

serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 N.J. 474 (2007).

In this case, removal is the proper penalty. In this regard, the appellant was a high-level employee who has been found guilty of significant misuse of both work and benefit time as well as violating the New Jersey Uniform Ethics Code. Such violations are egregious and cannot be tolerated in such a high-level employee, who in part, is to lead by example. The example the appellant set is clearly well below the standards expected of a public employee and worthy of removal.

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 Jean Lamothe.

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 21ST DAY OF SEPTEMBER, 2022

Dolores Gorczyca

Dolores Gorczyca
Presiding Member
Civil Service Commission

Inquiries
and
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 08605-20

AGENCY DKT. NO. 2021-224

**IN THE MATTER OF JEAN LAMOTHE,
NEW JERSEY DEPARTMENT OF LABOR
AND WORKFORCE DEVELOPMENT**

Cedric Ashley, Esq., appearing for appellant, Jean Lamothe

Kendall J. Collins, Deputy Attorney General, appearing for respondent, (Mathew J. Platkin, Attorney General of New Jersey, attorney)

Record Closed: August 1, 2022

Decided: August 12, 2022

BEFORE SUSAN L. OLGIATI, ALJ:

STATEMENT OF THE CASE

Appellant, Jean Lamothe, (“appellant” or “Lamothe”) appeals the determination of the respondent, the New Jersey Department of Labor and Workforce Development (“respondent” or “Department”) removing him from employment based on disciplinary charges of conduct unbecoming a public employee and other sufficient cause consisting of fraud, theft of time, and violation of the New Jersey Ethics Code. The specifications to the charges allege that during October 2017 to October 2018, appellant had no keycard (building access) activity and no computer activity totaling 204.5 hours or 29.21 days—

resulting in theft of time. Additionally, the specifications allege that appellant misused sick time to attend and/or travel to fraternity or other personal events. Appellant argues that the evidence is speculative, and that the penalty of removal is not justified.

PROCEDURAL HISTORY

On February 19, 2020, the Department issued appellant a Preliminary Notice of Disciplinary Action. On August 7, 2020, following a departmental hearing, the Department issued a Final Notice of Disciplinary Action charging appellant with:

- N.J.A.C. 4A:2-2.3(a)6 – Conduct unbecoming a public employee;
- N.J.A.C. 4A:2-2.3(a)12 – Other sufficient cause; Fraud, Theft of time; and violation of the New Jersey Uniform Ethics Code, Section II, Paragraph 4.

Based on these charges, appellant was removed from employment effective on August 7, 2020. He filed an appeal, and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case. N.J.S.A. 52:14-1 to -15 and N.J.S.A. 52:14F-1 to -23. The hearing was held on September 13, 2021, September 16, 2021, and October 20, 2021. Due to on-going restrictions relating to the COVID-19 pandemic, the hearing was conducted via Zoom video conference. The record remained open pending receipt of hearing transcripts and post hearing briefs which were received on or about March 11, 2022.

Thereafter, the record was re-opened on April 27, 2022, to clarify certain items in the record. Upon receipt and review of the clarifying information, the record reclosed on May 5, 2022. By Order of extension, the time for filing this Initial Decision was extended until August 1, 2022. On July 27, 2022, the record was again reopened to seek further clarification of the record. Upon receipt of the requested clarification the record reclosed on August 1, 2022.

FACTUAL DISCUSSION AND FINDINGS

Undisputed Facts:

Based on a review of the record, the following facts are undisputed or have been stipulated to by the parties, thus I **FIND** them as **FACT**:

Appellant began his employment with the Department in or about 1991.¹

During his employment, appellant received the Department's Ethics Code, as well as the State Ethics Commission's Uniform Ethics Code and attended mandatory ethics training. (R13.).

In January 2014, appellant completed a State of New Jersey Outside Activity Questionnaire relating to his position as an officer for Phi Beta Sigma Fraternity, Inc. By letter dated May 1, 2014, the Department's Ethics Liaison Officer (ELO), advised that the outside activity request had been approved as there did not appear to be a conflict of interest between appellant's job and his duties as an officer with the fraternity. (R14.) The ELO however further advised appellant:

You must ensure that your duties do not interfere with your State job in any way. You must also charge your leave time, excluding sick leave, for any outside activity you may be involved in during your work hours. In addition, the Department's time, contacts, equipment, materials and information, are only available to you as a State employee and must never be used in the performance of your outside activities.

Id.

Appellant's most recent position with the Department was Assistant Director of Disability Determinations Services.

¹ See respondent's closing brief, preliminary statement at page 2.

In that position, appellant worked out of three different offices located in Newark, Trenton, and New Brunswick, New Jersey. Of these three locations, appellant most frequently worked out of the Newark office. (See, R4)

Appellant's core working hours were 9 a.m. to 5 p.m.² (R15.)

During appellant's employment with the Department, including October 2017 through October 2018, he submitted ECATS timesheets reflecting his attendance and work during the reporting period. The ECATS timesheets contain an Employee's Certification which states:

I certify that is a true and accurate report of my attendance and work for the period indicated as of the date of this certification. I certify that the time recorded is in accordance with the applicable NJ Policy and Procedure. I realize that falsification of timesheets will result in disciplinary action up to and including removal.

See, R5.

During appellant's employment with the Department, he received annual performance evaluations. In the Rating Cycles Ending 2016, 2018³, and 2019, appellant received a Final Rating of "3" or "Exceptional." The rater for these evaluations was his supervisor, Caroline Stout. (P1.)

Sometime prior to March 2019, the Department's Office of Internal Audit (OIA) initiated an investigation of appellant's use of time and attendance for the period October 2017 - October 2018. OIA's investigation is summarized in a memo dated March 12, 2019, from Theresa Vallely, Acting Director, Office of Internal Audit to Caroline Stout, Director, Disability Determination Services and Tennille McCoy, Assistant Commissioner, Human Capital Services (a.k.a. Human Resources). (R3.)

² On Wednesdays, appellant's work hours varied from 7:00 a.m. to 3:00 p.m. See, R15, Alternative Workweek Program Application at NJDOL156.

³ The evaluation for the Rating Cycle Ending 2017 (10-1-16 – 9-30-2017) contains no rating information. See, P1.

As part of OIA's investigation, investigator Anya Gayles prepared a spread sheet reflecting appellant's use of sick time, his computer logon/logoff times, and his keycard "swipes" into and out of his office locations during the period October 2017 to October 2018. (R4.) Gayles also compiled publicly available Facebook posts by and of appellant during this time period. (R6.)

