



STATE OF NEW JERSEY

In the Matter of Randy Butler
Woodbine Developmental Center,
Department of Human Services

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC DKT. NOS. 2018-1780, 2018-
1781 and 2018-1782
OAL DKT. NOS. CSV 00268-18,
00269-18 and 00270-18
(Consolidated)

ISSUED: FEBRUARY 8, 2019 BW

The appeals of Randy Butler, Human Services Assistant, Woodbine Developmental Center, Department of Human Services, removals effective December 29, 30, and 31, 2017, on charges, were heard by Administrative Law Judge Tama B. Hughes, who rendered her consolidated initial decision on December 31, 2018. 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 February 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 find that the granting of the motion for summary decision was proper and affirms the removals of Randy Butler.

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 FEBRUARY, 2019

Deirdre' 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
GRANTING SUMMARY
DECISION
(CONSOLIDATED)

**IN THE MATTER OF RANDY BUTLER,
DEPARTMENT OF HUMAN SERVICES,
WOODBINE DEVELOPMENTAL
CENTER,**

OAL DKT. NO. CSV 00268-18
AGENCY DKT. NO. 2018-1780

AND,

**IN THE MATTER OF RANDY BUTLER,
DEPARTMENT OF HUMAN SERVICES,
WOODBINE DEVELOPMENTAL
CENTER,**

OAL DKT. NO. CSV 00269-18
AGENCY DKT. NO. 2018-1781

AND,

**IN THE MATTER OF RANDY BUTLER,
DEPARTMENT OF HUMAN SERVICES,
WOODBINE DEVELOPMENTAL
CENTER.**

OAL DKT. NO. CSV 00270-18
AGENCY DKT. NO. 2018-1782

William A. Nash, Esq., for appellant (Nash Law Firm, LLC, attorneys)

Shareef M. Omar, Deputy Attorney General for respondent (Gurbir S. Grewal,
Attorney General of New Jersey, attorney)

Record Closed: November 16, 2018

Decided: December 31, 2018

BEFORE TAMA B. HUGHES, ALJ:

STATEMENT OF THE CASE

This consolidated proceeding consists of three separate disciplinary actions brought against Randy Butler, ("Butler" or "appellant"), a Human Services Assistant with the Woodbine Developmental Center (respondent). Appellant appeals respondent's findings and sustained charges in all three actions of violations of N.J.A.C. 4A:2-2.3(A)4 (Chronic or Excessive Absenteeism or Lateness), N.J.A.C. 4A:2-2.3(A)6 (Conduct unbecoming of public employee), and N.J.A.C. 4A:2-2.3(A)12 (Other Sufficient Cause - specifically, violation of Section A-4 of the Department of Human Services Disciplinary Action Program). Additionally, appellant challenges the severity of the recommended disciplinary action of removal.

PROCEDURAL HISTORY

On or about September 23, 2016, respondent served upon appellant, a Preliminary Notice of Disciplinary Action (PNDR), as amended on February 22, 2017, which sought his removal. A second PNDR was served upon appellant on or about December 15, 2016, as amended on February 22, 2017, which also sought his removal. A third PNDR was issued on or about February 9, 2017, which also sought his removal. All three PNDR's charged appellant with chronic or excessive absenteeism from work, without pay. A departmental hearing was held on November 14, 2017, in all three matters. On November 29, 2017, respondent issued a Final Notice of Disciplinary Action (FNDA) in all three disciplinary actions, terminating appellant's employment effective that same date. All three matters were filed with the Office of Administrative Law (OAL) as a contested case on January 10, 2018, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On May 3, 2018, pursuant to N.J.A.C.1:1-17.1(a), the undersigned consolidated the three matters in the interest of efficiency and economy, and pursuant to the party's joint request.

