STATE OF NEW JERSEY

In the Matter of Daniel O'Connor
Hudson County, Department of
Roads and Public Property

CSC DKT. NO. 2021-150
OAL DKT. NO. CSV 08141-20

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JULY 2, 2021 BW

The appeal of Daniel O'Connor, Building Maintenance Worker, Hudson County, Department of Roads and Public Property, removal effective July 1, 2020, on charges, was heard by Administrative Law Judge Nanci G. Stokes, who rendered her initial decision on May 25, 2021. Exceptions were filed on behalf of the appellant.

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 June 30, 2021, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Daniel O'Connor.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 30TH DAY OF JUNE, 2021

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Allison Chris Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 08141-20
AGENCY DKT. NO. 2021-150

IN THE MATTER OF DANIEL O'CONNOR, HUDSON COUNTY DEPARTMENT OF ROADS AND PUBLIC PROPERTY.

William Hannan, Esq., appearing for appellant Daniel O'Connor (Oxfeld Cohen, attorneys)

Donald Gardner, Assistant County Counsel, appearing for respondent County of Hudson (Donato J. Batista, County Counsel for the County of Hudson, attorney)

Record Closed: April 22, 2021 Decided: May 25, 2021

BEFORE **NANCI G. STOKES**, ALJ:

STATEMENT OF THE CASE

From July 2019 through February 2020, appellant Daniel O'Connor had over eighty absences not covered by medical or family leaves or work accommodations designed to address his anxiety and depression and care for his sick wife, who later

died. Is O'Connor correctly terminated despite having no prior discipline? Yes. Progressive discipline may be bypassed where the underlying conduct is egregious, regardless of an individual's disciplinary history. In re Herrmann, 192 N.J. 19, 33–34 (2007).

PROCEDURAL HISTORY

On June 11, 2020, the Hudson County Department of Roads and Public Property (Hudson) served O'Connor with an Amended Preliminary Notice of Disciplinary Action (PNDA).[1] In its notice, Hudson charged appellant with chronic and excessive absenteeism in violation of N.J.A.C. 4A:2-2.3(a)(4); conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12).

In that notice, Hudson specified that in 2019 O'Connor, a building maintenance worker, was on intermittent and medical leave but was marked absent an additional seventy days. In December 2019, Hudson's Personnel Department was working with O'Connor. On January 3, 2020, Personnel provided O'Connor with an accommodation of a reduced four-day workweek beginning on January 6, 2020, and expiring on February 7, 2020. Yet, Hudson specified that O'Connor worked on one day and was absent on January 21, 22, 26, 27, 28, 30, and 31, and February 4, 6, 9, 10, 11, 13, 14, 17, 18, 19, 23, and 24, 2020.

The PNDA sought discipline of an undetermined suspension, resignation not in good standing, and removal from employment, and a departmental hearing on July 1, 2020.

[1] The parties agree that Hudson served O'Connor with the initial PNDA on February 18, 2020, but neither party supplied that document.

On July 1, 2020, Hudson conducted a departmental hearing, and O'Connor did not appear. On July 2, 2020, the hearing officer rendered a decision sustaining all charges and removing O'Connor.

A Final Notice of Disciplinary Action (FNDA) dated July 13, 2020, sustained the charges, and removed O'Connor effective July 1, 2020.

On July 24, 2020, O'Connor appealed the FNDA.

On August 24, 2020, the Civil Service Commission transmitted the case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6. On September 2, 2020, the OAL filed the appeal.

On October 2, 2020, I held a prehearing conference under N.J.A.C. 1:1-13.1 to discuss hearing availability, the nature of the proceeding, the issues to be resolved, and any unique evidentiary problems. I permitted additional time for discovery and scheduled a hearing for February 2, 2021. I adjourned the hearing at the parties' request and conducted a hearing on March 16, 2021, via Zoom because of continuing COVID-19 restrictions. At the request of the parties, I kept the record open for written summations.

On April 21, 2021, I received the summations. However, I requested confirmation that O'Connor had no prior discipline. On April 22, 2021, I accepted that information, and I closed the record.

DISCUSSION AND FINDINGS OF FACT

Background

The parties do not dispute the following background facts, and **I FIND** them as **FACT**:

On August 21, 2017, Hudson hired O'Connor as a building maintenance worker and assigned him to Meadowview Psychiatric Hospital. O'Connor's job duties included janitorial work and snow removal.