The OIA investigation concluded that appellant misused sick time to attend or travel to fraternity or other personal events. (R3.)

It further determined that on occasions totaling 204.5 hours or 29.21 days, appellant had no keycard or computer activity. (R3.)

The OIA investigation determined that Lamothe "owed" time for these occasions totaling 204.5 hours or 29.21 days. Id.

The OIA investigation also determined that appellant was using a keycard assigned to a former employee. Id.

At the conclusion of its investigation, OIA recommended that appellant turn in the keycard he was using and begin using the keycard assigned to him, that all Disability Determinations Services (DDS) employees immediately begin using sign in and sign out sheets, and that a doctor's note be requested at the discretion of the supervisor/director if an employee is using an excessive amount of sick time. (R3.)

From approximately 2018 to 2020, Betty Ng was the Equal Employment Opportunity/Affirmative Action (EEO/AA) Officer and ELO within the Department's Office of Diversity and Compliance, Human Capital Strategies.

On May 9, 2019, Ng interviewed appellant regarding his use of time. Ng prepared a statement summarizing his interview responses. (R7.) Appellant did not sign the statement.

On May 13, 2019, Ng emailed appellant inquiring about his use of time on numerous dates ranging from October 2017 to September 2018. (R8.)

On May 24, 2019, appellant emailed Ng his response. (R9.) He explained that he “never had issues with time and attendance” and found it “disturbing, frustrating, and disappointing” that in 2019 he was being asked about dates going back to 2017. He also explained that due to a default email setting within his division, he was unable to retrieve emails sent or received prior to May 24, 2018. (R9.) He advised that he had no records regarding Ng’s inquiry into 2017 dates but explained:

I did express to you that I do work in multiple offices and walking in behind a person at the door could explain a no entry key; however, I do not understand the no computer activity inference. When in the office there should be a computer activity; although there are times the system inaccurately reflects a person not being in the office when they are actually there.

Regarding your specific questions of July 20th [2018] and August 13th [2018] I was in New Orleans and Florida respectively. Please be advised that I did call in (sick days) with the assistant to the director on both of those days.

Regarding September 6th [2018] which we discussed when we met, I did meet with the Education Commissioner on that day. I recall meeting in his office @ 12:30-1:30. I was in the DOLWD office previous to my meeting with the Commissioner. If necessary, I can provide you with e-mail communication reflecting that [sic] was sent and received in the AM up until @ 11:45 am. I remember leaving the office @ 12:15-12:20 to get there. You also asked about me being at Mott Elementary that day. I was at Mott prior to my start time of work. I was there to greet the students on their first day of class. This took place prior to my office start time.

In reference to September 12th, I did utilize sick time after reporting to our New Brunswick office earlier in that day. I recall heading to DC in the afternoon and utilizing leave time for September 13th and 14th.

When we met, I expressed to you I know where this is coming from and whom it was coming from and you stated to me I should not jump to any assumptions and conclusions. I

shared with you that this is coming from Anthony Gowers⁴ and Director Stout because of my past experiences with them. I briefly shared one example of a statement of Tony Gowers saying "that he got rid of one assistant director and that he could do the same with another."

While I look forward to hearing back from you regarding these inquiries addressing time and attendance I'm asking that my communication also serve as a formal complaint to workplace harassment and discrimination against Tony Gowers and Caroline Stout. Unfortunately, there has been a long-standing history of my current immediate supervisor working to undermine my efforts in the work environment. The conduct exhibited by both of these individuals continue [sic] to adversely impact our work environment, our employees and staff relationships, and are counterproductive to a positive organizational atmosphere.

This harassment and targeting behavior towards me is unnecessary, inappropriate, and unprofessional. I have been subjected to this behavior going back to 2011 after being promoted to chief of the division. I will be submitting a detailed account of these negative experiences in a separate communication. I have noticed an increase of this targeted behavior against me since Paul Yuen became the Deputy Commissioner of the Department. It is my belief that the current Director, has always seen me as a threat to her position and now that she has a personal and intimate relationship with the deputy commissioner, she has stepped up her efforts to attempt to blemish my work record.

These issues have been on-going for quite some time and need to be addressed.

Finally, no employee should be made to feel uncomfortable in the workplace. My service to the department, at every level, and most recently serving in the position of Assistant Director has been exemplary and professional. I have upheld the mission of this Department and Division to a high level and standard. It truly is my sincere displeasure to report these individuals for dedicating substantial time and negative energy in attempting to sabotaging [sic] my career and the work I do for this Agency.

Id. (R9.)

⁴ Gowers is identified by Ng as the individual who manages information systems for DDS. See, R12 at NJDOL140.

As part of her investigation, Ng also reviewed among other documents prepared and/or obtained by OIA, records of telephone calls made from appellant's work landline at both his Trenton and Newark offices. (R17.)⁵ The telephone records for appellant's Trenton office are for the billing date September 1, 2018. (R17 at NJDOL 158-159.)⁶ The telephone records for appellant's Newark office are for the billing dates July 1, 2017, through July 1, 2019. (R17 at NJDOL 164-181.)

On August 27, 2019, Ng prepared a memo to Assistant Commissioner McCoy regarding her investigation into the "ethics concerns" involving Lamothe. (R11.) Ng concluded that the evidence "points to" appellant misusing his time. Id.

Thereafter, in accordance with N.J.S.A. 52: 13D-23(d), the Department requested permission of the State Ethics Commission to proceed with disciplinary action against Lamothe.

On January 30, 2020, the State Ethics Commission issued a letter authorizing the Department to proceed with disciplinary action against appellant for alleged ethics violations relating to his misuse of sick time to attend events related to his approved outside activity as an officer with his fraternity. (R12.)

Appellant's disciplinary history consists of a five-day suspension for conduct unbecoming a public employee, relating to a November 2014 physical assault in the workplace. (R16.)

Testimony:

The following is a summary of the relevant and material testimony given at the hearing.

⁵ The parties stipulated that R17 represents the telephone records that Ng reviewed during the course of her investigation.

⁶ The parties have represented that the redacted phone calls reflected in R17 at NJDOL160-163 are not attributed to appellant.

For respondent:

Anya Gayles has been employed by the Department since 2001. At all times relevant to this matter, Gayles worked as an investigator in OIA. OIA is responsible for conducting time and attendance investigations and ensuring compliance with relevant policies and procedures.