On or about October 1, 2018, respondent filed a Motion for Summary Decision for the first and second disciplinary actions (OAL Dkt. Nos. 00268-18 and 00269-18). Upon receipt of appellant's opposition and respondent's reply, the record closed on November 16, 2018.¹

FACTUAL DISCUSSION AND FINDINGS

Based on the undisputed documents presented by the parties and for purposes of deciding the Motion for Summary Decision, I **FIND** the following **FACTS**:

1. Appellant has been employed by the respondent since 2008 - currently holding the full-time position of Health Services Assistant ("HSA"). (Butler Certification, ¶ 1.) He is a member of the American Federation of State, County and Municipal Employees, AFL-CIO. (AFSCME) (Butler Certification, ¶ 2.)
2. Respondent and the AFSCME are parties to a Collective Bargaining Agreement (CBA), which sets forth the terms of its' membership employment and benefits. As part of the CBA, members are entitled to, among other things, a certain number of enumerated sick, administrative and vacation leave. Members are required to abide by the CBA in filing for and exercising their rights to such leave. (Butler Certification – Exhibit A.)
3. Under the terms of the CBA, full-time employees are entitled to three (3) days of administrative leave; fifteen (15) days of sick leave; and fifteen (15) days of vacation leave.² Additionally, a permanent employee may, upon written application setting forth the reason, be granted a leave of absence without pay

¹ Appellant filed a sur-reply on November 26, 2018, which was not accepted by the Tribunal.

² Under Article 13, Paragraph F(4), with certain exception, in all cases of illness, an employee is required to notify his supervisor of the reason for their absence at the earliest possible time but in no event less than one (1) hour before the employees' reporting time. Failure to report absences in accordance with the policy or abuse of sick leave privileges on the part of any employee may be cause for disciplinary action. Additionally, under section 4(b), in circumstances where an employee is absent on sick leave for five (5) or more consecutive working days, submission of verification of an illness by a physical is required to substantiate the use of sick leave. When sick leave is exhausted, vacation and administrative leave balances may be utilized for absences due to illness upon request of the employee. Article 13, Paragraph F(9). [emphasis added]

for a maximum period of one (1) year by the appointing authority with the approval of the Civil Service Commission. (Butler Certification – Exhibit A.)

4. The New Jersey Department of Human Services has a Disciplinary Action Program (Policy) which provides a table of offenses and penalties. One of the offenses identified is found under Section A4 (chronic or excessive absenteeism from work without pay.) For the first offense, the penalty range is counselling up to written warning. For a second offense, the penalty range is written warning up to official reprimand. For a third offense, the penalty range is official reprimand up to removal. For a fourth infraction, the penalty is removal. (Shareef M. Omar, Esq. (Omar) Certification – Exhibit C.)
5. In 2009, appellant received a written warning for chronic or excessive absenteeism in violation Section A4 of the Policy. (Omar Certification – Exhibit E.)
6. In 2010, appellant received an official reprimand and a five-day suspension for a second infraction of chronic or excessive absenteeism from work in violation of Section A4 of the Policy. (Omar Certification – Exhibit F.)
7. In 2010, appellant was disciplined a third time for chronic or excessive absenteeism from work in violation of Section A4 of the Policy and served with a PNDR. The matter settled and appellant received a twenty-day suspension. (Omar Certification – Exhibit G.)
8. In April 2013, appellant was disciplined a fourth time for chronic or excessive absenteeism from work in violation of Section A4 of the Policy and served with a PNDR. The PNDR was subsequently amended in October 2013. The disciplinary action sought by respondent was removal. A departmental hearing was held on October 15, 2013. On December 6, 2013, a FNDA was issued

with a sustained charge of violation of Section A4 of the Policy. Appellant appealed this determination.³ (Omar Certification – Exhibits H and I.)

9. In June 2013, appellant was charged with a fifth violation of chronic or excessive absenteeism from work in violation of Section A4 and served with a PNDR. The disciplinary action sought by respondent was removal. A department hearing was held on October 15, 2013. On December 6, 2013, a FNDA was issued with a sustained charge of violation of Section A4 of the Policy.⁴ Appellant appealed this determination. (Omar Certification – Exhibit I.)
10. In October 2013, appellant was charged with a sixth violation of chronic or excessive absenteeism from work in violation of Section A4 and served with a PNDR. The disciplinary action sought by respondent was removal.
11. A departmental hearing was held on October 15, 2013. On December 6, 2013, a FNDA was issued with a sustained charge of violation of Section A4 of the Policy. (Omar Certification – Exhibit J.) Appellant appealed this determination.
12. All three disciplinary actions (A4.4, A4.5 and A4.6) were transmitted to the OAL on January 14, 2014, to be heard as contested cases. On January 14, 2015, the parties entered into a global Settlement Agreement wherein the Policy violations of Section A4, in all three disciplinary actions (A4.4, A4.5 and A4.6) FNDA's, were sustained. In lieu of termination, appellant was suspended for six months without pay, with credit for time served, and concurrent time on each count. (Omar Certification – Exhibits H, I and J.)
13. The Settlement Agreement, Paragraph C(4) states, in pertinent part: "If appellant resumes his employment at Woodbine, he fully understands that any

³ The FNDA, dated December 6, 2013, encompassed the charges from both the fourth and fifth PNDA.

