STATE OF NEW JERSEY

In the Matter of Kimberly McCall,
Newark School District

CSC DKT. NO. 2019-1978
OAL DKT. NO. CSV 02729-19

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: AUGUST 24, 2022

The appeal of Kimberly McCall, Security Guard, Newark School District, removal, effective January 28, 2019, on charges, was heard by Administrative Law Judge Julio C. Morejon (ALJ), who rendered his initial decision on July 21, 2022. 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, including a thorough review of the exceptions and reply, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of August 24, 2022, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ'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 Kimberly McCall.

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 24TH DAY OF AUGUST, 2022

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
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Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. CSV 02729-19
AGENCY DKT. NO. CSC 2019-1978

**IN THE MATTER OF KIMBERLY McCALL,**
**NEWARK PUBLIC SCHOOL DISTRICT.**

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**Arnold S. Cohen**, Esq., for appellant, Kimberly McCall (Oxfeld Cohen., attorneys)

**Bernard Mercado**, Esq., for respondent Newark Public School District (Office of General Counsel, attorneys)

Record Closed: January 3, 2022 Decided: July 21, 2022

BEFORE **JULIO C. MOREJON**, ALJ:

## STATEMENT OF THE CASE

Appellant, Kimberly McCall (Appellant or McCall) appealed the decision by respondent, Newark Public School District (Respondent or the District), removing her from employment as a security guard, effective January 28, 2019. The Appellant is charged with violating the terms of a Settlement and Last Chance Agreement dated June 5, 2018, (LCA) previously entered with the District, for absenteeism and tardiness.

## PROCEDURAL HISTORY

On October 13, 2018, the District issued a Preliminary Notice of Disciplinary Action (PNDA) seeking to remove McCall from her employment as a security guard for alleged violations of the following charges:

N.J.A.C.4A:2-2.3(a)6 – Conduct unbecoming a public employee.
N.J.A.C.4A:2-2.3(a)4 – Chronic or excessive absenteeism or lateness.
N.J.A.C.4A:2-2.3(a)7 – Neglect of duty.
N.J.A.C.4A:2-2.3(a)11 – Other sufficient cause.

Following a departmental hearing, held on November 7, 2018, the District issued a Final Notice of Disciplinary Action (FNDA), dated January 10, 2019, upholding all of the charges contained in the PNDA and imposed an employment termination of McCall effective January 28, 2019.

McCall appealed the FNDA, and the matter was filed at the Office of Administrative Law (OAL) on February 26, 2019, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 14F-1 to 13.

Between February 27, 2019, the date this matter was assigned to the undersigned and December 18, 2019, the date a hearing was held, the parties engaged in pre-hearing discovery, settlement discussions and telephone status conferences with the undersigned.

At the conclusion of the hearing on December 18, 2019, the parties requested that the record remain open to allow them to file post-hearing briefs, which the parties filed on February 13, 2020. Pursuant to Executive Order No. 127, the time to file a decision was extended until January 3, 2022. Thereafter, extensions to file an initial decision were requested.

## ISSUES

The issues to be determined in this matter are the following:

1. Whether McCall is guilty of the alleged conduct resulting in her violating the terms of the LCA, and the District's decision to remove her from employment? and if so,

2. Whether the disciplinary action against McCall should have been a reprimand or suspension on principles of progressive discipline.

## FACTUAL DISCUSSION AND FINDINGS

Most of the facts in this matter are not in dispute, as evidenced by the joint submission of facts, and I **FIND** the following as **FACT** herein.

The Joint Stipulation of Facts (J-2/A) [1] provides:

1. The Board and Local 617 Service Employees International Union (SEIU) are parties to a Collective Bargaining Agreement, which is in effect for the contract term March 1, 2013 to June 30, 2016.

2. For non-instructional staff, the District has adopted the Rules and Regulations of the Civil Service Commission and Office of Administrative Law with respect to disciplinary procedures.

3. Appellant was first employed by the Newark Public Schools on October 17, 1994, as a permanent career service security guard.

4. For the 2017-18 school year, Appellant was assigned to Ann Street School. Appellant previously served a one (1) day suspension without pay for absenteeism on or about November 23, 2004 and a ten (10) day suspension without pay for the absenteeism on or about July 10, 2017).