Gayles first became aware of Lamothe through allegations made by his subordinates to the Office of Diversity and Compliance regarding his time and attendance. Gayles conducted the OIA investigation into Lamothe's time and attendance. Her investigation covered the period of October 1, 2017, through October 1, 2018. She explained that it is typical to go back one year when conducting such investigations.

Gayles prepared a memo summarizing her investigation which was submitted for signature (and issuance) by her acting director. (R-3.) The memo listed Lamothe's Facebook posts in date order. During her investigation, Gayles found a pattern of Mondays and Fridays where Lamothe used sick time or no time at all to attend fraternity/personal events. After reviewing the data and Lamothe's Facebook activity, Gayles became suspicious. The Department believed that Lamothe would leave early on a Friday and/or not attend work on a Monday to attend events, some of which were out of state.

She also found that there were numerous occasions where there was no keycard activity of Lamothe entering or leaving his work location, and no computer log on or off activity for the entire day. She found that very unusual. She also found that there were additional dates where he was using sick time when he was not sick.

She prepared a color-coded spread sheet summarizing Lamothe's keycard and computer log on activity and his use of time. (R-4.) The rows marked in green represented dates on which he used sick time. The rows marked in yellow represented dates on which he had no activity (keycard or computer log in/off) and on which he had requested no leave time. She also reviewed Lamothe's ECATS reports for October 2017

through October 2018. (R-5.) The ECATS reports reflected that Lamothe had not requested leave time on many of the dates on which he had no activity.

Gayles did not know Lamothe prior to the investigation and has no personal animosity towards him.

On cross-examination, Gayles explained that the referral for the investigation did not identify the subordinates who made the allegations against Lamothe.

Regarding Lamothe's key card "swipes," Gayles acknowledged that she could have reviewed information relating to his swipes in between the first in and the last out, but explained that the focus of her investigation was on when he arrived at his office and when he left.

Gayles did not interview anyone during her investigation. Her conclusions were based on the data reviewed. She did not review any of Lamothe's emails but explained that he was asked by the Office of Diversity and Compliance to submit documentation. Gayles concluded that Lamothe was not at work on the dates on her spread sheet that are marked in yellow.

She did not conduct an analysis of Lamothe's phone usage and did not review his personnel file or any FMLA documentation.

She explained that Lamothe was "charged" with time owed, only for those dates on which there was no keycard or computer activity. See, R3. The other dates demonstrate a pattern of using time around attending or traveling to personal events. Id.

Gayles confirmed that during the time covered by her investigation, employees were not permitted to work remotely.

Theresa Vallely has worked for the Department since 2016. She is currently the Director of the OIA. In 2019, when she was Acting Director, she was asked to review the time and attendance report and the supporting documentation prepared by Gayles. She

reviewed the spread sheet and selected a sampling of the “more problematic dates” and traced them through the time sheets and the Facebook postings. She agreed with the findings of the investigation. She believed the allegations were well supported. She believed it was clear from the swipe information, the computer log in and out information, and the time sheets, that Lamothe’s use of time followed a pattern.

She did not know Lamothe prior to reviewing the investigation report and has no animosity towards him.

On cross examination, Vallely explained that the investigation demonstrated a pattern of Lamothe using an hour or two of sick leave taken on a Thursday followed by a vacation day or holiday taken on a Friday. Additionally, there were Facebook posts on a weekend followed by a Monday on which Lamothe either had no activity or on which he took sick time.

She did not recall if she discussed with Gayles whether Lamothe’s cell phone or emails should be looked into.

Vallely did not consult with the IT department regarding Lamothe’s emails. She did not agree that sending or receiving emails on a particular date would demonstrate that Lamothe was working on that date because it is possible to delay the email send time. She also confirmed that a review of Lamothe’s State cell phone was not part of the OIA investigation.

Vallely did not conduct any interviews as part of her review of the investigation report.

Betty Ng testified that she became involved in the investigation of Lamothe when the Department received an anonymous letter claiming that he was engaging in behavior to make it appear that he was in the office when he was not. Additionally, when Ng was in the Newark office investigating another matter, an employee approached her with an ethics concern about a member of management who was always on the phone on non-work-related activities. The employee was referring to Lamothe.

As Lamothe worked in three different offices, there were several people who made complaints. Ng explained that in or about September 2018, there was a separate staff complaint about Lamothe's time and attendance that was brought to Director Stout and Assistant Director Julio Vacacela. Ng assigned an investigator to investigate the allegations.

Ng received the OIA report and discussed the matter with her supervisor, Assistant Commissioner McCoy. There were many days were Lamothe misused his sick time or had absolutely no activity.

Lamothe was cooperative during their May 9, 2019, interview. He reviewed his interview statement and said he was in agreement with it, but did not want to sign the statement because he would not be getting a copy.

Ng asked Lamothe about his activity on September 6, 2018, as there was a Facebook posting from that date indicating that he was at a non-work-related event at the Mott School in Trenton. Lamothe said he was at the school for approximately one hour and then went to work. There was another Facebook posting for that day indicating that Lamothe met with the Commissioner of Education. He said he was performing mentoring work with the commissioner for approximately fifty minutes at lunch time.

Ng also asked Lamothe about the many days on which he had no computer activity and no keycard swipe card activity. Lamothe advised that he typically "swipes" his keycard unless someone holds the door for him. He also typically logs onto his computer.

Ng explained that in addition to logging onto the Department's computer system, as part of his job duties, Lamothe would also have to use a card to log into the Social Security Administration (SSA) system.

Lamothe also explained that he "swiped" a key fob to enter and exit the New Brunswick office, and that he used an access card in the Newark and Trenton offices. He said he rarely had meetings outside of the office.

Ng also questioned Lamothe regarding his August 13, 2018, trip to Florida, for which there were Facebook postings. Lamothe did not directly answer her question but responded that he had a medical condition, and that there are days when he does not feel well enough to work a full day even though he is not sick in bed. He said that he uses his sick time and that he had a lot of vacation and sick time.

Ng questioned Lamothe about his activities on September 17, 2018, when he used sick time. Based on Facebook postings, it appeared that he was in Virginia or Washington D.C. He admitted that that may have been accurate.

They also discussed March 26, 2018, a date on which there is a Facebook post of Lamothe at a New Jersey Senate confirmation hearing and on which he did not use any leave time. He said he went to the hearing around lunchtime but did not stay long because he could not find a seat. Ng asked why he had no keycard or computer activity on that date, and he responded that he would have to look at his activity.