⁴ See footnote 3.

future time and attendance infractions will result in his removal . . . ” (Omar Certification – Exhibits H, I and J.)

14. The Settlement Agreement, Paragraph F, states, in pertinent part: “Except for the assessment of Randy Butler’s disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party.” (Omar Certification – Exhibit H, I and J.)
15. The Settlement Agreement, Paragraph G, specifically waived, among other things, any and all claims that appellant may have under the Family Leave Act. (Omar Certification – Exhibit H, I and J.)
16. On July 28, 2016 and August 18, 2016, appellant called out sick. As of the week of July 23, 2016, appellant had a sick leave balance of zero (“0”), however, he still had administrative and vacation leave available.⁵ Appellant’s absence was marked as “UW” or “unauthorized absence” and was without pay. (Omar Certification – Exhibits U and T.)
17. In September 2016, respondent issued a PNDR charging appellant with violation of: N.J.A.C. 4A:2-2.3(a)12 – specifically Policy Section A4; N.J.A.C 4A:2-2.3(a)4 (chronic or excess absenteeism or lateness); and N.J.A.C. 4A:2-2.3(a)6 (conduct unbecoming a public employee) for calling out sick on July 28, 2016 and August 18, 2016. This was the seventh disciplinary action brought against appellant for alleged violation of Policy Section A4. The PNDR was subsequently amended in February 2017. The disciplinary action sought by respondent was removal. (Omar Certification – Exhibits K and L.)
18. A departmental hearing was held in the matter on November 14, 2017, and thereafter, on November 29, 2017, a FNDA was issued with sustained charges of violation of N.J.A.C. 4A:2-2.3(a)4, N.J.A.C. 4A:2-2.3(a)6, and N.J.A.C. 4A:2-

⁵ Under the CBA, employees are required to take certain proactive measures to have such time applied in lieu of sick leave.

2.3(a)12 – specifically violation of Policy Section A4. (Omar Certification – Exhibits K, L and O.) Appellant timely appealed this determination.

19. On October 20, 2016 through October 23, 2016, respondent called out sick. (Omar Certification – Exhibits T, Omar Second Certification – Exhibit A; Butler Certification, ¶ 25.) As of the week of July 23, 2016, appellant had a sick leave balance of zero (“0”) and by October 15, 2016, he had used all of his vacation and administrative leave. (Omar Certification – Exhibits V and T.) Appellant provided respondent with a doctor’s note for the days in question. (Butler Certification ¶ 25; Omar Second Certification – Exhibit B.)
20. In December 2016, respondent issued a PNDR charging appellant with violation of: N.J.A.C. 4A:2-2.3(a)12 – specifically Policy Section A4; N.J.A.C. 4A:2-2.3(a)4 (chronic or excess absenteeism or lateness); and N.J.A.C. 4A:2-2.3(a)6 (conduct unbecoming a public employee). This was the eighth disciplinary action against respondent for alleged violation of Policy Section A4. The PNDR was subsequently amended in February 2017. The disciplinary action sought by respondent was removal. (Omar Certification – Exhibit M.)
21. A departmental hearing was held on November 14, 2017 and thereafter, on November 29, 2017, a FNDA was issued with sustained charges of violation of N.J.A.C. 4A:2-2.3(a)4, N.J.A.C. 4A:2-2.3(a)6 and N.J.A.C. 4A:2-2.3(a)12 – specifically violation of Policy Section A4 (Omar Certification – Exhibit P.) Appellant timely appealed this determination.⁶

⁶ In February 2017, respondent issued a PNDR charging appellant with violation of N.J.A.C. 4A:2-2.3(a)12 – specifically Policy Section A4, N.J.A.C. 4A:2-2.3(a)4 (chronic or excess absenteeism or lateness) and N.J.A.C. 4A:2-2.3(a)6 (conduct unbecoming a public employee). This was the ninth instance that respondent had been charged with violation of Policy Section A4. The disciplinary action sought by respondent was removal. (Omar Certification – Exhibit N.) A departmental hearing was held on November 14, 2017, and thereafter, on November 29, 2017, a FNDA was issued with sustained charges of violation of N.J.A.C. 4A:2-2.3(a)4, N.J.A.C. 4A:2-2.3(a)6 and N.J.A.C. 4A:2-2.3(a)12 – specifically violation of Policy Section A4) (Omar Certification – Exhibit Q.) Appellant timely appealed this determination. This matter, which is found under OAL Docket No. CSV 00270-18, is not encompassed within the instant motion.

