appointing authority has not clearly abused its discretion. Id. at 579. The Commission must consider an employee's past record, including both mitigating factors and prior discipline when determining the appropriate penalty to be imposed. Bock at 523. The frequency, number and continuity of the employer's warnings, previous discipline and other measures indicate the progression of the discipline.

Here, Spellman has been the subject of six prior disciplinary actions that date back to 2015, for the same conduct at issue here. Over a period of four years, she received written warnings and multiple suspensions - the last suspension was for a period of twenty-five days. The instant disciplinary actions determined that Spellman took a total of thirty-two days of unauthorized leave which is a little over a month, and on top of that incurred multiple hours of "W-time" for either arriving to work late or leaving early.

Spellman does not dispute the W-time, rather seeks in mitigation the fact that at the time she took the unauthorized leave, she was in an extremely abusive relationship and was having difficulty finding childcare as a result of the situation. Unfortunately, by her own testimony, and for her own personal reasons, this information was not shared

with her supervisors who would have attempted to assist her either by directing her to a program, employee assistance or even the police or her union representatives. All that the facility knew was that they had an employee, who for the past four years, has been chronically absent or late.

Based upon the foregoing disciplinary actions and upon the totality of the record, I **CONCLUDE** that the suspension and removal is the appropriate penalty. The sustained charges against Spellman are serious in nature and major disciplinary action is warranted.

ORDER

It is hereby **ORDERED** that the charges in each matter against the respondent are **AFFIRMED**. It is further **ORDERED** that the penalty of a forty-five-day suspension under the August 14, 2019, FNDA (OAL Docket No. 13412-19) is **AFFIRMED** and the penalty of removal under the August 14, 2019, FNDA (OAL Docket No. 13413-19) is also **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.

February 19, 2021
DATE

TAMA B. HUGHES, ALJ

Date Received at Agency: February 19, 2021

Date Mailed to Parties: February 19, 2021 (Sent Via E-Mail)

TBH/dm

WITNESS LIST

For appellant:

Markita Spellman

For respondent:

Stacie Bates
Michelle Savage

EXHIBIT LIST

Joint Exhibits:

J-1 August 14, 2019, FNDA (Suspension)
J-2 August 14, 2019, FNDA (Removal)
J-3 PNDA (Suspension and Removal)
J-4 P.S. 5.11 (Unauthorized Absence)

For appellant:

P-1 Temporary Restraining Order
P-2 Handwritten note
P-3 Collective Bargaining Agreement – County of Atlantic and American Federation of State, County and Municipal Employees

For respondent:

R-1 Disciplinary History
R-2 P.S. 1.04 and Supervisor Guide for Proper Use of Disciplinary Action Forms