STATE OF NEW JERSEY

In the Matter of Scott Shields
Hunterdon Developmental Center,
Department of Human Services

CSC DKT. NO. 2019-417
OAL DKT. NO. CSV 13360-18

**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**

**ISSUED: NOVEMBER 6, 2019 BW**

The appeal of Scott Shields, Senior Food Service Handler, Hunterdon Developmental Center, Department of Human Services, removal effective August 3, 2018, on charges, was heard by Administrative Law Judge Carl V. Buck III, who rendered his initial decision on October 17, 2019. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of November 6, 2019, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeals of Scott Shields.

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 6th DAY OF NOVEMBER, 2019

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
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 13360-18

AGENCY DKT. NO. 2019-417

**SCOTT SHIELDS, DEPARTMENT OF HUMAN SERVICES, HUNTERDON DEVELOPMENTAL CENTER.**

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**John F. McDonnell,** Esq., for Scott Shields, appellant (McDonnell, Artigliere, P.C., attorneys)

**Alexis Fedorchak,** Deputy Attorney General, for Department of Human Services, Hunterdon Developmental Center (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: July 18, 2019 Decided: October 17, 2019

BEFORE **CARL V. BUCK III,** ALJ:

## STATEMENT OF THE CASE

Scott Shields, Senior Food Service Handler (appellant), appeals the August 1, 2018 decision of his employer, the New Jersey Department of Human Services (DHS) Hunterdon Developmental Center (HDC, Hunterdon or respondent) on a disciplinary action imposing removal from employment on charges of: absent from work as scheduled; chronic or excessive absenteeism; conduct unbecoming a public employee, and other sufficient cause. The charges arise out of the appellant not

reporting for work on February 11, 2018[1]. Appellant argues that he had a valid excuse for his absence on this date.

## PROCEDURAL HISTORY

On March 28, 2018, the appellant, an employee with HDC, was charged in a Preliminary Notice of Disciplinary Action (PNDA) with being absent from work as scheduled without permission and without giving proper notice of intended absence, in violation of New Jersey Department of Human Services Administrative Order (DHS AO 4.08) A1.4; chronic or excessive absenteeism in violation of N.J.A.C. 4A:2-2.3(a)4; conduct unbecoming of employee (sic) in violation of N.J.S.A. 4A:2-2.3(a)6; and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)12. (J-1.) Appellant requested a hearing which was held before a hearing officer on May 23, 2018. The hearing officer sustained the charges in a Final Notice of Disciplinary Action (FNDA) which ordered the appellant removed from his employment with DHS effective June 10, 2019. (J-6.) The appellant filed an appeal with the Civil Service Commission and it was transferred to the Office of Administrative Law (OAL) as a contested case where it was filed on September 14, 2018. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The State filed a Motion for Summary Disposition on April 4, 2019. Due to the objection of the appellant and the proximate hearing date, the Court did not render a decision on the motion but moved forward with the scheduled hearing date of May 7, 2019. A hearing was held on May 7, 2019. At that time, the parties requested time to submit written closing statements and legal memoranda. A transcript of the hearing was received on June 11, 2019. Upon the receipt of submissions, the record closed on July 18, 2019. An extension was requested and granted for the filing of this Initial Decision.

## FACTUAL DISCUSSION AND FINDINGS

From the Joint Exhibits submitted by the parties, the following is undisputed and I, therefore **FIND** the following as **FACT:**

[1] Appellant did not report for work at 11:00 am and called in at approximately 1:15 pm.

1. Appellant was employed by HDC for a period of approximately fifteen years, most recently as a Senior Food Service Hander.

2. Prior to the present matter, the appellant has previously sustained notice(s) of corrective and disciplinary violation(s). (J-2.) The earliest being on October 19, 2006. The most recent being on January 23, 2017. This list includes, but is not limited to, the following violation(s):

    a. On June 8, 2016, the appellant was issued a FNDA for:

        i. Calling out for illness and failing to comply with the required call time on January 28, 2016; and

        ii. For calling to report being late but failing to report for work and failing to notify his supervisor of the intended absence.