[1] The District's exhibits were premarked as "J-2, J-3," etc. In the hearing Appellant stipulated to the same in evidence, and the District's exhibits were then marked as exhibits "J-2/A, J-3/B", etc. to reflect the corresponding District's exhibits.

In addition to the **FACTS** that were stipulated, I **FIND** the following additional **FACTS** herein:

The District initially charged McCall with violating the following(J-6/E):

> Since the beginning of the 2018-2019 school year, you have been absent on Twenty-eight (28) occasions. Specifically, you were absent on the following dates using sick time: July 31, 2018; August 9 and 13, 2018; September 12, 18 and 27, 2018; October 1, 2, 3, 4, 5, 9, 10, 11, 12, 15, 16 and 17, 2018 (18 sick days). You were absent on the following dates using exhausted sick time: October 19, 22, 23, 24, 25, 26, 29, 30 and 31, 2018 (10 exhausted sick days). Your pattern of absences constitutes chronic or excessive absenteeism, and you are hereby charged accordingly.
>
> [emphasis added]

However, subsequent to the issuance of the PNDA in October 2018, on November 6, 2018, the District granted McCall a leave of absence from October 1, 2018 through November 2, 2018 (A-6).[2] The leave was approved after the instant charges were brought against McCall, where she was charged with taking excessive sick days in October 2018, in violation of the LCA (J-7/F).

At the hearing, the District agreed that October 2018 sick days were no longer part of the disciplinary charges against McCall, as the District had granted her a retroactive leave of absence. (A-6), and I **FIND** that McCall is charged with absences in violation of the LCA for the following dates: July 31, 2018; August 9 and 13, 2018; September 12, 18 and 27, 2018, as the District recognizes that it granted McCall a leave of absence for the absences from October 1, 2018 through November 2, 2018 (J-5/D). Under the Last Chance Agreement, she was entitled to no more than one sick day per month and was required to directly contact her supervisor for each absence. (Id.)

[2] Appellant's exhibits were pre-marked as exhibits "1, 2", etc. In the hearing the same were converted to exhibits "A-1, A-2" etc. to reflect Appellant's exhibits.

McCall is charged with violating the terms of a Settlement and Last Chance Agreement, dated June 5, 2018, (J-4/C). As part of the LCA McCall received a six-month unpaid suspension, commencing on November 6, 2017, and she returned to work on July 23, 2018. McCall does not deny "technically violating" the terms of the LCA and argues that she should not be terminated from her employment, as she did not cause or exacerbate the medical causes of her absences, but instead, the District exacerbated her "tenuous medical condition", causing all of the absences, as McCall did not receive her insurance coverage until September 29, 2018.

In admitting to violating the terms of the LCA, McCall admits to the following:

1. Reporting to work late on four occasions in September 2018, specifically September 4, 7, 18, and 27, 2018, (J-5/D, J-7/G, and J-8/I).
2. Being out sick two days in August 2018, on August 9 and 13, 2018.
3. Being out sick on three occasions in September 2018 on September 12, 18 and 27.
4. Did not contact her immediate supervisor Senior Manager Bullock each time she was late or before she was going to take a sick day as required by the LCA.
5. Did not notify her school administrator or the school staff of her sick days in August or September of 2018 in advance of taking them.
6. Did not produce any medical documentation within 72 hours for any of the sick days she took in August or September 2018.

(J-3/B, J-5/D, and J-6/E)

## Testimony

Hasan Bullock

The District presented the testimony of Hasan Bullock, Senior Manager, Office of Security Services (Bullock). Bullock was McCall's direct supervisor when she returned to duty and assigned to Fourteenth Avenue School for the 2018-19 school year. Bullock testified that he was aware that Appellant was subject to meeting the terms of the LCA.

In discussing the duties of a security guard, Bullock stated that it is important that security guards report to work on time and that they not be excessively absent and

elaborated that when a security guard is late arriving to their post, it leaves the school exposed without security. Further, Bullock testified that when a security guard calls out sick, sometimes there may not be enough time to get a substitute so that the absence becomes a stress on the remaining security guards and staff.

Bullock testified that McCall did not provide him any advance notice when she reported late for duty on four separate occasions in September 2018 or her absences in August and September 2018. Bullock testified that Appellant never provided any medical documentation for her absences in August 2018 and September 2018, but she did provide the medical documentation for her October 2018 absences. Bullock concluded by indicating that he requested disciplinary action against Appellant for her failure to comply with the requirements of the LCA (R-1).

