A-5

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Christopher Higgins,
Department of Human Services

CSC Docket No. 2014-1790
OAL Docket No. CSV 7012-14

ISSUED: SEP 0 2 2015 (SLK)

The appeal of Christopher Higgins, a Repairer with the Vineland Developmental Center (VDC), Department of Human Services, of his removal effective January 10, 2014, on charges, was heard by Administrative Law Judge W. Todd Miller (ALJ), who rendered his initial decision on June 26, 2015. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision and having reviewed the testimony and evidence presented before the Office of Administrative Law (OAL) and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on August 19, 2015, did not adopt the ALJ's recommendation to reverse the removal. Rather, the Commission upheld the appellant's removal.

DISCUSSION

The appellant was removed on charges of conduct unbecoming a public employee, sleeping on duty, failure or excessive delay in carrying out an order which would not result in danger to person, falsification of attendance records, and violation of a rule, regulation, policy, procedure order or administrative decision. Specifically, the appointing authority asserted that on January 4, 2014, the appellant was found sleeping in his shop, that he did not timely respond to "Do It Now" (DIN) maintenance orders, and that he recorded on his sign in/out sheet that he left at 1:30 p.m. when his actual departure time was 12:38 p.m. Upon the

appellant's appeal, the matter was transmitted to the OAL for a hearing as a contested case.

In his initial decision, the ALJ found that there was insufficient proof to establish that the appellant was actually sleeping on duty. Specifically, the ALJ indicated that the appellant credibly testified that he was working outside from 8:05 a.m. to 9:00 a.m. cleaning sewage pits and that there was no testimony to show that the sewage pits were not cleaned at that time. While working in the pits, the appellant testified that he received two calls on his cell phone from Amanda Hill, a Telephone Operator, regarding "DIN" orders for lack of heat and snow and ice complaints in the Reeves and Wolverton Cottages. Thereafter, Mary Potter, an Assistant Supervisor of Resident Living (Developmental Disabilities), entered the appellant's shop at 9:05 a.m. and observed him reclining in a chair, with his winter coat covering him and his eyes closed, and she testified that it took some time for him to get himself together. Although Potter testified that the appellant appeared to be sleeping, the ALJ determined that it was plausible and believable that he was resting and trying to warm up next to the heater.

With respect to the charge of failure or excessive delay in carrying out an order, the ALJ found that the appellant was working with Potter from 9:00 a.m. to 10:00 a.m. spreading salt and sand, and that witnesses confirmed that he completed his first "DIN" request at the Reeves Cottage between 10:00 a.m. and 11:00 a.m. Afterwards, he warmed up back in the shop and cleaned up the shop, and was subsequently ordered by Potter shortly before noon to complete the second and third "DIN" orders. Although the appellant may have taken longer breaks than usual due to the extremely cold weather, the ALJ concluded that he reasonably responded to the many calls and task requests. In reference to the falsification charge, although the appellant signed out at 12:38 p.m. and entered on his timesheet that he actually left at 1:30 p.m., the appellant explained that he was feeling ill and was going to go home after he finished cleaning the sewage pits. As there were no witnesses to confirm the appellant's whereabouts after he signed out and there was no inspection between 12:38 p.m. and 1:30 p.m. to see if he had actually cleaned the sewage pits, the ALJ concluded that the appellant cleaned the sewage pits and then left after 1:30 p.m.[1] Consequently, the ALJ determined that the appointing authority did not sustain its burden of proof and recommended dismissing all of the charges and reversing the removal.

In its exceptions, the appointing authority argues that Potter credibly testified that when she entered the shop at 9:05 a.m., the appellant did not hear her, was leaning back in a recliner with his feet up covered by a coat with his eyes

---

[1] The Commission notes that the ALJ excluded the appellant's alleged admission made at the departmental level that he actually left work at 12:38 p.m. The ALJ concluded that the alleged admission was made in conjunction to settlement discussions and was, therefore, inadmissible. The Commission agrees and notes that the appellant's alleged admission was not considered.