    These two incidents resulted in appellant receiving unauthorized absences. (R-6.)

    The penalty sought by HDC in this FNDA was removal. The parties, however, entered into a written settlement agreement, dated September 15, 2016, which resolved the disciplinary issues and stated that the resolution of the discipline was being approved stating that appellant shall schedule a "fit for duty" examination by October 15, 2016 and that should his physician determine he is fit to return to duty, "Respondent shall reduce the penalty on the FNDA dated 6/8/16 from Removal to 6 months suspension....However, if Appellant commits any further infraction resulting in an unauthorized absence, Hunterdon shall pursue his removal and , this is a LAST CHANCE AGREEMENT." (emphasis in original) (Id.)

3. Appellant obtained an appropriate doctor's note on November 2, 2016 and supplied it to HRC on November 3, 2016. (J-12.)

4. On December 27, 2016, the appellant did not report for work at the beginning of his shift – 6:00 am. HDC attempted to call him and did not reach appellant. At approximately 10:37 am a call was made to HDC on appellant's behalf stating appellant was in the emergency room and would be out due to illness. (J-8.)

5. On December 28, 2016, appellant called out due to illness at approximately 9:20 am (his shift commenced at 6:00 am). (J-8.)

6. On January 15, 2017, appellant called out due to illness at approximately 8:38 am (his shift commenced at 6:00 am). (J-8.)

7. On February 11, 2018, the appellant did not report for work at the beginning of his shift at 11:00 am[2]. He called in at 1:15 pm to state that he would be in for his shift. He was told that his call was more than two hours late and not to report for work. (J-1.)

8. The appellant was removed from his position for the February 11, 2018 absence. Ibid.

9. The appellant's past disciplinary history is recorded in a February 9, 2018, computer printout. (R-2.)

10. Based on the appellant not reporting for work on February 11, 2018, Hunterdon charged the appellant with committing the following infractions, which were sustained after a hearing: A1.4 - Absent from work as scheduled without permission and without giving proper notice of intended absence; N.J.A.C. 4A:2-2.3(a)4 - Chronic or excessive absenteeism; N.J.A.C. 4A:2-2.3(a)6 - Conduct unbecoming of employee (sic); and N.J.A.C. 4A:2-2.3(a)12 - Other sufficient cause. (R-1.)

## TESTIMONY

**Respondent**

[2] Hereinafter referred to as the "February 11, 2018, work day."

**Patricia Kozelnk**, Food Supervisor II at Hunterdon, supervises approximately eighty employees, she handles disciplinary matters for those employees and testified to the responsibilities appellant had as a Senior Food Service Handler. Appellant worked under her and was employed at Hunterdon prior to Kozelnk's arrival. She did not have any personal problems with appellant and testified to a number of his disciplinary actions and his disciplinary history. She detailed his progressive disciplinary history culminating with a charge in June 2016, which was settled by the parties entering a "last chance agreement".

On cross-examination, Kozelnk stated that she was aware of certain medical concerns expressed by the appellant, including his traumatic brain injury in 2010. She also stated that supervisors have some latitude in the imposition of discipline.

**Brianna Stull**, Supervisor, Food Service Operations at Hunterdon deals with disciplinary issues under Patricia Kozelnk. She detailed to the administrative procedure for tardiness and lateness and the applicability of that procedure to all employees as well as the process for an individual to call for "late" or "sick" employees. She identified the log whereby the appellant called at 1:15 pm on February 11, 2018, she spoke with appellant and he stated he would be in late. She responded that it was two hours past his scheduled start time and that coverage for his shift had been obtained. Coverage was usually obtained fifteen to thirty minutes after a shift would begin and an employee did not report. She testified to the importance of all persons reporting for work in light of impact on the other employees and particularly the clients at HDC.