On January 8, 2019, O'Connor first advised Hudson that he needed to take leave under the Family and Medical Leave Act (FMLA) for his medical condition. The eligibility notice advised O'Connor that he was eligible for up to twelve weeks of unpaid leave, and he needed to pay health-insurance premiums to continue coverage while on leave.

On January 25, 2019, Hudson approved O'Connor's intermittent leave from January 20, 2019, through July 20, 2019. The medical-leave form states that this was a leave "extension," but the prior medical-leave period or reason is unspecified. The medical certification from Dr. Harold Levine, a family-medicine physician, lists treatment dates of February 28, March 14, May 25, and July 3, 2018, and January 11, 2019. Dr. Levine indicates that O'Connor took medication for depression.

On February 25, 2019, Hudson granted O'Connor intermittent FMLA leave from February 18, 2019, until August 18, 2019, to care for his wife, Ann, who had received a lung-cancer diagnosis. O'Connor's wife passed away on April 15, 2019. Before his wife's passing, O'Connor continued to work on an intermittent basis per his approved leave.

However, O'Connor was absent on the following dates not covered by the medical leave or other excused absence, i.e., vacation or sick time: July 22, 23, 24, 25, 27, 28, 29, and 30, 2019, and August 1, 2, 5, 6, 7, 8, 10, 11, 12, 13, 15, 16, 19, 20, 21, 22, 24, 25, 26, 27, 29, and 30, 2019.

Hudson approved O'Connor for personal intermittent FMLA leave from August 30, 2019, through September 15, 2019. Notably, Hudson's Personnel Department suggested this leave when it became aware of O'Connor's absences. Dr. Levine's letter dated August 12, 2019, which was supplied to support this leave, states that O'Connor could return to work on September 16, 2019, with no restriction.

However, Hudson again approved intermittent medical leave from September 17, 2019, through January 5, 2020. O'Connor was absent on the following dates not covered by medical leave or other excused absence: October 10, 11, 28, and 29, 2019, November 11, 14, and 22, 2019, and December 1, 3, 5, 10, 11, 12, 14, 15, 19, 20, 25, 26, 30, and 31, 2019.

Each leave-request acknowledgment advises that any leave extension required an application with supplemental medical documentation. Moreover, the document states that the employee was solely responsible for an extension and that the application was due at least ten days before the leave's expiration.

Hudson next approved O'Connor for an accommodation through an interactive process in January 2020, reducing his workweek to four days per week for January and February 2020. Regarding the accommodation, Hudson requested that O'Connor provide an updated medical certification from his doctor. O'Connor provided a medical recertification noting anxiety and depression as the accommodation's basis, and that O'Connor treated with Dr. Levine on November 26, 2019, and December 10, and 20, 2019. Dr. Levine recommended the four-day workweek, and estimated O'Connor's total incapacity over a three-month period to be three days. Dr. Levine also noted that O'Connor agreed to therapy. By letter dated March 4, 2021, Dr. Levine stated that he

treated O'Connor from 2019 until 2020 for anxiety and depression due to the death of his wife. The letter does not specify dates of treatment.

After O'Connor did not appear for work from January 6 through January 8, 2020, Hudson again confirmed the accommodation to O'Connor, in writing, noting that Hudson expected O'Connor to work Monday through Thursday from January 6 through February 7, 2020. Hudson advised O'Connor that "regular and predictable attendance is considered an essential function of your job as a building maintenance worker. Failure to attend work, and comply with this reduced work schedule accommodation, will result in absences losing job protections and may be subject to discipline, up to and including termination."

Despite the accommodation developed on January 3, 2020, and approved on January 5, 2020, O'Connor was absent on the following dates: January 6, 7, 8, 9, 11, 12, 13, 14, 16, 17, 21, 22, 26, 27, 28, 30, and 31, 2020, and February 4, 6, 9, 10, 11, 13, 14, 17, 18, 19, 23, and 24, 2020. O'Connor did not seek additional leave or further accommodation.

By letter dated March 5, 2020, a therapist stated that O'Connor had participated in therapy since January 9, 2020, to address his bereavement and process the five stages of grief. No frequency of therapy is identified.

O'Connor received no discipline before the termination in this case.