closed, and it took him an inordinate amount of time to respond to her. As such, the appellant's self-serving testimony that he was not sleeping strains belief. With respect to the charge of failure or excessive delay in carrying out an order, the appointing authority disputes the ALJ's finding that it was unrefuted that the appellant was working outside cleaning the sewage pits between 8:05 a.m. and 9:00 a.m. It presents that Hill credibly testified that she spoke to the appellant at 8:25 a.m. and 8:27 a.m. regarding the DIN requests for two of the cottages on the shop phone. Significantly, the appellant never provided phone records proving that he received these calls on his cell phone. Additionally, Hill testified that Potter had called her about the same time inquiring into the whereabouts of the appellant and she advised her that he was in his shop, which is where Potter found him sleeping. Consequently, the appointing authority argues that the testimony establishes that the appellant was in the shop and not cleaning the sewage pits between 8:05 a.m. and 9:00 a.m. Regardless, when Potter enlisted the appellant at 9:05 a.m. to help with sanding, he acknowledged that he had already received two DIN requests but never advised Potter at that time of the outstanding requests. Further, while the ALJ determined that the appellant was working on helping with sanding until 10:00 a.m., Potter testified that the appellant was back in the shop around 9:30 a.m. and Hill testified that she spoke to the appellant at 9:39 a.m. about a third DIN request. Moreover, the appellant testified that between 10:00 a.m. and 10:15 a.m. he was taking his union break. The appointing authority also argues that even if he completed the Reeves DIN order by 11:00 a.m., the appellant testified that between 11:00 a.m. and 11:50 a.m. that he was warming up and cleaning the shop. The appointing authority argues that "warming up" and "cleaning the shop" cannot take precedence over completing DIN orders, especially when there are residents in the cottages with medical conditions on such a cold day. Additionally, there is no independent evidence that the appellant actually started on the third DIN request, at Wolverton Cottage at 12:12 p.m., as he testified. Regardless, even if that was the case, this was still excessive delay as it was nearly four hours after he received this DIN order.

With reference to the falsification charge, the appointing authority presents that the appellant signed out at 12:38 p.m., but recorded his sign out time as 1:30 p.m. Hill testified that she witnessed the appellant signing out at 12:38 p.m. and that he told her that he was going home sick and she wrote this in her log book. Other than his own self-serving testimony that he told Hill at the time he was signing out that he was not going to leave until after he cleaned the sewage pits, there is no independent testimony or evidence to corroborate this statement. Moreover, the appellant never challenged Hill's testimony, log book entry, and written statement, which evidence that she believed that he left to go home sick. Further, Hill received a fourth DIN order at 12:49 p.m. and, since she believed that the appellant had gone home sick, she did not call him. As such, the appointing authority argues that the credible evidence indicates that the appellant left at 12:38 p.m.

In his reply to the exceptions, the appellant argues that there was no independent witness or surveillance verification at the shop that he was sleeping and the ALJ properly concluded that the appointing authority did not meet its burden of proof regarding that charge. Regarding the charge of failure or excessive delay in carrying out an order, all parties agreed that the appellant received three separate "DIN" orders for work to be done at three separate cottages. Additionally, Potter "pressed" him into service to help spread sand and Hill testified that the maintenance worker would be the one who sets the prioritization regarding completing work orders. Therefore, the appellant contends that the ALJ reasonably pointed out that he could not be in three places at the same time. Moreover, Potter testified that there were no work sheets that indicated when maintenance work would be completed nor could she dispute how long it would take to clean out the sewage pits. Further, there is no physical evidence or any witnesses who can state where he was throughout the day. In reference to the falsification charge, the appellant presents that the appointing authority could not produce any witness or independent evidence to support its allegation that he did not leave the work premises at 1:30 p.m. The appellant highlights that Hill could not confirm where he went after he signed out nor was there any surveillance or witness who could place or not place him at the shop after he signed out.

Upon its *de novo* review of the record, including the testimony provided at the hearing, the Commission does not agree with the ALJ's recommendation to reverse the removal and dismiss all of the charges. Rather, for the reasons stated below, the Commission finds that the appointing authority sustained all of the charges and upholds the appellant's removal.

The Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 *N.J.* 644 (1999) (quoting *State v. Locurto*, 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by the credible evidence. With regard to the standard for overturning an ALJ's credibility determination, *N.J.S.A.* 52:14B-10(c) provides, in part, that:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary,

capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.

See also N.J.A.C. 1:1-18.6(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). The Commission finds that in this case, this strict standard has been met.

Therefore, based on its review of the testimony and the entire record, the Commission makes the following findings:

1) On Saturday, January 4, 2014, the appellant was the only Repairer on duty and his shift was between 8:00 a.m. and 4:30 p.m. It was an extremely cold day and the grounds were covered in snow and ice. At 8:25 a.m. and 8:27 a.m., Hill called the appellant to let him know that there were heat and snow and ice related "DIN" maintenance orders for Reeves and Wolverton Cottages. The appellant was in the shop and received these phone calls on the shop phone. "DIN" orders take priority over other tasks, especially weather related ones on a cold day due to the residents' medical conditions. Around this same time, Potter called Hill and, based on the fact that the appellant had answered her phone calls on the shop phone, advised Potter that the appellant was in the shop.

2) At 9:05 a.m., Potter entered the shop and observed the appellant sleeping in a reclining chair. She called out to him and, after about 20 to 30 seconds, he responded to her. Potter enlisted the appellant to help with sanding the VDC's grounds. However, the appellant did not inform Potter that he had already been called about two DIN requests and therefore she was unable to prioritize and seek other assistance for these tasks.

3) Around 9:30 a.m., the appellant was back in the shop after helping with sanding. At 9:39 a.m., Hill called and let him know that there was a third "DIN" order; this time from Landis Cottage.