On cross-examination, she stated she had not asked the appellant why he was late on February 11, 2018 and that lateness could, in specific circumstances, be excused.

**Rose Burke**, Personnel Assistant III at HDC, was familiar with the appellant's dealings with the Human Resources (HR) department. She had had no personal disputes or disagreements with appellant and testified to his last chance agreement and the requirement that he obtain a fitness for duty appointment to determine if he was capable of carrying out the duties his title carried and if appellant could follow the policies set out in DHS 77 (J-10) regarding reporting late and reporting sick. On October 5, 2016 Dr. Manga, appellant's doctor, sent a letter stating appellant was able to perform his essential functions; however, the doctor

did not send confirmation that appellant could follow the policies of HDC. This second part was prepared by Dr. Manga on November 2, 2016 and received by Burke on November 3, 2016. (J-12.)

**Appellant**

**Scott Shields** testified that on some occasions he had been late for medical reasons. He recounted his medical concerns, beginning with a bad car accident in 2010. He was in a coma for two months as a result of the accident and had traumatic brain injury, a shattered left ankle, trauma to the left side of his body. He received a prescription for Xanax to assist him sleeping after this accident.

The evening before February 11, 2018, Shields was with his step-father, with whom he had a particularly close relationship. His step-father was hospitalized in the last stages of pancreatic cancer. Shields left the hospital about 12:30 am or 1:00 am, went home and took a Xanax. He went to sleep and woke up around 12:45 pm. He dressed and started driving to work when he made a call stating he was on his way. He was told not to bother as it was past 1:00 pm.

On cross examination, Shields stated he had been at Hunterdon for about fifteen years and that he was aware of their policies and procedures about attendance and timeliness. As he had been taking Xanax for about eight years, he was aware of the side effects but he had been overwhelmed by his step-father's condition. He did not think of calling in that night stating he would not be in the following day.

## Additional Findings

Appellant challenges only the penalty imposed.

## LEGAL ANALYSIS AND CONCLUSION

The appellant's rights and duties are governed by laws including the Civil Service Act and the regulations promulgated thereunder. A civil service employee who commits a

wrongful act related to his or her employment, or provides other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6, -20; N.J.A.C. 4A2-2.2, -2.3. Major discipline includes removal, or fine or suspension for more than five working days. N.J.A.C. 4A:2-2.2. Employees may be disciplined for insubordination, neglect of duty, conduct unbecoming a public employee, failure or inability to perform duties, chronic or excessive absenteeism or lateness; and other sufficient cause, among other things. N.J.A.C. 4A:2-2.3. An employee may be removed for egregious conduct without regard to progressive discipline. In re Carter, 191 N.J. 474 (2007). Otherwise, progressive discipline would be applied. West New York v. Bock, 38 N.J. 500 (1962).

The Appointing Authority has the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

**Charges Outlined in the FNDA**

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant, and credible evidence. 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 re Polk, 90 N.J. 550, 560 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47, 49 (1975). Both guilt and penalty are redetermined on appeal from a determination by the appointing authority. Henry v. Rahway State Prison, 81 N.J. 571, 575-76 (1980).

Here, the appellant has been charged in an FNDA with chronic/excessive absenteeism, N.J.A.C. 4A: 2-2.3(a)4, conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)6, and other sufficient cause, N.J.A.C. 4A: 2-2.3(a)12 for violating DHSAO A.4, chronic or excessive absenteeism.

Under N.J.A.C. 4A:2-2.3(a)4, an employee may be subject to discipline for chronic or excessive absenteeism. While there is no precise number that constitutes "chronic," it is generally understood that chronic conduct is conduct that continues over a long time or recurs frequently. Good v. N. State Prison, 97 N.J.A.R.2d (CSV) 529, 531. Courts have consistently held that excessive absenteeism need not be accommodated, and that attendance is an essential function of most jobs. See, e.g., Muller v. Exxon Research and Eng'g Co., 345 N.J.Super. 595, 605-06 (App.Div. 2001); Svarnas v. AT&T Communications, 326 N.J.Super. 59, 78 (App.Div. 1999) ("[a]n employee who does not come to work cannot perform any of her job functions, essential or otherwise").