On cross examination Bullock testified that McCall requested to be reassigned from working at the high school, and Bullock assigned her to Fourteenth Avenue School. Bullock stated he was under no obligation to reassign McCall, as security guards are not allowed to request their assignments. Bullock also confirmed that McCall was scheduled to be the first security guard to arrive at the school every day so that any lateness she committed would leave the school unsecured until the second security guard arrived approximately half-hour later. Bullock also testified that Appellant's lateness and absences had a detrimental effect on the remaining staff at the school and on certain occasions, when Appellant was absent, the school was hard pressed to find a replacement for her, leaving the school staff the burden to compensate for her absence on such occasions.

Bullock testified that he is not sure of the exact date when he gave Appellant his memo advising her of her absences and lateness (R-1), but he did confirm that he was sure that he gave it to Appellant directly on her first day back at the school.

Armando Cepero

The District's next witness was Fourteenth Avenue School Principal Armando Cepero (Cepero). Cepero confirmed that neither he nor his staff received any advance

notice from McCall when she was late on four occasions in September. Further, Cepero also testified that neither he nor his staff received any medical documentation from Appellant for her absences in August or September 2018. Cepero also confirmed that security guards serve an important role at the school and that it is critical that they report to work on time and do not call out sick excessively. Cepero also elaborated that Appellant's tardiness and absences created a hardship on the school and staff.

Kimberly McCall

McCall did not call any witnesses and testified in her case. McCall has been employed with the District since February 1994. Prior to her employment she had been in the military.

McCall admitted entering into the LCA and stated that she had "no choice" but to do so as she needed her job and medical coverage due to her medical condition. Concerning her medical condition, McCall stated that she was diagnosed with Lupus, Rheumatoid Arthritis, and autoimmune arthritis. Also, her spleen was removed as a result of an injury she sustained at school when she fell down the stairs in school while assisting a student. McCall could not recall when her spleen was removed, which caused the resulting medical conditions to occur. She did state that she had filed a Workers' Compensation claim related to the injury.

McCall stated that when she first returned to duty in July 2018, she was originally assigned to South Street School for a short amount of time until she was assigned to Science Park High School and was eventually assigned to Fourteenth Avenue School McCall testified that she did not request to be transferred but that she informed Bullock that her medical condition would prevent her from fully performing her security guard duties and she would accept whatever assignment Bullock made (A-1). Specifically, McCall testified that she communicated to Bullock her concern that she was being "set up for failure" by the District in assigning her to Science Park High School as she needed to be placed in a location that did not have students until her medical coverage was reinstated and she could resume her medical treatment to have her condition in "remission". (A-1).

McCall testified that her medical condition caused her inability to report for duty. McCall testified that because she did not have medical coverage at the time of her reinstatement in July 2018, she could not be treated for her medical conditions, and it resulted in her being unable to report to duty in the dates stated in the charges against her (J-3/B). McCall further testified that when she did not report to work in August and September 2018, she could not obtain a medical note as required in the LCA because she had no medical insurance. McCall stated that the District exacerbated her medical condition by not providing her with medical coverage upon her reinstatement in July 2018, which caused her to be excessively absent when she returned to work.

McCall testified that her four late arrivals to work in September 2018, were the result of her automobile overheating and her inability to transport to work. McCall admitted that she did not call Bullock when she would be late or absent to work as she called the District's automated phone system which would eventually reach her supervisors which she believed was enough to satisfy her reporting obligations under the LCA, as this is system the District has in place for all employees to call in late or absent.

McCall disputed receiving Bullock's memo of dated October 9, 2018, informing her that she would be brough up on disciplinary action as a result of her absences, and in violation of the LCA (R-1). McCall testified that she became aware of the disciplinary action when she was served with the PNDA in early November 2018 (J-1). McCall also testified concerning emails that she had submitted in real time when she did not report to work (A-2, A-3, A-4, and A-5).

McCall testified that her personnel file reflects that she has been disciplined only for lateness and absences twice before, and only after she had her spleen removed and the related autoimmune issues thereafter (J-2). McCall highlighted that she has been employed since 1994 and all of her evaluations have been "outstanding" except for the current wave of attendance related issues.