4) From 10:00 a.m. to 10:15 a.m., the appellant took his union break in the shop. Thereafter, he proceeded to Reeves Cottage, completed this DIN order, and was back in the shop by 11:00 a.m.

5) Between 11:00 a.m. and 11:50 a.m., the appellant was in the shop warming up and cleaning the shop. At 11:50 a.m., Potter spoke to the appellant and ordered him to attend to the outstanding DIN orders at Landis and Wolverton Cottages. Thereafter, the appellant proceeded to Landis Cottage and completed this DIN order by 12:10 p.m.

6) If the appellant completed the Wolverton DIN order, the earliest that he proceeded to attend to this order was after 12:10 p.m.

7) At 12:38 p.m., the appellant signed his sign in/sign out timesheet, advised Hill that he was going home sick, and left for the day. However, the appellant had recorded his sign out time as being 1:30 p.m.

8) At 12:49 p.m., Hill received a fourth "DIN" order for the day. However, Hill did not reach out to the appellant because he had already told her that he had gone home sick.

In this case, upon review of the entire record, including the testimony provided at the hearing, the Commission finds that there is sufficient evidence in the record to overturn some of the ALJ's credibility determinations. Hill testified that the appellant was in the shop at 8:25 a.m. and 8:27 a.m. as he answered her calls on the shop phone. This testimony is corroborated by the fact that Hill advised Potter shortly thereafter that the appellant was in the shop and Potter found the appellant there at 9:05 a.m. Additionally, the appellant did not provide any records to prove that he received these phone calls on his cell phone or at least provide evidence of the efforts that he made to obtain this information. This undermines the appellant's testimony that he was cleaning the sewage pits at that time. To credit the appellant's self-serving testimony in that regard in the face of the other testimony detailed above is clearly unreasonable. Further, the ALJ did not find that Potter's testimony regarding the appellant reclining in a chair with his feet up, his coat over him, and his eyes closed, was not credible. Instead, the ALJ found that Potter could not know if the appellant was actually sleeping. However, in light of the appellant admitting that his eyes were closed and the fact that Potter credibly testified that it took the appellant an inordinate amount of time to respond to her undermines the credibility of his testimony that he merely had his eyes closed and was not sleeping. Further, it is undisputed that the appellant knew about two DIN orders at the time that Potter approached him to have him help with the sanding, but he failed to inform her that there was a conflict between these orders.

Additionally, the appellant could have addressed the DINs prior to 10:00 a.m. as Potter credibly testified that the appellant was back in the shop around 9:30 a.m. and Hill credibly testified that she spoke to the appellant at 9:39 a.m. The appellant admitted that he took a 10:00 a.m. to 10:15 a.m. break in the shop while these DIN requests were outstanding even though his break was not mandatory. The appellant admitted that after he finished the Reeves Cottage DIN order he was in the shop from 11:00 a.m. to 11:50 a.m. warming up and cleaning up. Therefore, when considering that there were heat related DIN orders that were still

outstanding from 8:27 a.m. and 9:49 a.m., it was an excessive delay to wait 50 minutes before attending to the next outstanding DIN order. Moreover, it cannot be ignored that the appellant only responded to the Landis Cottage DIN order after Potter ordered him to do so at 11:50 a.m. Further, even assuming that he actually completed the third DIN order at Wolverton Cottage, the earliest he could have completed it was after 12:10 p.m. which was nearly four hours after he received this order.

With regard to the falsification charge, Hill testified that she witnessed the appellant sign out 12:38 p.m. and that he told her that he was going home sick. While the appellant testified that he also told Hill that he was going to clean the pits before leaving which is why he recorded his sign out time as 1:30 p.m., Hill did not testify that the appellant told her anything other than he was leaving because he was sick. Further, why the ALJ found that Hill was unclear as to whether the appellant had also told her that he was going to do more work before he left is not supported by the evidence. Hill's testimony was that the appellant only stated that he was going home sick, which was corroborated by her log book which only states that the appellant left at 12:38 p.m. because he was sick and her similar statement that she provided to the appointing authority five days after the incident. There are also no witnesses or any other corroborating evidence that he did work after he signed out at 12:38 p.m. and the appellant did not cross-examine his only potential corroborating witness, Hill, about his statement, her testimony, or log book entry. Moreover, Hill's belief that the appellant actually left when he signed out and not that he was staying to do more work is further corroborated by the fact that she received a fourth DIN order at 12:49 p.m., but did not contact the appellant because he had already advised her that he had gone home sick. It is also noted that the appellant gave no explanation as to why he signed out before he was planning on completing his work instead of signing out after completing his work. Consequently, the Commission finds that the appellant's testimony in that regard is not worthy of belief.

With regard to the penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock, 38 N.J. 500 (1962).* However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison,* 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007).