In general, employers cannot be expected to find a way to accommodate the unpredictable nature of an employee's sporadic and unscheduled absences. Svarnas, 326 N.J.Super. at 77. As noted by the New Jersey Supreme Court, "just cause for dismissal can be found in habitual tardiness or other similar conduct." West New York v. Bock, 38 N.J. 500, 522 (1962). While a single instance may not be sufficient, "numerous occurrences over a reasonably short space of time, even though sporadic, may evidence an attitude of indifference amounting to neglect of duty." Id. As the Appellate Division summarized, "[w]e do not expect heroics, but 'being there,' i.e. appearing for work on a regular and timely basis is not asking too much" of an employee. State-Operated School District of Newark v. Gaines, 309 N.J.Super. 327, 333 (App.Div. 1998).

It is undisputed that appellant has either called out late for being tardy or called out late for being sick from work on at least five occasions since October 25, 2015 [3][4].

[3] October 25, 2015, October 29, 2015, January 28, 2016, January 30, 2016 and February 11, 2016.
[4] There have been other instances of this violation prior to October 27, 2015.

The appellant, in this matter, responds that he suffers lingering effects from and automobile accident and resulting coma in 2010. Further, he states he is suffering negative psychological effects from the sickness and death of his step-father which occurred on February 26, 2018 (some two weeks after the incident which gave rise to his removal). Even accepting the appellant's claim that his absences are related to various health issues does not raise a disputed issue of material fact since employees may be subject to discipline for chronic/excessive absenteeism even if that excessive absenteeism is related to an illness or disability. See, e.g., Muller v. Exxon Research and Eng'g Co., 345 N.J.Super. 595, 605-06 (App. Div. 2001) (under the NJLAD, excess absenteeism need not be accommodated even if it is caused by a disability otherwise protected by the Act). An employee who does not show up for work does not satisfy the essential functions of their employment and cannot perform their workplace duties. Svarnas, 326 N.J.Super. at 78. As the Civil Service Commission has previously noted:

> [E]xcessive absenteeism is not necessarily limited to instances of bad faith or lack of justification on the part of the employee who was frequently away from her job. After reasonable consideration is given to an employee by an appointing authority, the employer is left with a serious personnel problem, and a point is reached where the absenteeism must be weighed against the public right to efficient and economic service. An employer is entitled to be free of excessive disruption and inefficiency due to an inordinate amount of employee absence. [Terrell v. Newark Housing Authority, 92 N.J.A.R.2d (CSV) 750, 752.]

See also Frank Bellamy v. Township of Aberdeen, Department of Public Works, 96 N.J.A.R.2d (CSV) 770 (excessive employee absences, even with good cause, impair the work of the political subdivision employer and may justify an employee's removal); Clifford Luckey v. Department of Public Works, Borough of Lindenwold, 96 N.J.A.R.2d(CSV) 266 (sustaining removal of civil service employee for excessive absences even though employee was "debilitated by an occasional illness, and by a continuing addiction to substance abuse" related to absences); Johnny LaBour v. Housing Authority of the City of Paterson, 95 N.J.A.R.2d(CSV) 682 (sustaining removal of civil service employee for excessive absences related to medical and substance abuse problems); Frank Weil v. Atlantic County Department of Public Safety, 97

N.J.A.R.2d(CSV) 413 (removal appropriate for excessive unauthorized absences even if those absences are related to medical condition). The respondent, like any governmental entity, "has the right to expect that its employees will report to work and perform the duties and functions assigned to them." Id. To permit employees to fail to report to work when they are required to do so "would create chaos in carrying out essential government functions and would greatly harm public officials in their attempts to carry out their duties and responsibilities." Id.