Respondent's Case

Dennis Quish

Hudson employs Quish as the facility manager for Meadowview Psychiatric Hospital in Secaucus, consisting of fifteen buildings over fifty acres. As a hospital, the

facility runs year-round. Quish testified that he was O'Connor's supervisor, but not his immediate supervisor.

Quish worked with O'Connor on occasion, especially concerning snow removal. When at work, O'Connor was a good employee who correctly performed his assigned tasks.

Quish testified that everyone was sympathetic to O'Connor's unfortunate situation, and acknowledged that O'Connor had experienced a traumatic event. Still, Quish and the Personnel Department repeatedly advised O'Connor that he was putting his job in jeopardy by his persistent absences. Notably, Quish spoke with O'Connor on multiple occasions and encouraged him to "right the ship," and Quish was hopeful that O'Connor would. Yet, this never happened, despite O'Connor stating that he understood and would do so. O'Connor did not return to work.

Quish also explained that O'Connor's absences impacted operations and occasionally required him to use overtime to fill O'Connor's shifts.

Appellant's Case

Daniel O'Connor

O'Connor previously worked for Pepsi as a production-line worker for thirty-seven years before retiring from that position. He currently receives a pension from Pepsi.

O'Connor explained that after his wife's death he experienced anxiety and depression, which caused him to miss work. The depression caused O'Connor to isolate himself and unplug his phone and doorbell.

When O'Connor was not feeling well enough to work, he called out sick, following Hudson's policy. Specifically, he would leave a message on the answering service at the psychiatric hospital.

O'Connor acknowledged receiving Hudson's leave-of-absence letters, and was aware that he was to abide by the terms of these letters. O'Connor confirmed that he did complete the required leave-of-absence paperwork after his wife's cancer diagnosis.

O'Connor was aware that he was to return to work on January 6, 2020. He blamed his anxiety and depression for his absences, and he felt ashamed. O'Connor acknowledged that he was "unable to right the ship" and return to his duties. While O'Connor knew that others would have to cover his shifts, he had previously covered for other employees when he was at work.

O'Connor did not obtain additional therapy or psychological treatment after March 5, 2020. He maintains that this was because he no longer had health-insurance benefits, and other services were unavailable.

O'Connor also testified that he is now capable of returning to his position with Hudson. He explained that he has completed the five stages of grief.

Additional Findings

Based upon the testimony provided, and my assessment of its credibility, together with the documents submitted, and my assessment of their sufficiency, I make the following additional **FINDINGS** of **FACT**:

I **FIND** that a preponderance of the evidence exists that Hudson responded compassionately to O'Connor's circumstances. Indeed, Hudson approved all of O'Connor's leave requests and worked interactively to develop an accommodation for O'Connor. Hudson even suggested O'Connor taking leave upon learning of O'Connor's

excessive absences. Hudson based all leave terms and the accommodation on Dr. Levine's medical documentation indicating O'Connor's level of incapacity during those periods.

Still, I **FIND** that a preponderance of the evidence exists that O'Connor had nearly eighty absences from July 2019 through February 7, 2020, not covered by the approved leave requests or the interactive accommodation. Attendance records reveal that O'Connor was absent the entire month of August 2019, and most days remaining in 2019. After July 2019, O'Connor did not work five consecutive days. Moreover, the attendance record shows that O'Connor was at work only twenty-eight days from July 2019 until February 2020.

Indeed, I **FIND** that a preponderance of the evidence exists that O'Connor did not comply with the leave or accommodation requirements and did not seek an extension of the accommodation expiring on February 7, 2020. Instead, O'Connor stopped reporting to work. Still, I **FIND** that a preponderance of the evidence exists that O'Connor did call the answering service to leave messages before being absent.

Likewise, I **FIND** that a preponderance of the evidence exists that O'Connor was aware that he could face employment termination if he failed to meet the obligations under the accommodation, but he did not meet those obligations. While O'Connor had sporadic treatment to address his understandable grief and difficulties during his wife's illness and after her death, he did little to alleviate these problems or their impact on his employment. I further **FIND** that a preponderance of the evidence exists that O'Connor was aware of and capable of completing leave-of-absence documentation allowing his employer to plan for such absences, but failed to do so. Moreover, Hudson was obligated to find coverage for his duties when O'Connor was absent, and consequently incurred overtime costs.