In this matter, the appointing authority and the appellant had entered into a Last Chance Agreement stemming from an incident on November 22, 2013. Among other violations, the charges included falsifying his attendance records and violation of a rule, regulation, policy, procedure order or administrative decision. In return for a reduction of his discipline, the appellant agreed that any violation related to this incident within the 24-month period following his return would result in his removal. The Commission notes that the use of the Last Chance Agreement is solely for the purpose of determining the appropriate penalty. While the OAL and the Commission are not strictly bound by the terms set forth in the agreement, since neither entity was a party to the settlement, the Commission is nonetheless cognizant of the fact that the parties voluntarily agreed to the penalty of removal for any subsequent violation. Consequently, a Last Chance Agreement can be used by the Commission as a significant factor to be considered, along with the appellant's prior disciplinary history, when determining the appropriate penalty in an appeal. Additionally, Last Chance Agreements are construed in favor of appointing authorities because to do otherwise would discourage their use by making their terms meaningless. *See Watson v. City of East Orang*e, 175 *N.J.* 442 (2003) (The Supreme Court found an employee's termination was warranted when that employee did not perform in compliance with a Last Chance Agreement as contemplated by the parties. The Court added that a contrary conclusion would likely chill employers from entering into such agreements to the detriment of future employees.); *In the Matter of Phillip Montgomery* (MSB, decided May 9, 2000) (In denying a request for reconsideration of an employee's removal, it was indicated that in addition to the employee's extensive history of infractions and the concept of progressive discipline, it gave significant weight to the fact that the employee signed an agreement acknowledging that further instances of certain infractions would result in further disciplinary action up to and including removal.) *See also, In the Matter of Tina Kirk* (CSC, decided January 27, 2010); *In the Matter of Brian Whittle* (MSB, decided May 28, 2003); *In the Matter of Ann Marie Collins-Cole* (MSB, decided December 18, 2002) and *In the Matter of Donald Hickerson* (MSB, decided September 10, 2002).

In the present matter, the appellant is responsible for a vulnerable population and holds a position of trust, *i.e.*, the maintenance of facilities for residents who suffer from a variety of medical conditions. On the morning of an extremely cold day, the appellant received three "DIN" orders to attend to a lack of heat and snow and ice issues at three separate cottages on the VDC campus. Instead of following the appointing authority's policy of immediately taking care of these "DIN" orders, the appellant was found sleeping, which placed these vulnerable residents at risk. Further, when an Assistant Supervisor enlisted the appellant's help for sanding the campus, the appellant failed to inform her that there were multiple maintenance issues that needed immediate attention which did not allow her to prioritize these tasks and seek other assistance. Additionally, even after completing the sanding task and being aware of the DINs, the appellant chose

to "warm up" and "clean up the shop" before attending to these issues. In fact, the appellant only proceeded to complete the second DIN order after being ordered by the Assistant Supervisor several hours after he was initially informed of these issues. The appellant also signed out for the day at 12:38 p.m. and advised the Telephone Operator that he was going home sick but falsified his timesheet by recording the time that he left as 1:30 p.m. All this occurred less than two months after an incident which resulted in his entering into a Last Chance Agreement. Therefore, even assuming the appellant was not subject to a Last Chance Agreement, the seriousness of the offenses in this case, especially in light of his recent 30 working day suspension, provide a sufficient basis to warrant his removal. Further, the fact that the appellant, in essence, violated the Last Chance Agreement only a few months after entering into it provides a further aggravating factor which supports his removal. Under these circumstances, the Commission concludes that the penalty imposed by the appointing authority is neither unduly harsh nor disproportionate to the offenses and should be upheld.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing Christopher Higgins was justified. Therefore, the Commission affirms that action and dismisses his appeal.

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 19th DAY OF AUGUST, 2015

Robert M Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 7012-14
AGENCY DKT. NO. 2014-1790

IN THE MATTER OF CHRISTOPHER HIGGINS, DEPARTMENT OF HUMAN SERVICES, VINELAND DEVELOPMENTAL CENTER.

Gerald Batt, Esq., for appellant Christopher Higgins, (Lipman, Antonellie, Batt, Gilson, Rothman & Capasso, attorneys)

Anthony DiLello, Deputy Attorney General, for respondent, Department of Human Services, Vineland Developmental Center (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: May 15, 2015 Decided: June 26, 2015

BEFORE **W. TODD MILLER,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter concerns the appeal of a disciplinary matter against appellant, a repairer with the Vineland Developmental Center (VDC). Appellant appealed his removal, effective January 1, 2014, on charges sustained in Final Notice of Disciplinary Action (FNDA), dated May 6, 2014, including N.J.A.C. 4A:2.2.3(a) Conduct Unbecoming a Public Employee, N.J.A.C. 4A:2.2.3(a)11 Other Sufficient Cause -

Sleeping on Duty (B-3); Failure or Excessive Delay in carrying out an order which would not result in danger to persons (B-4); Falsification of Attendance Records (C-8), and a violation of other (unspecified) rule, regulation, policy, procedure order or administrative decision (E-1).