In judging whether an employee's absenteeism is chronic or excessive, relevant factors include, among others, the number of absences, the time span between the absences, and the negative impact on the work place. See Harris v. Woodbine Developmental Ctr., CSV 4885-02, Initial Decision, (February 11, 2003), adopted, Comm'r (March 27, 2003) http://njlaw.rutgers.edu/collections/oal/; Hendrix v. City of Asbury, CSV 10042-99, Initial Decision, (April 10, 2001), adopted, Comm'r (June 8, 2001) http://njlaw.rutgers.edu/collections/oal/; Morgan v. Union Cnty. Runnells Specialized Hosp., 97 N.J.A.R.2d (CSV) 295. It is factually undisputed that, October 25, 2015 and February 11, 2016, the appellant called off from work five times. The appellant's employer had a right to expect that he would be present at work as scheduled, willing and able to perform the job for which he had been employed. The respondent is not obligated to continue to employ a person who either cannot or will not perform his job duties on a regular basis. Accordingly, I **CONCLUDE** that the respondent has demonstrated, by a preponderance of credible evidence, that the appellant's conduct constitutes a violation of N.J.A.C. 4A:2-2.3(a) (4) (Chronic and Excessive Absenteeism), and that such charge must be **SUSTAINED.**

The appellant was also charged with conduct unbecoming a public employee. N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale of efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998). See also In re Emmons, 63 N.J.Super. 136, 140 (App.Div. 1960). Such misconduct "need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which

devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Department of Ridgewood, 258 N.J.Super. 32, 40 (App.Div. 1992) (quoting Asbury Park v. Dep't of Civil Service, 17 N.J. 419, 429 (1955).

The appellant's attendance record demonstrates a pattern of chronic/excessive absenteeism. Such an attendance record evidences "an attitude of indifference amounting to neglect of duty." Bock, 38 N.J. at 522. I **CONCLUDE**, therefore, that the appellant's conduct did rise to a level of conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6) and the respondent has met its burden of proof to sustain this charge. This charge must, therefore, be **SUSTAINED**.

The appellant has further been charged with violating N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause—specifically, a violation of DHS AO 4:08, "Tardiness/ Lateness". HDC's administrative procedures define tardiness "as the failure by an employee to report for duty at a re-determined time and after the scheduled start of the work assignment." (J-3.) It is factually uncontested that appellant violated this policy on five occasions between October 25, 2015 and February 11, 2016. I **CONCLUDE**, therefore, that the respondent has met its burden of proof to sustain this charge and this charge must be **SUSTAINED**.

## PENALTY

The Civil Service Commission may increase or decrease the penalty imposed by the appointing authority, though removal cannot be substituted for a lesser penalty. N.J.S.A. 11A:2-19. When determining the appropriate penalty, the Board must utilize the evaluation process set forth in West New York v. Bock, 38 N.J. 500 (1962), and consider the employee's reasonably recent history of promotions, commendations and the like (if any), as well as formally adjudicated disciplinary actions and instances of misconduct informally adjudicated. Since Bock, the concept of progressive discipline has been utilized in two ways when determining the appropriate penalty for present misconduct: to support the imposition of a more severe penalty for a public employee

who engages in habitual misconduct, and to mitigate the penalty for a current offense. In re Herrmann, 192 N.J. 19, 30–33 (2007).

"Although we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Bock, 38 N.J. 500, 523 (1962), that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990). An employee's poor disciplinary record can "support an appointing authority's decision to rid itself of a problematic employee based on charges that, but for the past record, ordinarily would have resulted in a lesser sanction." In re Anthony Stallworth, 208 N.J. 182, 196 (2011) (quoting In re Herrmann, 192 N.J. at 32). "[T]he concept of progressive discipline can be utilized to 'ratchet up' or support [the] imposition of a more severe penalty for a public employee who engages in habitual misconduct." Stallworth, 208 N.J. at 196 (quoting In re Herrmann, 192 N.J. at 30-33)).