McCall acknowledged that her illness prevents her from fully performing her duties and results in her being absent from work. McCall stated that she wanted the District to

demonstrate "morality and fairness" for her medical condition that prevented her from fully performing her duties. Specifically, she asked that the District assign her to a location where she had limited access to students and staff in accommodating her medical condition.

On cross-examination, McCall admitted that security guards are important to the school and that they are required to report to work on time and cannot be excessively absent and that if they are late or excessively absent, that causes a problem at the school. She also acknowledged that Bullock did grant her request for another location away from a high school upon her reinstatement by being reassigned to an elementary school, and that she understood that work assignments were at the total discretion of the District, and that her reassignment to Fourteenth Avenue School was an accommodation to assist her.

McCall also admitted that she may still have been out during the days she was sick even if she had medical insurance during that time period, and she stated that she could not perform her duties when she is sick. McCall admitted that she knew that she had to be in contact with Bullock about her absences but felt that the automated reporting system was satisfactory, as that is the system that is in place for all District employees to report an absence or lateness.

Finally, on cross examination McCall admitted that if she were to return to work, she may still continue to be absent on days that she is sick due to her ongoing medical condition and that nothing will be able to limit her absenteeism in the future while she is sick.

## Credibility Determination

Prior to conducting a legal analysis and making conclusions, it is necessary to address the credibility of testimony of the witnesses, in order to evaluate the alleged violations against McCall.

"The interest, motive, bias, or prejudice of a witness may affect his credibility and justify the . . . trier of fact, whose province it is to pass upon the credibility of an interested

witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952). The choice of accepting or rejecting the witness's testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960. A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). A fact finder ". . . is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, 5 N.J. 514, 521–22 (1950); see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

I **FIND** the testimony of Bullock and Cepero to be credible concerning the District's procedures regarding required attendance at work and procedures on how to report absences and lateness in general, and specifically as the same pertains to McCall. In addition, I **FIND** the testimony of Bullock and Cepero to be unbiased toward McCall in that each witness clearly testified concerning McCall's attendance record and any accommodations the District made for her to address her medical condition. Specifically, I **FIND** Bullock's testimony to be candid and believable concerning whether he had actually tendered the disciplinary memo to McCall, and I **FIND** that the same is of no consequence as it did not prejudice McCall's employment status.

I **FIND** McCall's testimony believable and candid concerning her employment limitations resulting from her medical condition. I **FIND** that McCall admitted to entering into the LCA and not reporting to work as required therein but denies that it was intentional in contravention of the LCA. I **FIND** McCall's testimony to be truthful that she thought she did not have medical coverage, although it was factually inaccurate because the District concedes that she had medical coverall retroactive to her start date in July 2018.

## Legal Analysis and Conclusion

In appeals concerning major disciplinary action, the appointing authority bears the burden of proof. N.J.A.C. 4A:2-1.4(a). The burden of proof is by a preponderance of the evidence, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), and the hearing is de novo, Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980).

McCall is charged with violating the terms of a Settlement and Last Chance Agreement, which she executed in order to avoid termination. As part of the LCA McCall received a six-month unpaid suspension, commencing on November 6, 2017. She returned to work on July 23, 2018. Paragraphs 7 and 8 of the Last Chance Agreement provides as follows:

Paragraph 7:

> Appellant understands and agrees that this is a Last Chance Agreement" constituting a probationary period and as such, she is subject to immediate termination by Respondent for incurring in excess of the following enumerated infractions over the next 12 months after execution of this Settlement Agreement:
>
> (a) no more than one (1) sick day per month which must be accompanied by appropriate notice beforehand to her supervisors along with competent medical documentation to be received by the Talent Department within 72 hours of the absence;
>
> (b) should Appellant be absent for more than one day each month due to her own hospitalization, Appellant will be required to produce to the Talent Department within 72 hours of her return with due notice to her supervisors, hospital admittance and discharge papers evidencing her hospitalization and accounting for the entire time she was absent from duty, the failure to produce such documentation or account for all of her time absent due to her own hospitalization will be deemed to be a violation of the terms of this Agreement;

(c) no more than one (1) instance of lateness/tardiness per month;

(d) absolutely no unauthorized leaves or Absences Without Leave ("AWOLs") will be permitted;

(e) Appellant understands that she has a responsibility to be at the work site during her entire work shift and that her failure to do so or respond to her supervisors when paged will result in being marked AWOL;

(f) Appellant will perform her duties, complete all assignments and tasks assigned to her during the relevant time period to the satisfaction of her supervisors after they have had an opportunity to review said assignments; and

(g) no instances of insubordination or neglect of duty will be permitted. After the initial 12-month period, Appellant understands that she will be subject to further major discipline, up to and including termination, for any infraction that she commits.