Lamothe said that he was disappointed that these questions were being asked of him and that he never intentionally abused his time. He blamed Stout and others for his problems. Lamothe believed that Stout was threatened by him.

On May 13, 2019, Ng emailed Lamothe a list of dates on which there were questions about his use of time. (R8.) She gave him until May 15, 2019, to respond. On that date, Lamothe advised that he was in the process of crafting a response. Id. On May 24, 2019, Lamothe provided Ng with his written response. He blamed Director Stout and the Deputy Commissioner for his problems. Ng provided Lamothe with a link to the EEO forms to file a complaint.

On August 13, 2019, Ng emailed Lamothe and asked him to check his emails regarding his time and leave. (R10.) She advised him to contact IT if he had any difficulties. She also suggested that he check his calendar for any meetings he may have had. She gave him until August 16, 2019, to respond. He provided no additional information.

Thereafter, Ng prepared her memo to Assistant Commissioner McCoy, summarizing the ethical concerns raised. (R11.) Ng concluded that the evidence "pointed to" Lamothe misusing his time. (R11.)

On cross-examination, Ng confirmed that her role related to the ethics investigation of Lamothe. She explained that the purpose of an ethics investigation is to determine whether someone violated the Uniform Ethics Code.

As part of her investigation, Ng spoke with Carolyn Stout and asked if Lamothe was working or if they had meetings on any of the dates on which there was no activity. Her conversation with Stout is not mentioned in her memo. Ng explained that the conversation with Stout did not impact her report, as Stout had no information indicating that Lamothe was working on the dates in question.

Ng's memo, her summary letter, the OIA report, and its attachments were presented to the State Ethics Commission.

Ng explained that in her memo, she characterized Lamothe's admission to misusing sick time on July 20, August 13, and September 13 and 14, 2018, as "many" dates.

She acknowledged that she did not interview anyone from the Newark, New Brunswick, or Trenton offices about the allegations. Other than Stout, Ng did not speak to any other supervisor to confirm whether Lamothe was working on the dates in question. She did not speak with anyone in IT to determine how far back he could access his emails.

Regarding the log of telephone calls made by Lamothe, Ng determined that several calls were not work related. Some of the calls were to the Anthropology Department at Georgia State University and a Washington, D.C. number was for Lamothe's fraternity. Her analysis of the phone calls appears in her memo. (R11 at NJDOL140).

Ng did not specifically recall conducting an EEO investigation into Lamothe's claims about Stout, but explained that if he completed the EEO forms given to him--an investigation would have been done. Lamothe also claimed that Stout was not at work on certain dates and gave Ng a list of those dates. Ng looked into the dates and determined that they coincided with Stout's use of time.

Caroline Stout has been employed by the Department for nearly forty-one years. She is currently the Director of Disability Determination Services. She has held this position for approximately five years.

Stout became familiar with Lamothe when she was the Chief of Disability Determination Services, from 2002 to 2011. Lamothe began to report to her in approximately 2014 when she was an Assistant Director and Lamothe was the Chief. He continued to directly report to her until his removal. Lamothe received an evaluation rating of "3" which was the "best" one could get. However, when Lamothe was Chief, there were some issues with him not being in the office. Stout recalled one occasion when the Director called to ask where Lamothe was. Stout met with Lamothe in 2014 to discuss his need to report where he was. She prepared a memo to give to him at that time, but did not issue it because he "received [her] message" and had a good understanding of the issue.

Additionally, Stout recalled another incident around the same time frame when Lamothe had reported an absence to an assistant rather than reporting it to Stout, as was required by the reporting protocol.

When Stout became the Director, she had to remind Lamothe to submit timesheets and/or request leave for time he was taking. Stout had "intermittent" concerns about Lamothe reporting his use of time during the period October 2017-2018.

In or about spring 2019, Ms. Stout received an email from Assistant Director Julio Vacacela, containing a copy of a Facebook page showing Lamothe at a fraternity function when he should have been at work or requested leave time. She forwarded the email to Ng.

Stout received a copy of the OIA memo and the supporting exhibits. (R3.) Thereafter, she discussed the memo with her immediate supervisor, Assistant Commissioner Ron Marino. Marino advised Stout to have Human Capital Services handle the situation. Stout had no further involvement with the investigation or the decision to issue disciplinary charges against Lamothe.

Stout confirmed that during the relevant time period neither the State of New Jersey, nor the SSA, authorized remote work. She explained that as an assistant director, Lamothe would be expected to be in constant communication with the chiefs and herself through meetings or phone calls. He would also be responsible for looking at the workloads of the regions and looking at the SSA data. To perform this work, Lamothe would have to report to his office and log onto his work SSA computer. He could receive emails through his cell phone but could not access the SSA database or cases through same. She estimated that he could only do about twenty percent of his work by using a State issued cell phone. She also confirmed that SSA did not issue laptops to employees during this time.

Stout recalled that she and Lamothe may have had some "points of contention" when they spoke in 2014 about his time, but that they always had a professional relationship. She bears no personal animosity toward him. Stout recommended Lamothe for the Chief position, and in 2017 she was involved in the decision to promote him to Assistant Director.

On cross-examination, Stout acknowledged that in 2016, she rated Lamothe as exceptional and that she had the ability to comment on his performance. She explained that when Lamothe was working, his performance was exceptional. She never had a problem with his performance overall and there was never any question of his capability. However, she explained that "performance is separate from behavior."

Stout acknowledged that there were only a few occasions when there was difficulty reaching Lamothe and that there was never a time when he could not be reached for the entire day. During October 2017 to October 2018, Stout did not have any need to counsel

Lamothe because any information she received from staff or from Lamothe's "direct reports" was not substantiated.

In or around summer 2019, Ng told Stout about the anonymous complaint regarding Lamothe. They also discussed that there had been a prior investigation into Lamothe's use of time but that investigation "fell flat on someone's desk."

For appellant:

Appellant did not testify and called no witnesses on his behalf.

CREDIBILITY

In evaluating evidence, it is necessary for me as the finder of fact to assess the credibility of the witnesses. This requires an overall assessment of the witness's story in light of its rationality or 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). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950).

A trier of fact may reject testimony as "inherently incredible" when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). "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) (citation omitted).

I accept the testimony of each of the Department's witnesses as credible. The testimony of Anya Gayles and Theresa Vallely regarding the scope of the OIA investigation and their roles in same was reasonable, reliable, and without motivation or

bias. I also accept the testimony of Betty Ng regarding her actions in connection with the Department's ethics investigation, including her interview of appellant and his responses thereto as reliable and without motivation or bias.