While O'Connor suggests that he is now capable of returning to work, I **FIND** that a preponderance of the evidence does **NOT** exist to support this statement. O'Connor

states that he completed the five stages of grief. Still, O'Connor did not regularly obtain medical treatment, or continue his therapy, and presents no medical documentation to demonstrate his current ability to work.

CONCLUSIONS OF LAW

Discipline

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2. Indeed, "[t]here is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998).

Under N.J.A.C. 4A:2-1.4(a), in appeals concerning major disciplinary action, the appointing authority bears the burden of proof. That burden of proof is by a preponderance of the evidence, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), and the hearing as to both guilt and the penalty is de novo, Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980); West New York v. Bock, 38 N.J. 500 (1962). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). One can describe preponderance as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

Hudson charged appellant with chronic and excessive absenteeism in violation of N.J.A.C. 4A:2-2.3(a)(4); conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12).

"Conduct unbecoming a public employee" is an elastic phrase encompassing conduct that adversely affects the morale or efficiency of a governmental unit, or that tends to destroy public respect for governmental employees and confidence in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998). "Where an employee regularly absents himself . . . , such actions tend to affect the morale of [the other] employees and cause administrative problems which an institution should not be required to bear." Brown v. Trenton State Prison, 13 N.J.A.R. 466, 471 (1988).

Moreover, misconduct does not require that the employee violate the criminal code, a written rule, or policy of the employer. In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). The complained-of conduct and its attending circumstances need only "'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)).

Under N.J.A.C. 4A:2-2.3(a)(4), an employee may be subject to discipline for chronic or excessive absenteeism. Good v. Northern State Prison, 97 N.J.A.R.2d (CSV) 529, 531. 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. Ibid. Courts consistently hold that excessive absenteeism need not be accommodated, and that attendance is an essential function of most jobs. "We do not expect heroics, but 'being there,' i.e., appearing for work on a regular and timely basis, is not asking too much." Gaines, 309 N.J. Super. at 333.

Even illness or disability does not alone excuse chronic absenteeism. As the Appellate Division highlighted in Svarnas v. AT&T Communications, 326 N.J. Super. 59, 79 (App. Div. 1999), an employee who does not come to work cannot perform any of her job functions, essential or otherwise. Moreover, an employer cannot "reasonably accommodate the unpredictable aspect of an employee's sporadic and unscheduled absences." Id. at 77. In Svarnas, an employee suffering from multiple illnesses and bodily injuries from a car accident was absent for "more than 600 days in a twenty-two-

year period" and did not improve her attendance when allowed to work part-time as requested. Id. at 80. The court concluded that the employee "failed to demonstrate that, with a reasonable accommodation, she would have been able to perform her job functions satisfactorily." Ibid. Similarly, in Muller v. Exxon Research & Engineering Co., 345 N.J. Super. 595, 605–06 (App. Div. 2001), the Appellate Division concluded that an employer need not accommodate excess absenteeism even when caused by a disability otherwise protected by the Law Against Discrimination. Moreover, reasonable accommodation need not include indefinite part-time work schedules. Id. at 606.

Given my findings of fact, I **CONCLUDE** that a preponderance of the credible evidence exists that O'Connor was chronically and excessively absent from work in violation of N.J.A.C. 4A:2-2.3(a)(4). Hudson had a right to expect that O'Connor would be present at work, willing and able to work, yet he was not. Frequent absences disrupt the public workplace and create a hardship for the remaining employees, who must absorb the responsibilities of a person who cannot or will not perform them.

Moreover, I **CONCLUDE** that a preponderance of the credible evidence exists that O'Connor's conduct was unbecoming of a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6) because his actions adversely affected Hudson's efficiency. Where the behavior is chronic, not only is this tendency to impair efficiency exacerbated, but the conduct can also negatively affect the public's confidence in the delivery of governmental services.

Violations of N.J.A.C. 4A:2-2.3(a)(12) for "other sufficient cause" can include violations of agency policy or procedures. Here, Hudson does not cite to a departmental rule, policy, or procedure not followed by O'Connor. O'Connor did leave messages on the answering machine concerning his absences. Notably, the regulations addressing "unbecoming conduct" and "chronic absenteeism" cover O'Connor's actions and inaction in this case. Thus, I **CONCLUDE** that a preponderance of the credible evidence does **NOT** exist to support a separate violation of N.J.A.C. 4A:2-2.3(a)(12).