On June 6, 2014, this matter was received by the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14-B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was heard on December 30, 2014 and February 11, 2015. Closing briefs were submitted and the record closed on May 15, 2015.

FACTUAL BACKGROUND

On January 4, 2014, appellant was working as a repairer for the VDC. It was below zero degrees and snowing heavily. At 8:17 a.m. Amanda Hill, front desk operator for the VDC, received a maintenance request (a/k/a "Do It Now" or DIN—meaning high priority service call) that snow had to be removed from the door(s) at the Reaves Cottage (R-4). At 8:25 a.m. and 8:27 a.m. another DIN request was directed to Hill regarding heat complaints at the Reeves and Wolverton Cottages (R-4). Hill testified that she communicated all of these calls (DINs) to appellant shortly after she received them. Appellant recalled getting the calls from Hill on his cell phone.

Mary Potter, (Potter) Assistant Supervisor, testified. The VDC had a special event scheduled for the residents. Potter wanted the walkways sanded or salted due to the ice and snow. Potter was rounding up staff and maintenance personnel to complete this task at around 9:00 a.m.

Potter entered the carpenter shop at about 9:05 a.m. and observed appellant sitting in the office recliner chair with his feet up on the desk. He was covered over with his winter coat pulled up to his neck. He appeared to be sleeping as his eyes were closed and it took him some time to get himself together, when she walked in. Potter explained that she needed help with salting and sanding the walkways. Appellant remained reclined with his feet up, according to Potter. Potter explained that appellant

stated you better call the grounds crew to move the sand. Potter told appellant she was not calling the grounds crew because he (appellant) needed to get up and help get the sand buckets to the auditorium sidewalks. Appellant did not respond and Potter asked him if he was refusing her directions to which he said "no" he wasn't. Potter left the office and waited outside for appellant. Appellant came outside and complied with Potter's request. Potter and appellant spread sand and salt on the walkways until about 10:00 a.m. During cross-examination Potter explained that appellant responded to her arrival in his office within twenty seconds (not one minute - R-10) and that he came outside to spread sand within two minutes.

Potter recalled the walkways near the auditorium had several inches of ice under the snow. It was not safe for the disabled residents to walk on, even after the walkways were sanded, so the event was cancelled.

Appellant testified that his duties start at 8:00 a.m. Appellant's title is a repairer and his shift is from 8:00 a.m. to 4:30 p.m. One of his first duties of each day is to clean the sewerage traps or pits around VDC, because they get clogged with tissue paper and other sewerage debris. If they are not cleaned daily sewage spills or overflows might occur.

At 8:05 a.m. appellant started his routine of cleaning the sewerage pits in zero degree snow-driven weather. VDC has two sewerage pits. They are generally cleaned out twice per day. The first pit is behind the electric shop on Landis Avenue. This is located about three city blocks from the maintenance shop. This task took about twenty minutes. The second pit is near the soccer fields. This task took appellant about thirty minutes.

Shortly before 9:00 a.m., appellant walked back to the maintenance shop. He cleaned up because the pits contain raw sewage. Appellant testified that he was "frozen" so he took a break and sat in the office recliner which is right next to the heater. He pulled his jacket up over his body to capture and hold the heat coming off the heating unit around his body, so he could warm up.

Appellant received a call from the switchboard that Potter was looking for him. He remained in the recliner warming up for a few minutes when Potter came into the maintenance office. Potter requested that appellant help spread sand and salt around the facility. Appellant recalled distributing salt and sand with Potter until about 10:00 a.m.

At 10:00 a.m. appellant returned to the shop and warmed up in the same fashion he did earlier until 10:15 a.m. At 10:15 appellant starting working on the maintenance requests (aka "Do It Now" or DINs) placed earlier by receptionist Amanda Hill. These came in while he was cleaning the sewerage pits and spreading sand. Appellant went to the Reaves Cottage to remove ice and snow from the front door. The door could not open due to the accumulating snow. It presented an emergency egress hazard. This task took about an hour. Appellant headed back to the shop at about 11:00 a.m. At 11:50 a.m. Potter confirmed that appellant had gone to Reaves Cottage earlier that morning (R-10), but he had not arrived at Landis Cottage.

From 11:15 a.m. to 11:50 a.m. appellant again warmed up as he did earlier; completed paperwork connected with his DIN orders; and cleaned up the shop all while attempting to dry off and get warm. At 11:50 a.m. appellant received a call from Potter to go to Landis Cottage for a heating service (DIN) call. Appellant arrived at Landis Cottage at around noon. At 12:10 p.m. Potter confirmed that appellant had gone to Landis Cottage at around noon, but only after she told him to go (R-10). Appellant triggered a call for heat at six thermostats and each time the heating system responded properly. The heating complaint was resolved by appellant.