Additionally, I accept the testimony of Caroline Stout as credible. Her testimony regarding her working relationship with appellant, her positive performance evaluations of him, and her role in recommending him for promotions was reasonable, reliable, and without motivation or bias. Similarly, her testimony of her 2014 counseling of appellant and thereafter, her intermittent concerns regarding appellant's use of time during October 2017 through October 2018, was reasonable, reliable, and without motivation or bias.

ADDITIONAL FINDINGS OF FACT

Having had the opportunity to listen to the testimony of the witnesses and to observe their demeanor at hearing and further having reviewed and considered the documentary evidence in the record, I further **FIND** the following as **FACT**:

The Department's attendance and leave policy provides that sick leave is to be used when an employee, due to injury or illness, is unable to perform his/her duties. An employee calling in to request sick leave must speak with the immediate supervisor or designated alternative supervisor. (R15.)

Appellant began reporting to Caroline Stout in 2014. In that same year, Stout spoke to the appellant about his need to report his location. Thereafter, during October 2017 to October 2018, Stout had intermittent concerns about the appellant's use of time but did not counsel him again.

The Department received at least one anonymous complaint regarding appellant's use of time. Separate complaints about appellant's use of time were also made to the Department's Office of Diversity and Compliance.

During October 2017 through October 2018, Department employees were not permitted to work remotely.

As part of appellant's job duties, he was required to log into his work computer and review SSA data. To access the SSA database he had to use an access card and code. Appellant estimated that he forgot his SSA card approximately two times. He could not access the SSA database through a cell phone.

During his May 9, 2019, interview with Ng, appellant acknowledged that there was an occasion when his boss questioned his time and that he explained he was in the building but at a different location because his system was not working. (R7.) He acknowledged that he usually swiped into his office location unless someone held the door for him and that he typically logged into his computer. Id. He estimated that he forgot his SSA card on approximately two occasions, and that on such occasions he would call the SSA to get into the system. Id. Appellant also acknowledged that he rarely had meetings out of the office. Id. Appellant also explained that he went to the March 26, 2018, Senate confirmation hearing around lunchtime but did not stay long because he could not find a seat. Id.

From October 2017 to October 2018, no telephone calls were made from appellant's Newark office phone (landline) on any of the dates on which he had no keycard or computer activity.

From May 15, 2018, to June 15, 2018, appellant was on Family and Medical Leave Act (FMLA) leave. (R4.) The record contains no information regarding the nature of, or the reason for, appellant's FMLA leave.

Appellant had no keycard activity and no computer activity on the following dates which he reported as working:

2017

November 13, 27

December 5, 8, 13, 15, 22

2018

January 5, 8, 12, 30

February 1, 12⁷

March 1, 8⁸, 15, 19, 26, 29

April 2, 16, 18, 23, 27, 30

(R4, See also, R5.)

Additionally, appellant had no keycard and no computer activity on the following dates on which he reported working part of the day and using sick leave for the remainder:

2017

October 13⁹ 4 hours work, 3 hours sick

November 3 5 hours work, 2 hours sick

2018

January 26 4 hours work, 3 hours sick

February 5 4.5 hours work, 2.5 hours sick

February 21 4 hours work, 3 hours sick

February 26 6 hours work, 1 hour sick

March 22 3 hours work, 4 hours sick

April 5 3 hours work, 4 hours sick

April 10 4 hours work, 3 hours sick

April 12 5 hours work, 2 hours sick

April 19 3 hours work, 4 hours sick

(R4, See also, R5.)

⁷ Appellant had no keycard or computer activity on February 12, 2018, however it appears that OIA did not "charge" appellant with any time owed on this date and therefore it was not included in the calculation of occasions without any activity totaling 204.50 hours or 29.21 days.

⁸ There was a two-hour closing on this date.

⁹ Appellant had no keycard or computer activity on October 13, 2017, a date on which he reported working 4 hours and using 3 hours of sick time, however it appears that he was not "charged" with any time owed on this date and therefore it was not included in the calculation of occasions without any activity totaling 204.50 hours or 29.21 days.

Publicly available Facebook posts by and of appellant during October 2017 to October 2018 included, but were not limited to, the following:

Friday, October 13, 2017, Facebook post and photographs by appellant, "Wishing Zeta Atlantic Regional Director Soror [J.Y.B.]¹⁰, Esquire and all our lovely and sophisticated Sisters of Zeta Phi Beta Sorority, Incorporated a productive, informative, and successful conference. Welcome to the Garden State of New Jersey!" (R6.). Appellant appears in the photographs accompanying the post. Id. On that date, he had no keycard or computer activity despite reporting that he worked four hours and used three hours of sick time. (R4.)

Saturday, January 27, 2018, Facebook post and photographs by appellant, "Jean Lamothe is with [K.A.-C.H.]. January 27, 2018. Marshall, TX. Truly enjoyed my visit to HBCU, Wiley College, home to Beta chapter. Tremendous fraternal history on this campus." Id. Appellant has two additional Facebook posts from Marshall, Texas on this date. Id. The day before, January 26, 2018, appellant had no keycard or computer activity despite reporting that he worked three hours and used three hours of sick time. (R4.)

Monday, February 5, 2018, Facebook post and photographs by appellant noting that he added a temporary profile picture and stating, "With Trenton Sigma Betas at Community Service project promoting healthy eating. Teaching and including our youth auxiliary group in our activities is a priority of good mentorship. #InvestingInOurYouth, #MabMondays." Id. On this date, appellant had no keycard or computer activity despite reporting that he worked 4.5 hours and used 2.5 hours of sick time. (R4.)

Friday, March 2, 2018, Facebook post and photographs of appellant by another individual, "[S.A.-S], is with Jean Lamothe. March 2, 2018, Biloxi, Mississippi. Big shoutout to the sigmas and the Zeta's from Mississippi." Id. On this date, appellant used

¹⁰ For privacy purposes, initials are used to refer to other individuals identified in Facebook posts by or relating to Lamothe

seven hours of sick time. The day before, March 1, 2018, he had no keycard or computer activity, despite reporting that he worked seven hours. (R4.)

Monday, March 19, 2018, Facebook post and photographs by appellant, noting that he added a temporary profile picture, and stating. "March 19, 2018. MAB MONDAY, with the Brothers of Beta Kappa chapter Tuskegee University." Id. On that date, appellant had no keycard or computer activity, despite reporting that he worked seven hours. (R4.)