Penalty

In determining the reasonableness of a sanction, the employee's past record and any mitigating circumstances provide guidance. Bock, 38 N.J. 500. Although appellants often cite the concept of progressive discipline as a mandate for lesser penalties for first-time offenses,

> that is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, 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.
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> [In re Herrmann, 192 N.J. at 33–34.]

Although the focus is generally on the seriousness of the current charge and the prior disciplinary history of the appellant, consideration of the civil service laws' purpose is required. Civil service laws "are designed to promote efficient public service, not to benefit errant employees. The welfare of the people as a whole, and not exclusively the welfare of the civil servant, is the basic policy underlying our statutory scheme." Gaines, 309 N.J. Super. at 334. Indeed, "[t]he overriding concern in assessing the propriety of [the] penalty is the public good. Of the various considerations which bear upon that issue, several factors may be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record." George v. North Princeton Developmental Ctr., 1996 N.J. AGEN. LEXIS 467, Initial Decision at *10 (March 6, 1996).

O'Connor urges that his mitigating circumstances warrant less discipline than his removal. To support his position, O'Connor initially relies upon Mercardo v. South

Woods State Prison, CSV 9200-11, Initial Decision (February 23, 2012), adopted in part, modified in part, Civil Serv. Comm'n (April 18, 2012), http://njlaw.rutgers.edu/collections/oal/search.html. In Mercardo, the employer suspended Mercardo for fifteen days regarding two missed days in March 2011, and removed him for missing three days in April 2011. Mercardo's employment record contained four prior minor disciplines for attendance-related issues, two of which occurred shortly before the disciplinary actions at issue. Prior discipline included two official written reprimands in 2010, a three-day suspension in 2011, and a five-day suspension in 2011. However, the administrative law judge (ALJ) noted that Mercardo did not receive notice of the charges underlying the three-day and five-day suspensions until after the dates of the absences in the case. Moreover, Mercardo applied for intermittent leave under the FMLA, which the employer disapproved *after* the absences occurred. Mercardo also had a legitimate reason for his absences, i.e., to care for his ill wife. Given these mitigating circumstances, the ALJ recommended modifying the removal to a ninety-working-day suspension, and the Civil Service Commission agreed.

O'Connor also highlights that other removal cases resulted in only suspensions. See Williams v. City of Newark, CSV 3749-00, Initial Decision (August 26, 2002), adopted, Merit Sys. Bd. (June 2, 2003), http://njlaw.rutgers.edu/collections/oal/search.html (excessive-absenteeism removal penalty modified to a sixty-day suspension for the thirty-one sick or no-time days utilized by Williams in little more than one year); Major v. City of Newark, CSV 09271-00 and CSV 01220-01, Initial Decision (May 3, 2002), adopted, Merit Sys. Bd. (September 30, 2002), http://njlaw.rutgers.edu/collections/oal/search.html (removal for excessive absenteeism modified to ninety-day suspension because the majority of Major's absences were related to line-of-duty injuries and the other absences were because of an unpredictable illness now under control).

Still, in other cases, the Commissioner recognized that chronic absenteeism can be sufficient just cause for the removal of an employee. See Rios v. Paterson Hous. Auth., CSV 3009-02, Initial Decision (August 1, 2005), adopted, Civil Serv. Comm'n

(September 13, 2005), http://njlaw.rutgers.edu/collections/oal/search.html (concluding that removal was appropriate for an employee who was out of work for a total of 247 days from January 1999 through August 2001). Indeed, "[j]ust cause for dismissal can be found in habitual tardiness or similar chronic conduct." Bock, 38 N.J. at 522. While a single instance may not be sufficient, "numerous occurrences over a reasonably short space of time, even though sporadic, may evidence an attitude of indifference amounting to neglect of duty." Ibid. Notably, removal is appropriate "where the charges and proofs include a long-term, consistent, and unapproved course of habitual and chronic absenteeism and lateness by the appellant." Terrell v. Newark Hous. Auth., 1992 N.J. AGEN LEXIS 4882, Initial Decision at *12 (August 4, 1992). Moreover, "[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 [their] job." Id. at *13–14. As explained in Terrell:

> 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 weighed 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.
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> [Id. at *13.]