Appellant received another DIN regarding heat at the Wolverton Cottage. Appellant arrived at the Wolverton Cottage at around 12:15 p.m. He triggered a call for heat at all the thermostats and the heat responded appropriately. Again, the heating complaints were resolved. Appellant finished at the Wolverton Cottage at around 12:30 p.m.

At 12:38 p.m. appellant went to the switchboard and told Amanda Hill (the receptionist) that he was going home ill. The VDC maintains an employee sign in/sign out log at this location. Appellant signed out 12:38 p.m. for 1:30 p.m. Appellant claims he told Hill that he was going to clean out the pits one more time before he went home. This would take him about forty-five minutes. Hill was unclear if this discussion occurred. Hill saw appellant walk out the front door but did not know where he went thereafter. There were no eye witnesses whether appellant went to clean out the pits for a second time or whether he went straight home at 12:38 p.m. Nor did anyone dispute appellant's testimony that it is standard procedure to clean the pits twice per day.

As additional evidence, the VDC asserts that appellant admitted right before his departmental Loudermill[1] hearing that he left for home at 12:38 p.m. Prior to the Lourdermill hearing the parties engaged in settlement discussions. The employee relations staff, Linda Parthemer, (Parthemer) was presenting the case for VDC. Appellant was represented by union staff. Appellant contended that he could produce eyewitnesses confirming that he did not leave the facility early at 12:38 p.m. but rather left at 1:30 p.m. In conjunction with discussing the facts and proofs, an offer to settle the case was being discussed wherein appellant would resign and in exchange the VDC would not oppose his application for unemployment benefits. It is clear that appellant disputed the VDC allegation that he left early because he was looking for eye-witnesses that he cleaned the pits from 12:38 p.m. to 1:30 p.m. When he could not find an eyewitness he opted to discuss the resignation proposal, which obviously did not come to fruition because the case is still contested. Parthemer claimed in this (OAL) proceeding that appellant blurted out an admission during the Loudermill prehearing discussions that he really left for home at 12:38 p.m.

Appellant denies that he made such admission or statement to Parthemer before the Loudermill hearing (See transcript annexed to appellant brief dated May 11, 2015;

[1] Referring to Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) which involves the employee's right to a departmental hearing prior to any discharge action. It includes notice of the charges, an explanation of the employer evidence and the employee's right to present their side of the story.

Exhibit A). Alternatively, even if the statement was made by appellant, it was made in the context of developing a settlement, and is therefore is inadmissible.

The Loudermill hearing was delayed for at least forty minutes while the parties discussed their proofs and theory of their case. The settlement was being crafted around the strengths and weaknesses of each party's proofs. When appellant could not find a corroborating witness, he became more inclined to take the settlement offer and admit wrongdoing (e.g., Parthemer recalled "I gave him a half an hour after the union rep and again you **might think this is part of negotiations**, but the union rep at one point persisted that Chris went back to the shop after he signed out ..."). Appellant asserts that since a settlement was not reached, it is improper and prejudicial for the VDC to use the open and forthright settlement discussions against appellant in the de novo hearing.

There was no distinct and measurable delineation of when the settlement discussions actually began, prior to the Loudermill hearing. It is most common that parties should, and do, try to settle cases before hearings. There is no formal procedure, form, rule, or announcement as to how or when these discussions commence, except they commonly occur at hearings. In this case there were, indisputably, prehearing settlement discussions that involved appellant and his union representative. And in the absence of specific facts, rules, procedures, orders, etc., I am most inclined to hold that all discussions prior to the Loudermill hearing were settlement in nature See, Evid. R. 408(1). In the absence of more formality, Parthemer's state of mind may not have perceived that settlement negotiations were occurring. Conversely, appellant and his union representative were trying to get the best deal through settlement discussions involving a variety of concepts, facts, and outcomes. Thus it is possible that one side was discussing settlement while the other side was not. Moreover, appellant clearly denied making any such admission as described by Parthemer. Thus, I would have to rule out settlement discussions first and thereafter engage in credibility determinations as to the existence of the alleged admission by appellant. Based upon this record, I **FIND** that the discussions did involve, to some degree, prehearing settlement negotiations as envisioned under Evid.

R. 408. I therefore will not consider the settlement discussions made by appellant just before his Loudermill hearing as admissible[2] admissions in this matter.

The VDC also charged appellant with falsification of time records. Appellant filled in his timesheet indicating that he took lunch from 12:00 p.m. to 12:30 p.m. The VDC asserted during the hearing that appellant's time entries are fraudulent because by his own admission, he did not take lunch between 12:00 p.m. and 12:30 p.m. Appellant was admittedly working between 12:00 p.m. and 12:30 p.m. Appellant explained that everyone in the maintenance shop enters one-half hour for lunch each day from 12:00 p.m. to 12.30 p.m. no matter what they are doing at the time. It is a standard pro forma lunch entry so the half hour for lunch is unpaid. The VDC disputed this claim.