22. In 2013, appellant applied for and received FMLA. There is nothing in the record to indicate that appellant requested or applied for FMLA or a leave of absence without pay in accordance with the CBA in 2016.

LEGAL ANALYSIS AND CONCLUSION

Summary decision is the administrative counterpart to summary judgment in the judicial arena. N.J.A.C. 1:1-12.5 provides that summary decision should be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. In order to defeat a summary decision motion, the adverse party must respond by affidavits setting forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary hearing. Use of the summary procedure is aimed at the swift uncovering of the merits and either their effective disposition or their advancement toward a prompt resolution by trial. Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954).

The New Jersey Supreme Court encouraged trial-level courts not to refrain from granting summary judgment when the proper circumstances present themselves. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 541 (1995). While cautioning that a judge should not weigh the truth of the evidence or resolve factual disputes at this early stage of the proceedings, the court clarified that when the evidence is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment. Id. at 540. Appellate courts recognize that “[a]n evidentiary hearing is mandated only when the proposed administrative action is based on disputed adjudicatory facts.” Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 120 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996).

I **FIND** that under the Brill standards this matter is appropriate for summary disposition. The allegations are supported by tangible evidence and the facts presented by the appellant in his opposition papers are insufficient to raise disputed facts in the record. Lo

Russo v. State-Operated Sch. Dist. of Jersey City, Essex County, 97 N.J.A.R.2d (EDU) 505, 506 (citing Borough of Franklin Lakes v. Mutzberg, 226 N.J. Super. 46, 57 (App. Div. 1988)).

Public employees' rights and duties are governed and protected by the provisions of the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, and the regulations promulgated pursuant thereunder. N.J.A.C. 4A:1-1.1 et seq. However, public employees may be disciplined for a variety of offenses involving their employment, including the general causes for discipline as set forth in N.J.A.C. 4A:2-2.3(a). An appointing authority may discipline an employee for sufficient cause, including failure to obey laws, rules and regulations of the appointing authority. N.J.A.C. 4A:2-2.3(a)(12). If sufficient cause is established, then a determination must be made on what is a reasonable penalty.

In an appeal concerning major disciplinary action, the burden of proof is on the appointing authority to show that the action taken was justified. N.J.S.A. 11:2-21 and N.J.A.C. 4A:2-14(a). The burden is to establish by a preponderance of the competent, relevant, and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk License Revocation, 90 N.J. 550 (1982).

Here, respondent sustained charges against appellant for chronic or excessive absenteeism or lateness (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) - specifically, violation of Section 4A-4 of the New Jersey Department of Human Services Disciplinary Action Policy.)

Appellant asserts that there are genuine issues of material fact that exists which would preclude the granting of summary decision. He further argues that respondent has failed to demonstrate the negative impact his absences had on the workplace and improperly includes, in his disciplinary history, sick leave which was sanctioned under FMLA.

It is undisputed that appellant has, over the years, had a lengthy history of chronic or excessive absenteeism which dates back to 2009. Since 2009, he has incurred six sustained charges of chronic or excessive absenteeism. While appellant argues that it is inappropriate

to consider his absences in 2013 as he was protected under FMLA, given the Settlement Agreement which specifically stated that the charges would be counted towards his disciplinary record and appellant's waiver of any claim under FMLA, this argument lacks merit. Even assuming arguendo the 2013 charges were taken out of the disciplinary equation - he incurred three other sustained charges for the same conduct prior to 2013. Additionally, there is nothing in the record to suggest that appellant applied for and was granted FMLA in 2016, which would cover the absences which are the subject matter of this motion.

While appellant does not agree that he was out of work without authorization in July/August 2016, the undisputed "call records" for the dates in question reflect otherwise. Additionally, while it appears that appellant had at his disposal administrative and vacation time available to use in lieu of calling out sick, there is nothing in the record to reflect that appellant affirmatively took such measures to utilize the same.