Friday, March 23, 2018, Facebook post and photographs by appellant, "Jean Lamothe is with [T.W.] and 3 others. March 23, 2018. Southeastern Region had a very good opening ceremony last night. Shout out to Regional Director [E.W.] and the planning committee." Id. On this date, appellant also responded to a comment to his post stating, "No worries Soror [C], I may be back South for your Charlotte Zeta event in August. #ConstitutionallyBound." On the day before, March 22, 2018, appellant had no keycard or computer activity, despite reporting that he worked three hours and used four hours sick time. (R4.)

Monday, March 26, 2018, Facebook post and photographs by appellant, "Jean Lamothe is with [L.R.] and six others. March 26, 2018, Trenton NJ. It is official, Dr. [R] is Senate confirmed as New Jersey Education Commissioner. The Senate hearing was well attended by Students, family, Fraternity Brothers, and other D9 organizations, teachers, faculty, staff, administrators, and government officials. Great day for the Blue and White and great day for our Education system in New Jersey. #EducationMatters #StudentsFirst." The post contains five photographs of appellant and others at the confirmation hearing. Id. On that date, appellant had no keycard or computer activity, despite reporting that he worked seven hours. (R4.)

Monday, April 2, 2018, Facebook post and photographs by Phi Beta Sigma Fraternity. "Southeastern Region is with Jean Lamothe and 2 others. April 2, 2018. Winston-Salem, NC." Id. On that date, appellant had no keycard or computer activity, despite reporting that he worked seven hours. (R4.)

Friday, April 6, 2018, Facebook post and photographs by another, “[L.S] is with Jean Lamothe and 3 others. April 6, 2018. More Day 1 photos; (Thursday April 5).” Id. On April 5, 2018, appellant had no keycard or computer activity, despite reporting that he worked three hours and used four hours of sick time. (R4.)

Monday, April 23, 2018, Facebook post and photographs by appellant noting that he added a temporary profile picture and stating, “In Austin, Texas during the Gulf Coast regional conference with my friend and amazing Public Relations officer, Bro. [B.G.]. #mabmondays #Brotherhood.” The post contains a photograph of appellant standing in front of a sign for the Gulf Coast Regional Conference listing the dates of the conference as April 12-15, 2018. Id. On April 12, 2018, appellant had no keycard or computer activity, despite reporting that he worked five hours and used two hours of sick time. On April 16, appellant had no keycard or computer activity, despite reporting that he worked seven hours.¹¹ (R4.)

Friday, July 20, 2018, Facebook post and photograph by another individual, “[B.G.] is with Jean Lamothe at New Orleans Ernest N. Morial Convention Center. July 20, 2018. With International President Bro. [M.C.] and 1st Vice President Bro. Jean Lamothe at the Zeta Phi Beta Sorority Inc. 2018 Boule...zetaboule2018.” (R6.) Appellant admitted to using sick time on this date. He used seven hours of sick time. (R4.)

Monday, August 13, 2018, Facebook post and photographs by appellant, “Jean Lamothe is with [J.B.]. August 13. Had an opportunity to visit Florida Memorial University, home of Beta Pi chapter (1947).” Id. Appellant admitted to using sick time on this date. He used seven hours of sick time. (R4.)

Wednesday, September 12, 2018, Facebook photographs and posts by appellant, “Jean Lamothe is with [R.S. and B.B.]. September 12. 1st evening at CBC during Real Talk sponsored by PBS. Our panelist addressed the issue of Police Brutality.” An additional post on this date states, “[Lamothe] September 12. Edited. Heading to DC for

¹¹ In this instance, appellant’s Facebook post date does not match the date of the event referenced. However, the content of the post matches the accompanying photo which depicts appellant in front of a sign noting the event dates. Appellant also had no keycard and no computer activity on April 23, 2018, a date which he reported as working seven hours.

CBC 2018.” Id. Appellant admitted to using sick time on this date. He used 2.5 hours of sick time. (R4.)

Thursday, September 13, 2018, Facebook photographs and posts by appellant, stating, “Jean Lamothe September 13. A productive day meeting with the NPHC Council Presidents.” A photograph accompanying this post shows a meeting agenda for Thursday, September 13, 2018. Id.

Thursday, September 13, 2018, Facebook post and photograph, by another individual, “[J.C.W.] is with [F.D.B] and Jean Lamothe. September 13. Our boys posing with the First International President of Phi Beta Sigma Fraternity Inc-Bro Jean Lamothe & our 2nd Vice President Bro. [F.D.B.]. JCW.” Id.

Appellant admitted using time on September 13 and 14, 2018. He used seven hours of sick time on each of these dates. (R4.)

Appellant’s use of sick time on dates he was traveling to or attending fraternity or other personal events was a violation of the Department’s attendance and leave policy.

Appellant’s use of sick time on dates he was traveling to or attending fraternity events was a violation of the conditions of which he was advised upon the approval of his outside activity of serving as an officer in his fraternity and was a violation of the New Jersey Uniform Ethics Code.

Appellant failed to report to work on the occasions totaling at least 204.5 hours or 29.21 days on which he had no computer or keyboard activity. Appellant’s certifications on his time sheets on each of these occasions were false.

LEGAL ANALYSIS AND CONCLUSIONS

At issue here is whether appellant committed the violations alleged and if so, whether the penalty of removal is appropriate.

Respondent argues that the evidence demonstrates that it has met its burden of proof and therefore the charges should be sustained. It also argues that termination is the only appropriate penalty, because appellant has engaged in egregious behavior which demonstrates a lack of honesty and integrity, and violates the public trust.

Appellant argues that the Department's investigation is lacking, the evidence is speculative, and that respondent is attempting to shift the burden of proof onto appellant. He further argues that the penalty is excessive. Appellant contends that the time alleged to have been misused or "stolen" -- twenty-nine days over the course of one year, "amounts to approximately one day every other week," and for this the Department seeks removal, "the equivalent of the death penalty of employment." Appellant argues that the dates were not consecutive but were "spaced out over an entire year." Appellant also contends that the evidence demonstrates that he can complete work related tasks through his phone and that he can engage in meetings and interact with employees without using his office "landline" or his desktop computer. Additionally appellant argues that the social media posts are irrelevant because some occur before and/or after working hours and because posts and photographs of an event do not confirm when the event actually occurred.