Other cases reached similar conclusions. In Morgan v. Union County Runnells Specialized Hospital, 1996 N.J. AGEN LEXIS 1261, Initial Decision (December 3, 1996), the ALJ concluded that the employer's removal of a clerk typist was justified for excessive absenteeism and lateness. Morgan was absent fifty-one days out of 130 work days for six months, and late approximately ten times. Significantly, from January 1, 1995, to July 21, 1995, there were only three periods in which Morgan was present for seven or more consecutive days. The ALJ concluded that termination was reasonable. Specifically, the ALJ noted "the substantial and egregious nature of the behavior complained of, coupled with the clear, acknowledged notice issued by the

appointing authority" as to Morgan's required presence at work and "the burden this kind of absence places on others in the department, as well as the effect it has on morale." Id. at *6; see also Harris v. Woodbine Developmental Ctr., CSV 4885-02, Initial Decision (February 11, 2003), adopted, Civil Serv. Comm'n (March 27, 2003), http://njlaw.rutgers.edu/collections/oal/search.html (concluding that Harris's forty-one absences over one year amounted to chronic and excessive absenteeism warranting her removal); Ellis v. Jersey City Pub. Schs., CSV 1656-17 and CSV 4261-16, Initial Decision (November 27, 2017), http://njlaw.rutgers.edu/collections/oal/search.html, aff'd on reconsideration, Civil Serv. Comm'n, 2018 N.J. CSC LEXIS 657 (September 7, 2018) (determining that Ellis's twenty-six absences and three dates of tardiness warranted removal, even ignoring her prior disciplinary record).

Here, O'Connor has no prior disciplinary record, and his supervisor agrees that when he was at work, O'Connor was good at his job. Hudson attempted to be sensitive to O'Connor's unfortunate circumstances and waited for O'Connor to "right the ship" without seeking discipline, or even considering his position "abandoned," for months. See N.J.A.C. 4A:2-6.2(b) (an "employee who is absent from duty for five or more consecutive business days without the approval of his or her superior shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing").

However, Hudson cannot reasonably be obligated to continue the employment of an individual who cannot or will not regularly perform the duties assigned to him. Hudson based the leaves and interactive accommodation on Dr. Levine's recommendations identifying O'Connor's level and extent of incapacity, not Hudson's arbitrary determination of O'Connor's ability to work or failure to consider O'Connor's understandable anxiety and depression. Indeed, I concluded that O'Connor was chronically and excessively absent while knowing his obligations to attend work and failing to do so. The charges outlined in the FNDA are serious and O'Connor's conduct is far more egregious than that of the appellant in Mercardo or other cases he relies upon to support a suspension here. Instead, the circumstances are more like those noted in multiple termination cases reporting frequent absences over an extended

period and the strain placed on employers by those absences, even when caused by illness or disability. Accordingly, I **CONCLUDE** that O'Connor's removal is the appropriate penalty under the circumstances.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that appellant be removed from employment.

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.

May 25, 2021

DATE

NANCI G. STOKES, ALJ

Date Received at Agency: May 25, 2021

Date Mailed to Parties: May 25, 2021

ljb

APPENDIX

Witnesses

For Appellant:

Daniel O'Connor

For Respondent:

Dennis Quish

Exhibits

Joint:

Joint Stipulation of Facts

J-1 Final Notice of Disciplinary Action dated July 13, 2020

J-2 Intermittent Leave Form effective January 20, 2019, with medical documentation, leave requirements and eligibility notice

J-3 Intermittent Leave Form effective February 18, 2019, with medical documentation, leave requirements and eligibility notice

J-4 2019 Attendance form

J-5 Intermittent Leave Form effective August 30, 2019, with medical documentation, leave requirements and eligibility notice

J-6 Intermittent Leave Form effective September 17, 2019, with leave requirements and eligibility notice

J-7 Intermittent Leave/Accommodation Form effective January 5, 2020, with leave requirements and eligibility notice

J-8 2020 Attendance form

J-9 Hudson's letter to O'Connor dated January 8, 2020

For Appellant:

A-1 Dr. Levine's letter dated March 4, 2021

A-2 New Pathway Counseling Services' letter dated March 5, 2020