With regard to his absences in October 2016, under the CBA, a doctor's note is required only if an employee is absent from work for five or more consecutive working days. In such case, the note would be used to substantiate the use of an employee's "sick leave." While he was only out for three consecutive days, appellant provided a doctor's note. Regardless, as of that date and time, he had already exhausted his sick leave time as well as all of his vacation and administrative leave. Without any available time left, his absences could not be applied to "sick leave" or any other available leave, and was properly deemed unauthorized absences without pay.

An employee may be subject to discipline for chronic or excessive absenteeism. N.J.A.C. 4A:2-2.3(a)(4). 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) (under the Law Against Discrimination (LAD), excess absenteeism need not be accommodated even if it is caused by a disability otherwise protected by the Act); Svarnas v. AT&T Commc'n, 326 N.J. Super. 59, 79 (App. Div. 1999)

([a]n employee who does not come to work cannot perform any of her job functions, essential or otherwise); see also, Dudley v. Calif. Dep't of Transp., 2000 W.L. 328119 (9th Cir. 2000) (a diabetic with frequent absences who failed to provide adequate medical documentation and could not provide a definite return to work date was not a qualified individual.)

Furthermore, in Hatcher v. Northern State Prison, CSV 3684-01, Initial Decision (November 18, 2002), <http://njlaw.rutgers.edu/collections/oal/>, the court held that:

[T]here is no way to reasonably accommodate the unpredictable aspect of an employee's sporadic and unscheduled absences. Svarnas v. AT&T Communications, 326 N.J. Super. 59, 77 (App. Div. 1999). As noted by the New Jersey Supreme Court, "just cause for dismissal can be found in habitual tardiness or similar chronic 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." Ibid. Especially in times of budgetary constraint, it is important that management utilize existing staff efficiently and effectively. "We do not expect heroics," but "being there," i.e., appearing for work on a regular and timely basis is not asking too much. State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 333 (App. Div. 1998).

Here, appellant's five unexcused absences in a ten-month-period would alone warrant disciplinary action under the Policy. When viewed as a whole however, appellant's history of unauthorized absences reveals a pattern of chronic unauthorized absences. Appellant's employer has a right to expect that he would be present at work and ready, willing and able to work. Certainly respondent is not obligated to continue to employ a person who either cannot or will not perform his job duties on a regular basis. Frequent absences cause disruption in the workplace and create a hardship for the remaining employees who must absorb the job duties of a person who cannot or will not perform them—regardless of whether they are "key" employees or not.

For the foregoing reasons, I **CONCLUDE** that the respondent has met its burden of proving the charges chronic or excessive absenteeism or lateness. (N.J.A.C. 4A:2-2.3(a)(4)).

Appellant was also charged with Conduct Unbecoming an Employee (N.J.A.C. 4A:2-2.3(a)(6)), for his repeated unauthorized absences from work. 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)).

For the reasons cited above, I **CONCLUDE** that the respondent has met its burden of proving the charges of Conduct Unbecoming a Public Employee (N.J.A.C. 4A:2-2.3(a)6).

With regard to the charge of Other Sufficient Cause (N.J.A.C. 4A:2-2.3(a)12 – specifically Policy A4.7 - Chronic or Excessive Absenteeism From Work Without Pay) there is no definition in the New Jersey Administrative Code for other sufficient cause. Other sufficient cause is generally defined in the charges against appellant. The charge of other sufficient cause has been dismissed when “respondent has not given any substance to the allegation.” Simmons v. City of Newark, CSV 9122-99, Initial Decision (February 22, 2006), adopted, Comm’r (April 26, 2006), <<http://njlaw.rutgers.edu/collections/oal/final/csv9122-99.pdf>>. The FNDA states that the charge for Other Sufficient Cause is sustained for multiple instances of unauthorized absences from work.