While the proposed sanction of removal in this matter is harsh, this sanction must be viewed in light of the appellant's prior history of discipline. It is undisputed that this incident is the at least the fifth time the appellant has been subject to discipline for chronic/excessive absenteeism in the period October 25, 2015 to February 11, 2018. Each of these prior disciplinary actions employed escalating penalties for the appellant's conduct ranging from five working day suspension (J-5) to dismissal (J-6). The appellant's most recent discipline (prior to this incident) for being absent from work as scheduled without permission and without giving proper notice was from incidents occurring on December 27, 2016, December 28, 2016 and January 15, 2017 - imposing removal. (J-8.) A further aggravating factor present in this matter is that the settlement agreement the appellant executed with the respondent to resolve the FNDA of June 8, 2016, contained the express acknowledgement that the appellant understood that it was a "LAST CHANCE AGREEMENT." (J-6.) stating "However, if Appellant commits any further infraction resulting in an unauthorized absence, Hunterdon shall pursue his removal and , this is a LAST CHANCE AGREEMENT." (emphasis in original) (Id.) A Last Chance Agreement (LCA) such as this can be used as a significant factor, along with the appellant's prior disciplinary history, in determining the appropriate penalty in an appeal. These agreements are construed in

favor of the appointing authority because to do so otherwise would "discourage their use by making their terms meaningless." Watson v. City of E. Orange, 175 N.J. 442, 445 (2003) (citing Golson-El v. Runyon, 812 F.Supp. 558, 561 (E.D.Pa.)). In Watson, the New Jersey Supreme Court found that where an employee "simply did not perform as contemplated by the parties" in a clearly written and executed LCA, their discharge is warranted. Id.

Here, the appellant was a party to a clearly written and executed LCA in which he understood, or should have understood, the import and benefit of such a "last chance." He further acknowledged and agreed, as part of this LCA, the statement "However, if Appellant commits any further infraction resulting in an unauthorized absence, Hunterdon shall pursue his removal and, this is a LAST CHANCE AGREEMENT." Approximately three months later (December 27, 2016), appellant failed to call and four hours and thirty-seven minutes after the beginning of his shift, he called out sick stating he was in the emergency room. On December 28, 2016 appellant called out sick three hours and twenty minutes after the beginning of his shift. On January 15, 2017 appellant called out sick two hours and thirty-eight minutes after the beginning of his shift. (J-8.) Such an attendance record was not the type of attendance performance contemplated by the parties and expected of the appellant in executing the LCA signed by the appellant on September 15, 2016. (J-6.)

Based upon a consideration of the totality of the evidence, with due consideration of appellant's prior disciplinary record, and taking into consideration the concerns expressed by the appellant I am nonetheless constrained to **CONCLUDE** that sufficient cause was established by the respondent to warrant appellant's removal from his position with DHS.

## ORDER

Based upon the foregoing, in light of the facts and the law, the appellant's appeal is **DISMISSED** and the penalty of removal 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, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 17, 2019
DATE

**CARL V. BUCK III**, ALJ

Date Received at Agency: 10/17/19

Date Mailed to Parties: 10/17/19

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## APPENDIX

## LIST OF WITNESSES

**For Appellant:**

Scott Shields

**For Respondent:**

Patricia Kozelnk
Brianna Stull
Rose Burke

## LIST OF EXHIBITS

**For Appellant:**

P-1 Northstar Urgent Care note 5/3/18

**For Respondent:**

R-1 PNDA 3/26/18
FNDA 8/1/18
R-2 Disciplinary History
R-3 Administrative Procedure 004
R-4 Written Warning 8/11/11
R-5 Notice of Suspension 1/15/15
R-6 FNDA 6/8/16
Settlement Agreement 9/15/16
R-7 2016 Official Timekeeping Record
R-8 PNDA 1/23/17

R-9 Call Out Log

R-10 Administrative Procedures #001 and #004

R-11 Essential Functions Worksheet 10/5/16

R-12 Notice from Dr. Manha 11/2/16