Paragraph 8:

> Appellant acknowledges that she has now been suspended or written up on several prior occasions for charges pertaining to chronic or excessive absenteeism or lateness and is familiar with "notice of to employee" sections of prior recommended decision. As such, Appellant acknowledges that any further violations will result in disciplinary action, up to, and including termination. (emphasis provided)

(J-5/D).

The New Jersey Supreme Court has firmly established that an employee who enters into a last chance agreement is bound by its terms despite the fact that termination may be the agreed upon penalty for its violation. The seminal case involving last chance agreements is Watson v. City of East Orange, 175 N.J. 442 (2003), wherein a police officer appealed his termination that resulted when he failed to enroll in and complete a recovery program in a timely fashion as required by his last chance agreement. In Watson, the police officer who had a medical history of alcohol abuse, entered into a last chance agreement wherein he agreed to: (1) a suspension, (2) entering into a

rehabilitation program, (3) successfully completing the program within a certain amount of time, and thereafter, (4) agreeing to meet with a counselor, so that the failure to meet any of these conditions would result in his termination. Watson v. City of East Orange, 358 N.J. Super. 1, 3-4 (App.Div. 2001).

After Watson failed to complete the program within the time permitted, the City terminated him for violating the last chance agreement. Id. at 4-5. Watson appealed and the Office of Administrative Law upheld the termination indicating that while the last chance agreement was ambiguous as to the time for completing the program, Watson still violated the agreement since he never completed the program and noted that Watson even indicated that his medical condition, among other things, impeded his ability to perform his duties. Id.

Despite Watson arguing that his violation of the last chance agreement was minor in nature and that there was a non-material breach of its conditions, the Appellate Division nevertheless upheld the termination indicating that while the provision regarding the time period to complete the program may have been ambiguous, there was a reasonable inference that the parties expected him to complete the program within a reasonable amount of time before returning to work. Id. at 6. Further, despite the police officer's communications to his employers that he was having difficulty finding a medical doctor, he was advised to simply contact his primary care physician and arrange it. Id. at 7.

The New Jersey Supreme Court affirmed the Appellate Division and upheld the termination and, in doing so, specifically indicated that last chance agreements are construed in favor of appointing authorities because to do otherwise "would discourage their use by making their terms meaningless." Id. at 445 (citing Golson-El v. Runyon, 812 F.Supp. 558, 561 (E.D.Pa.) (while the penalty appeared harsh in relation to the infraction given the employee's medical condition, the court should not reinterpret the terms of the last chance agreement that the employee voluntarily entered into and instead, must abide by its terms and consequences.)

Moreover, the New Jersey Supreme Court also clarified that its decision to uphold the termination "does not require us to re-write the parties' agreement" so that once it is

determined that the employee had violated the agreement, dismissal is justified. Watson, 175 N.J. at 445. The Court emphasized that a contrary conclusion would likely chill employers from entering into such agreements to the detriment of future employees." Id.

In line with this public policy, the Appellate Division has also similarly upheld last chance agreements under this governing standard. In Matter of Strich, 2012 WL 2160123, Civil Service Dkt. No. 2010-660 (App.Div. 2012), an employee in the Brick tax assessor's office was terminated for violating the terms of his last chance agreement when he exceeded his permitted amount of absences after being in an off-duty motorcycle accident and suffering significant injuries. In upholding the termination, the Administrative Law Judge noted that while it was unfortunate that the employee's accident caused him to exhaust his sick days in violation of the last chance agreement, such an event was not unforeseen and that absent any coercion, the town had met its burden in proving the violation. Id. at 2.

On appeal, the Appellate Division cited the standard contained in Watson when it upheld the termination and noted that while the accident was not the employee's fault, the employee's termination was nonetheless warranted given that the last chance agreement was unambiguous in its required termination for exceeding the permitted absences, conditions that the employee had full knowledge of. Id. at 3. Further, the Appellate Division noted as additional support for upholding the termination that even in the absence of the last chance agreement, it appeared that the employee would not be able to perform his duties for an extended period of time so that any absence would be unexcused. Id.