Appellants right and duties are governed by the Civil Service Act and accompanying regulations. N.J.S.A. 11A:1-1 to 12-6. A public employee protected by the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his/her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2-2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:2.21; N.J.A.C. 4A:2-1.4(a). Atkinson v. Parsekian, 37 N.J. 143,149 (1962). In an administrative hearing, the appointing authority must show by a preponderance of the competent, relevant, and credible evidence that the employee is guilty as charged. See. In re Polk, 90 N.J. 550, 560 (1982) (noting that "the usual burden of proof for establishing claims before State agencies in contested administrative adjudications is a fair preponderance of the evidence"). As the Supreme Court has explained, "[u]nder the preponderance standard, 'a litigant must establish that a desired inference is more probable than not. If the evidence is in equipoise, the burden has not been met.'" Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 169 (2006) (citing Biunno, Current N.J. Rules of Evidence, comment 5a on N.J.R.E.101(b)(1)

(2005)); 2 McCormick on Evidence § 339 (Strong ed., 5th ed. 1999) ("The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence").

Conduct Unbecoming:

"Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); See also, In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Here, the preponderance of the evidence demonstrates that appellant misused sick leave by using sick time on dates on which he was not, due to illness or injury, unable to perform his job duties but rather was attending or traveling to events related to his fraternity or other personal activities. These instances include July 20, August 13, September 12, 13 and 14, 2018, dates to which appellant admitted. In addition to appellant's admissions, his misuse of sick time on these dates is further supported by Facebook posts on or around those dates reflecting that appellant was attending/traveling to fraternity related/personal events.

Additionally, a Facebook post from March 2, 2018, a date on which appellant took a sick day (7 hours), demonstrates that on that date he was in Biloxi, Mississippi at a fraternity related/personal event.

Appellant's use of sick time on these occasions violated the Department's attendance and leave policy and was improper. To the extent that the respondent believed that appellant engaged in a pattern of sick leave abuse on additional occasions, it has failed to prove those additional occasions by a preponderance of the evidence.

However, the evidence further demonstrates that on multiple occasions, totaling at least 204.5 hours or 29.21 days, appellant had no computer activity nor any keycard activity on dates he reported as working all or part of the day. During this time, Department employees were not permitted to work remotely, and appellant acknowledged that he rarely had meetings outside of the office. Even if appellant, as he contends, occasionally entered his office locations by having someone hold the door for him, it is not reasonable or rational to conclude that on each such occasion appellant also failed to log into or out of his computer, failed to make any telephone calls from his Newark office--his main office, and also exited the building without swiping out for the day. Such occasions are not only highly improbable but are contrary to appellant's acknowledgment that he typically "swiped" into his office location and typically logged onto his computer.

Further, Facebook posts on or around certain dates on which appellant reported he was working but had no keycard and no computer activity demonstrate that appellant was attending or traveling to fraternity related or personal events. As set forth herein, those dates include: October 13, 2017, January 26, 2018, February 5, 2018, March 1, 2018, March 19, 2018, March 22, 2018, March 26, 2018, April 2, 2018, April 5, 2018, April 12, 2018 and April 16, 2018. Thus, the preponderance of the evidence demonstrates that appellant did not report to work on these dates as he was required to do and as he certified on his time sheets.

In addition to the foregoing dates, for the reasons set forth herein, the evidence sufficiently preponderates that appellant was not at work as he was required to be and as he certified on his time sheets on the remaining instances totaling at least 204.5 hours or 29.21 days on which appellant had no computer or keycard activity.

While appellant takes issue with the scope and sufficiency of the Department's investigation, the findings of the investigation are unrefuted. Appellant did not testify at the hearing. Although I decline to draw an adverse inference from same, appellant produced no evidence and no witnesses to refute the charges. Evidence of exceptional performance evaluations during the relevant time period does not refute the fact that appellant failed to report to work and made false representations on his time sheets. Further, appellant's claims during the investigation that there were times when the computer system did not accurately reflect when a person was in the office, that he was the subject of harassment, discrimination, and "targeting" by Stout and others in the Department, are unsupported by any competent or credible evidence and do not refute or negate the investigative findings. Similarly, appellants claims and/or inferences made during the investigation that his use of sick time was related to his medical condition is also unsupported by any credible or competent evidence. Appellant produced no evidence of his medical condition. Although the record reflects that appellant was on a month long FMLA leave in May-June 2018, there is no information in the record regarding the nature of or reason for the leave.

Appellant's misuse of sick time, his failure to report to work as he was required to do and as he certified on his time sheets on occasions totaling at least 204.5 hours or 29.21 days, and his false representations on his time sheets constitute conduct unbecoming a public employee. This conduct violates the implicit standards of good behavior and is the precisely the type of conduct that destroys public respect in the delivery of governmental services. Appellant's leadership and supervisory position as an Assistant Director of the Department compounds the gravity of his conduct as he was expected to set an example for the other employees.

Accordingly, for the reasons herein, I **CONCLUDE** that respondent has demonstrated, by a preponderance of the credible evidence, that appellant's actions constitute conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)6 and that the charge is sustained.

Other Sufficient Cause:

N.J.A.C. 4A:2-2.3(a)12 provides that “[a]n employee may be subject to discipline for . . . [o]ther sufficient cause.” Other sufficient cause is an offense for conduct that violates the implicit standards of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. In re. MacDonald, Mercer Cty. Corr. Ctr., 2014 N.J. AGEN LEXIS 236, (May 19, 2014), adopted, 2014 N.J. AGEN LEXIS 1099 (September 3, 2014).

Here, appellant is specifically charged with fraud, theft of time, and violation of the Uniform Ethics Code. The Department does not specifically define the terms “fraud” and “theft of time,” and cites to no rules or regulations addressing such charges. Thus, I **CONCLUDE** that respondent has not proved by a preponderance of the evidence that appellant’s conduct constitutes “fraud” or “theft.” However, for the reasons set forth herein, the respondent has proved by a preponderance of the evidence that on occasions totaling at least 204.5 hours or 29.21 days, appellant failed to report to work as he was required to do and as he certified on his time sheets. Appellant’s representations on his time sheets were false. Appellant’s actions resulted in him being paid for work he did not perform. As an Assistant Director of the Department, appellant was expected to refrain from such improper conduct and to set an example for other employees.

Accordingly, I **CONCLUDE** that respondent has demonstrated, by a preponderance of the credible evidence, that appellant’s actions violated the implicit standards of good behavior and constitute other sufficient cause, in violation of N.J.A.C. 4A:2-2.3(a)12.