APPLICABLE LAW

The burden of persuasion rests with the agency in enforcement proceedings to prove violations of administrative regulations. Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The agency must prove its case by a preponderance of the credible evidence, which is the standard in proceedings before an administrative agency. Atkinson v. Parsekian, 37 N.J. 143 (1962). An appeal requires the Office of Administrative Law to conduct a de novo hearing and to determine the appellant's guilt or innocence, as well as the appropriate penalty. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987); Cliff v. Morris County Bd. of Social Serv., 197 N.J. Super. 307 (App. Div. 1984).

[2] In Rynar v. Lincoln Transit Co., 129 N.J.L. 525, 528 (1943) the court held "[T]here is a general rule that settlements and compromises are not in themselves evidence as admissions of liability. Hawthorne v. Eckerson Co. (appeal from United States District Court, Vermont), 77 Fed. Rep. (2d) 844. (See particularly the discussion in the dissenting opinion which seems to be a concurrence with the majority view on this point.) Attempts at compromise have long been favored in the law. 3 Blk. Com. 299. "The rule undoubtedly is, that an offer to pay any sum by way of compromise of a pending controversy, is not to be given in evidence against the party making it. This rule is founded in policy, that there may be no discouragement to amicable adjustment of disputes, by a fear, that if not completed, the party amicably disposed may be injured." Gerrish v. Sweetser, 4 Pick. 373, 377. The law favors compromises and because it favors them does not permit the bare fact of their occurrence to be interpreted as a guilty admission." See also, Evid. R. 408.

UNBECOMING CONDUCT

"Unbecoming conduct" is broadly defined as any conduct that adversely affects the morale or efficiency of the governmental unit or that has a tendency to destroy public respect and confidence in the delivery of governmental services. In re Appeal of Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). Unbecoming conduct may include behavior that is not in accord with propriety, modesty, good taste or good manners, or behavior that is otherwise unsuitable, indecorous or improper under the circumstances. Conduct unbecoming a public employee may be less serious than a violation of the law, but it is inappropriate on the part of the public employee. Ferrogine v. State Dep't of Human Serv., Trenton Psychiatric Hosp., CSV 2441-98, Initial Decision[3] (April 17, 1998), modified, Merit System Board (July 6, 1998). It is a fact-sensitive determination rather than one based on a legal formula.

CONCLUSIONS

Appellant is charged with N.J.A.C. 4A:2.2.3(a) Conduct Unbecoming a Public Employee, N.J.A.C. 4A:2.2.3(a)11; Sleeping on Duty (B-3); Failure or Excessive Delay in carrying out an order which would not result in danger to persons (B-4); Falsification of Attendance Records (C-8), and a violation of other (unspecified) rule, regulation, policy, procedure order or administrative decision (E-1).

Appellant testified that he was working from 8:05 a.m. to 9:00 a.m. cleaning the sewerage pits. This testimony was unrefuted. There was no inspection, offsetting appellant's testimony, that the sewerage pits were not cleaned when appellant claims he did. Therefore, I accepted that appellant was actually performing this task in freezing temperatures during a blizzard. If he was working in these conditions, it is plausible and believable that he would return to the shop, remove his cold wet clothing, and sit by the heater for a few minutes to dry off and warm up before he started his next task. Potter stated that appellant was in a recliner, with his eyes closed, and he took a minute to get himself together (R-10). He **appeared** to be sleeping according to Potter.

Potter did not dispute that appellant was wet or cold. Potter was clearly annoyed with appellant's attitude and cooperation. Against all the facts presented, I am not convinced that appellant was actually sleeping as opposed to being cold and trying to warm up. I believe appellant was clearly resting next to the heater. But the proofs are insufficient to establish that he was actually sleeping. I **CONCLUDE** that the VDC did not meet its burden of proof on the B-3 sleeping charge.

From 9:00 a.m. to 10:00 a.m. appellant was working with Potter spreading sand and salt around the VDC. Work performed by appellant during this timeframe is confirmed by Potter. Appellant complained to Potter that he should not have to perform this task because it was the grounds crew job. Appellant can complain that he was working out of title. This is not improper or disciplinary in nature so long as he performed the tasks requested by Potter, which he indisputably did.

From 10:00 a.m. to 11:00 a.m. the VDC witnesses confirmed that appellant completed his DIN involving breaking up the ice and snow around the door(s) at the Reaves Cottage. Since appellant was with Potter from 9:00 a.m. to 10:00 a.m. this task could not have been completed any sooner.

From 11:00 a.m. to 11:50 a.m. appellant testified he was warming up back in the shop due to the extreme cold temperatures and cleaning up the shop at the same time. No VDC witnesses refuted appellant's testimony.

Shortly before noon-time appellant was ordered by Potter to go to Reaves and Wolverton Cottage for a DIN "no heat" call. Again the VDC witnesses confirmed that appellant went to Reaves and Wolverton cottages and completed his duties; albeit not as timely as management desired. I **CONCLUDE** that the VDC failed to meet its burden of proof as to the (B-4) charge - Failure or Excessive Delay in carrying out an order which would not result in danger to persons. Appellant was working on many calls and tasks on what was undeniably an extreme weather day. He may have taken

[3] http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0

longer breaks than usual, due to the weather. But he appeared to be reasonably responding to all the calls and requests, weather considered.