The Civil Service Commission (the "Commission") has also similarly upheld last chance agreements in virtually all instances where termination was the agreed upon discipline among the parties. In Matter of King, 2009WL 3816575, Civil Service Dkt. No. 2009-121 (April 17,2009), a custodial worker appealed his termination from employment which resulted from the violation of a last chance agreement. Despite the fact that the last chance agreement between King and the Newark Public Schools only permitted the employee one sick day and one late arrival per month as well as no AWOL violations, the

custodial worker violated these terms by being sick more than two days during the month, late on several occasions and even AWOL on certain occasions. Id.

In King the custodial worker admitted to violating the last chance agreement but claimed that he was "beat down" by the working conditions at the school, that his assignment was less than desirable and denied having access to his supervisor to report his absence and lateness. Id. at 2. Despite the fact that the Administrative Law Judge reduced the termination to a suspension since Appellant only had a prior 10-day suspension, the Commission imposed termination as the penalty and cited that there was no dispute that the worker violated the last chance agreement which explicitly and clearly indicated that violation of its terms would result in termination, Id. In doing so, the Commission confirmed that the last chance agreement determines the appropriate penalty and gave it significant weight when it held that the employee's removal was justified since it unambiguously required termination for violation of its terms, regardless of the employee's prior disciplinary history. (Id. at 3); (see also, In the matter of Whittle, MSB, May 28, 2003)(termination of firefighter for violating terms of last chance agreement was warranted, especially in light of the employee's substantive disciplinary history.) In upholding the termination, the Commission rejected the employee's arguments that he was beat down, that he didn't like his assignment or that he was denied the ability to contact his supervisor.

In the within case there is no argument that the LCA is clear, unambiguous and there is no proof that McCall was coerced into executing the same. Moreover, McCall in addition to admitting executing the LCA, also executed a certification indicating that she entered into the LCA willingly and that she understood its terms and meanings as explained to her by her attorney (J-5/D).

The LCA clearly limits McCall's late arrivals and sick absences to only one instance per month, with notice beforehand to her supervisor and required medical documentation to be produced to the Board within seventy-two (72) hours. The relevant portions of the LCA clearly state these provisions and that McCall would be subject to immediate termination if she incurred in excess of the following infractions over the course of twelve (12) months. McCall admitted the same.

Therefore, I **CONCLUDE** the LCA is valid on its face, clear as to its requirements and enforceable.

The record reflects that McCall's conduct was not in compliance with the LCA in four different ways: (1) her late arrivals beyond the limit in September 2018; (2) her absences beyond the limit in August 2018 and September 2018; (3) her failure to notify her supervisors of her multiple sick day absences prior to or at the time of taking them; and (4) her failure to produce medical documentation within seventy-two (72) hours of each of her absences in August 2018, September 2018 and the first part of October 2018.

While admitting that she was not in compliance with the LCA, McCall testified that her medical condition caused her inability to report for duty. She admitted that even going forward if she were to be reinstated, she would miss work again because of her medical condition that renders her unable to work. McCall made these admissions while also recognizing how important it was for her to report for duty for the safety and protection of the students and staff.

McCall testified that because she did not have medical coverage at the time of her reinstatement in July 2018, she could not be treated for her medical conditions, and it resulted in her being unable to report to duty in the dates stated in the charges against her. McCall argues that the District exacerbated her medical condition by not providing her with medical coverage upon her reinstatement in July 2018, which caused her to be excessively absent when she returned to work. Despite this argument and belief, McCall did not present any proof that she had no health insurance or that a medical professional denied her treatment because she did not have medical insurance.

McCall testified that her four late arrivals to work in September 2018, were the result of her automobile overheating and her inability to transport to work. It is unfortunate that McCall's automobile was not working properly through no apparent fault of her own. However, she acknowledged that she was late to work on four occasions and not one, when she was aware of the LCA limitations. The record is devoid of McCall seeking

alternative plans of transportation to her work cite when she knew she had trouble with her automobile.

McCall admitted that she did not call Bullock when she would be late or absent to work as she called the District's automated phone system which would eventually reach her supervisors which she believed was enough to satisfy her reporting obligations under the LCA, as this is system the District has in place for all employees to call in late or absent. As for McCall's belief that it was sufficient to call the District's automated phone system and not Bullock to report her absence, the same is inconsistent with her testimony and knowledge that the LCA required her to call Bullock.