Appellant is also charged with violation of the New Jersey Uniform Ethics Code, Section II. General Standards of Conduct, paragraph 4:

No State officer or employee or special State officer or employee shall knowingly act in any way that might reasonably be expected to create an impression or suspicion among the public having knowledge of his/her acts that he/she may be engaged in conduct violative of his trust as a State officer or employee or special State officer or employee.

(R13.)

Appellant's actions in misusing his sick time and falsely representing on his time sheets that he was working on occasions when he was attending or traveling to fraternity or other personal events, or otherwise not at work, violate the trust placed in him as a public employee – particularly given his position as an Assistant Director.

Additionally, in 2014, when appellant was granted approval to participate in the outside activity of serving as an officer in his fraternity, he was specifically advised that he must ensure that his duties did not interfere with his State job in any way, and that he must charge his leave time, excluding sick leave, for any outside activity he was involved in during his work hours. For the reasons set forth herein, appellant failed to abide by these conditions and therefore failed to abide by the requirements of the New Jersey Uniform Ethics Code.

Accordingly, I **CONCLUDE** that respondent has demonstrated, by a preponderance of the credible evidence, that appellant's actions violated the New Jersey Uniform Ethics Code, Section II, paragraph 4 and constitute other sufficient cause, in violation of N.J.A.C. 4A:2-2.3(a)12. Thus, that the charge is sustained.

Finally, while the OIA investigation discovered that appellant was using a keycard belonging to another employee, the Department presented no evidence that appellant was aware of such usage and/or that he was using the keycard for some improper purpose. Thus, respondent has not sufficiently demonstrated that appellant's use of another's keycard constitutes conduct unbecoming a public employee or other sufficient cause warranting discipline.

PENALTY

Having determined that appellant committed the violations alleged, I must now determine the appropriate penalty to impose.

A civil service employee who commits a wrongful act related to his or her duties may be subject to major discipline. N.J.S.A. 11A:1-2(b), 2-6, and 2-20; N.J.A.C. 4A:2-2.2, 2.3(a). This requires a de novo review of appellant's disciplinary action. In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also, In re Parlo, 192 N.J. Super. 247 (App. Div. 1983).

However, “[p]rogressive 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” In re Herrmann, 192 N.J. 19, 33 (2007).

Here, the charges of conduct unbecoming a public employee and other sufficient cause consisting of violation of the Uniform Ethics Code have been sustained. Despite appellant's lengthy employment with the Department, his exceptional performance evaluations during the relevant time period, and his disciplinary history which consists of only one prior minor discipline,--his actions are egregious. Appellant's repeated conduct in failing to report to work as he was required to do and his conduct in making false representations on his time sheets resulted in him being paid for work he did not perform. These actions, in addition to his misuse of sick time constitute serious misconduct that violates not only the trust that his employer placed in him but also violates the public trust. Appellant's actions render him unsuitable to continue in his position of employment with the Department.

Appellant's arguments that his inactivity amounts to approximately only one day every other week, are wholly unpersuasive and do not justify mitigation of the penalty.

Accordingly, in light of the particular circumstances of this case, I **CONCLUDE** that removal is the appropriate penalty and should be **AFFIRMED**.

ORDER

I hereby **ORDER** that the charges of conduct unbecoming a public employee and other sufficient cause consisting of violation of the Uniform Ethics Code are **SUSTAINED**. I further **ORDER** that respondent's decision to remove appellant from his position of employment is **AFFIRMED** and appellant's appeal is hereby **DISMISSED**.

I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



August 12, 2022

DATE

SUSAN L. OLGATI, ALJ

Date Received at Agency:

Mailed to Parties:

SLO/as

APPENDIX

WITNESSES

For respondent:

Anya Gayles
Terry Vallely
Betty Ng
Caroline Stout
Justin Wiggins¹²

For appellant:

None

LIST OF EXHIBITS

For respondent:

- R1¹³ PNDA dated February 19, 2020 (NJDOL001-2)
- R2 FNDA dated August 7, 2020 (NJDOL003-4)
- R3 Memo from Theresa Vallely to Caroline Stout and Tennille McCoy dated March 12, 2019 (NJDOL009-15)
- R4 NJLWD Office of Internal Audit spreadsheet (NJDOL016-20)
- R5 ECATS Timesheets and Benefit Detail
- R6 Facebook postings (NJDOL053-125)
- R7 NJDOLWD Equal Employment Opportunity Office Memorandum. Respondent: Lamothe/Interviewer: Betty M. Ng, EEOAA Officer; dated May 9, 2019 (NJDOL126-129)

¹² The testimony of Justin Wiggins is not summarized herein or addressed in the credibility determination as his testimony was limited to authenticating appellant's disciplinary history.

¹³ The parties stipulated to the admissibility of exhibits R1- R15, and R17.

- R8 Email exchanges between Ng and Lamothe on May 13, 2019, and May 22, 2019, regarding time and attendance (NJDOL130-132)
- R9 Email exchanges between Ng and Lamothe on May 24, 2019, regarding time and attendance (NJDOL133-134)
- R10 Email from Ng to Lamothe on August 13, 2019, regarding investigation, (NJDOL135)
- R11 Memo from Ng to Tennille McCoy, re: Lamothe ethics concerns 2018-27; dated August 27, 2019 (NJDOL136-141)
- R12 Letter from State of New Jersey Ethics Commission; dated January 30, 2020, (NJDOL146)
- R13 General Standards of Conduct, Code of Ethics Receipt Form, dated August 19, 2003; Ethics Training Acknowledgment Form, dated October 31, 2019; State Ethics Code Acknowledgment Form, dated April 11, 2007; and Ethics Briefing Receipt, dated November 14, 2017 (NJDOL147-151)
- R14 Memo from Ethics Liaison Officer to Lamothe, dated May 1, 2014, re: Outside Activity Questionnaire (NJDOL142-145)
- R15 NJDOLWD Attendance and Leave Policy; Alternate Workweek Program Application for Lamothe; 2020 AWP Calendar; and DOLWD Hours of Work Employee Acknowledgment signed by Lamothe, (NJDOL152-157)
- R16 PNDA dated November 14, 2014; FNDA dated March 24, 2015
- R17 Telephone records relating to appellant's Newark and Trenton offices

For appellant:

- P1 Annual Performance Evaluations for Lamothe, 2016-2019 (JL P001-P037)