For the reasons previously cited above, I **CONCLUDE** that respondent has met its burden of proving the charge of Other Sufficient Cause Other Sufficient Cause (N.J.A.C. 4A:2-2.3(a)12) , specifically, violation of Section A4 of the New Jersey Department of Human Services Disciplinary Action Policy)

DISCIPLINARY ACTION

Principles of progressive discipline should be considered in the removal actions of civil service employees. Bock, 38 N.J. 500. The determination of whether a specific act supports removal requires an evaluation of the conduct in terms of its relationship to the nature of the position itself and an evaluation of the actual or potential impairment of the public interest that may be expected to result from the conduct in question. Golaine v. Cardinale, 142 N.J. Super. 385, 397 (Law Div. 1976). The frequency, number and continuity of the employer's warnings indicate the progression of the discipline. Id. On appeals from disciplinary action, the Civil Service Commission may redetermine guilt or modify a penalty originally imposed. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980). The Commission is empowered to substitute its own judgment on the appropriate penalty, even if the local appointing authority has not clearly abused its discretion. Id. at 579. The Commission must consider an employee's past record, including both mitigating factors and prior discipline when determining the appropriate penalty to be imposed. Bock, 38 N.J. at 523. The frequency, number and continuity of the employer's warnings, previous discipline and other measures indicate the progression of the discipline.

Here, appellant has been the subject of six prior disciplinary actions for the same conduct at issue here. He received a written warning, official reprimand and two suspensions—the last one for a period of six months. Appellant was clearly placed on notice in the Settlement Agreement which he acknowledged and signed, that any further attendance infractions would result in his removal. As a result of appellant's repeated violation of Section A4 of the Policy, respondent acted properly in terminating the appellant in accordance with the Policy.

Based upon the foregoing disciplinary actions and upon the totality of the record, I **CONCLUDE** that removal is the appropriate penalty. The sustained charges against appellant are serious in nature and major disciplinary action is warranted.

ORDER

It is hereby **ORDERED** that the Department of Human Services, Woodbine Developmental Center's Motion for Summary Decision is **GRANTED** and the removal of Randy Butler from his employment with the Woodbine Developmental Center is hereby **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.

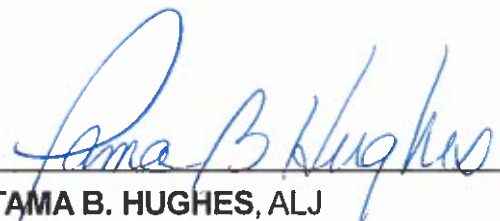
Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**,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

December 31, 2018

DATE

Date Received at Agency:

Date Mailed to Parties:


TAMA B. HUGHES, ALJ
12/31/18

12-31-18

tat/mph

EXHIBIT LIST

Appellant:

Randy Butler Certification

Exhibit A – Agreement (9 pages)

Exhibit B – Interoffice Communication (3 pages)

Exhibit C – Grievance Procedure Form (3 pages)

Respondent:

Shareef M. Omar, Esq. Certification

Exhibit A – Woodbine Developmental Center Information (1 page)

Exhibit B – Cottage Training Technician Job Description (3 pages)

Exhibit C – Department of Human Services Administrative Order 4:08 (22 pages)

Exhibit D – Appellant's Disciplinary History Record (2 pages)

Exhibit E – A4.1 Charge – Written Warning (1 page)

Exhibit F – A4.2 Charge – Official Reprimand (1 page)

Exhibit G – A4.3 Charge – Suspension Settlement (2 pages)

Exhibit H – A4.4 Charge – Suspension Settlement (10 pages)

Exhibit I – A4.5 Charge – Suspension Settlement (11 pages)

Exhibit J – A4.6 Charge – Suspension Settlement (10 pages)

Exhibit K – A4.7 Charge – Preliminary Notice of Disciplinary Action (1 page)

Exhibit L – A4.7 Charge – Amended Preliminary Notice of Disciplinary Action (1 page)

Exhibit M – A4.8 Charge – Preliminary Notice of Disciplinary Action (2 pages)

Exhibit N – A4.9 Charge – Final Notice of Disciplinary Action (1 page)

Exhibit O – A4.7 Charge – Final Notice of Disciplinary Action (1 page)

Exhibit P – A4.8 Charge – Final Notice of Disciplinary Action (1 page)

Exhibit Q – A4.9 Charge – Final Notice of Disciplinary Action (1 page)

Exhibit R – A4.10 Charge – Preliminary Notice of Disciplinary Action (1 page)

Exhibit S – A4.10 Charge – Final Notice of Disciplinary Action (1 page)

Exhibit T – Appellant’s 2016 Yearly Time Keeping Records (1 page)

Exhibit U – Call Logs (4 pages)

Exhibit V – Call Logs (2 pages)

Shareef M. Omar, Esq. (Second Certification)

Exhibit A – Human Services Assistant Job Description (3 pages)

Exhibit B – Doctor’s Note (1 page)