For the reasons stated herein, I **CONCLUDE** that the District has satisfied its burden of proof by a preponderance of the credible evidence that McCall violated the terms of the LCA in four different ways: (1) her late arrivals beyond the limit in September 2018; (2) her absences beyond the limit in August 2018 and September 2018; (3) her failure to notify her supervisors of her multiple sick day absences prior to or at the time of taking them; and (4) her failure to produce medical documentation within 72 hours of each of her absences in August 2018, September 2018 and the first part of October 2018.

The District has charged McCall with violating the following:

N.J.A.C.4A:2-2.3(a)6 – Conduct unbecoming a public employee.
N.J.A.C.4A:2-2.3(a)4 – Chronic or excessive absenteeism or lateness.
N.J.A.C.4A:2-2.3(a)7 – Neglect of duty.
N.J.A.C.4A:2-2.3(a)11 – Other sufficient cause.

The testimony of Bullock and Cepero established that the position of security guard is an important position to maintaining the safety and security of students and staff at the school District. Bullock's testimony revealed that it is important that security guards report to work on time and that they not be excessively absent and elaborated that when a security guard is late arriving to their post, it leaves the school exposed without security. Further, Bullock testified that when a security guard calls out sick, sometimes there may

not be enough time to get a substitute so that the absence becomes a stress on the remaining security guards and staff. McCall acknowledged in her testimony the importance of a security guard to the District, and that her position required her attendance for safety reasons.

Having previously concluded that McCall admitted to executing the LCA and that she did not comply with the terms of the same, I **CONCLUDE** that McCall's admission and conduct in failing to satisfy the terms of the LCA are clear examples of violating N.J.A.C.4A:2-2.3(a)6 – Conduct unbecoming a public employee, N.J.A.C.4A:2-2.3(a)4 – Chronic or excessive absenteeism or lateness, N.J.A.C.4A:2-2.3(a)7 – Neglect of duty, and N.J.A.C.4A:2-2.3(a)11 – Other sufficient cause. As a result, I **CONCLUDE** that the District has satisfied by a preponderance of the evidence McCall's violation of the charges contained in the FNDA and as stated herein.

Based upon the foregoing, I **CONCLUDE** that the decision of Respondent, Newark Public School District to terminate Appellant, Kimberly McCall due to her absences in violation of the Last Chance Agreement is **AFFIRMED**.

## ORDER

Given my findings of fact and conclusions of law, I **ORDER** that the decision of Respondent, Newark Public School District to terminate Appellant, Kimberly McCall due to her absences in violation of the Last Chance Agreement is **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, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. 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.

July 21, 2022
DATE

Julio Morejon
**JULIO C. MOREJON**, ALJ

Date Received at Agency: July 21, 2022

Date Mailed to Parties: July 21, 2022

lr

## APPENDIX

### Witnesses

For Appellant:

Kimberly McCall

For Respondent:

Hassan Bullock

Armando Cepero

### Exhibits

Joint:

J-1 FNDA dated 1/10/2019 and PNDA10/31/2018

J-2/A Joint Stipulation of Facts

J-3/B Final Notice of Disciplinary Action dated June 7, 2017

J-4/C Final Notice of Disciplinary Action dated November 6, 2017

J-5/D Settlement and Last Chance Agreement dated June 5, 2018

J-6/E Final Notice of Disciplinary Action dated January 10, 2019

J-7/G Kronos Time Detail Report July 2018- October 2018

J-8/H Calendar of Kronos Time Detail July 2018- October 2018

Appellant

A-1 July 23, 2018 email from Kimberly McCall to Hasan Bullock, et al.

A-2 August 1, 2018 email from Kimberly McCall to Hasan Bullock.

A-3 November 8, 2018 email from Kimberly McCall to W. Garrett.

A-4 October 10, 2018 email from Kimberly McCall to Hasan Bullock.

A-5 October 19, 2018 email from Kimberly McCall to Hasan Bullock.

A-6 November 6, 2018 letter from Andrea Caviness to Kimberly McCall.

A-7 10/22/18 note from James Agresti, M.D.

A-8 January 7, 2019 letter from Dr. Yolanda Mendez to Kimberly McCall.

Respondent

R-1 Memorandum from Hassan Bullock dated 10/9/2018