The VDC alleges that appellant falsified his timesheets (C-8), because he entered that he left work at 1:30 p.m. when in reality he left work at 12:38 p.m. The VDC proofs consist of the timesheets alone without any other specific or reliable corroboration. Appellant explained that he was feeling ill and was going to go home sick after he finished cleaning the sewerage pits at 1:30 p.m. No witnesses confirmed or refuted appellant's actions or whereabouts after he signed out at 12:38 p.m. No maintenance staff or maintenance supervisor testified where appellant was or wasn't after 12:38 p.m. No one inspected the sewerage pits to see if appellant actually did the work between 12:38 p.m. and 1:30 p.m. If the sewerage pits were cleaned out for a second time, then appellant did work. Conversely, if they were not cleaned out, he must have left early. Parthemer thought appellant's shift ended at 1:30 p.m. (R-8) so he was signing out about forty-five minutes early. Parthemer was incorrect in her understanding of the facts. Actually, appellant's shift ended at 4:30 p.m. (R-6). Therefore, appellant gained very little by signing out at 1:30 p.m. Indeed, appellant recorded three and one-half hours of sick time on his timesheet (R-6) which is consistent with his testimony and the facts. The fact that appellant actually recorded three and one-half hours of sick time added to the believability of his testimony—that he was not stealing time or fabricating time records. The was no discernible motive to fabricate forty-five minutes of sick time while also recording three and one-half hours of sick time.

Finally, the VDC alleged during the course of the hearing that appellant also falsified his timesheets because he entered lunch from 12:00 p.m. to 12:30 p.m. (R-6); when the facts revealed that he was working instead. This charge is spurious at best and is not contained in the FNDA (See, letter from Deputy Attorney General, (DAG) DiLello dated February 25, 2015). Post-hearing copies of a substantial number of timesheets from the maintenance shop confirm appellant's testimony that all maintenance staff routinely enters one-half hour for lunch from 12:00 p.m. to 12:30 p.m. (See, letter of DAG DiLello dated February 28, 2015, with attachments—marked as C-

1). Moreover, working through one's lunch period does not appear to be a disciplinary infraction. Lunch is personal time and one can work and take lunch at the same time, albeit even if it is without pay, and not be guilty of falsification. Merely entering a period of time that one is not supposed to get paid on a timesheet is not falsification of records.

I **CONCLUDE** that the charge of Falsification of Attendance Records (C-8) and Conduct Unbecoming a Public Employee must be **DISMISSED** for insufficient proofs.

I am mindful and agree that appellant appeared contumacious and disgruntled towards management. This was particularly problematic and frustrating on an extreme weather day. But appellant was confirmed by VDC staff to have spread salt and sand for an hour, shoveled snow around cottage doorways for an hour, and visited three cottages for heat calls. Thus appellant was verified as working from 9:00 am to 12:38 p.m. That leaves the gaps in time from 8:00 a.m. to 9:00 a.m. and 12:38 p.m. to 1:30 p.m. and there was insufficient proofs to sustain the charges that appellant was not working or fabricated forty-five minutes of sick time.

ORDER

Based upon the foregoing, all disciplinary charges filed against appellant are **DISMISSED.** Appellant is reinstated to his former position with back pay, service credit and all other emoluments. The amount of back pay awarded is to be reduced and mitigated to the extent of any income earned or that could have been earned by appellant during this period. Proof of income shall be submitted by or on behalf of appellant to the appointing authority within thirty days of issuance of this decision. Pursuant to N.J.A.C. 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, 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.

June 26, 2015
DATE

W. TODD MILLER, ALJ

Date Received at Agency: June 26, 2015

Date Mailed to Parties:

/jb

WITNESSES AND DOCUMENTS IN EVIDENCE

WITNESSES

For Appellant:

Christopher Higgins

For Respondent:

Amanda Hill
Mary Potter
Linda Parthemer

EXHIBITS

For Appellant:

None

For respondent:

R-1 Preliminary Notice of Disciplinary Action
R-2 Final Notice of Disciplinary Action
R-3 Intentionally Omitted
R-4 Operator's Log
R-5 Statement of Amanda Hill
R-6 Building Maintenance Sign-in-Sheet
R-7 Intentionally Omitted

R-8 Telefax From Linda Parthemer

R-9 Prior Disciplinary Action

R-10 Narrative Report from Mary Potter

R-11 Intentionally Omitted

R-12 Appellant's Disciplinary History

R-13 Intentionally Omitted

R-14 Prior Disciplinary Action

R-15 Intentionally Omitted

R-16 Table of Offenses and Penalties

By the ALJ:

C-1 Time Records for Maintenance Staff