



DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 21<sup>ST</sup> DAY OF DECEMBER, 2022

*Deirdre' L. Webster Cobb*

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Deirdré L. Webster Cobb  
Chairperson  
Civil Service Commission

Inquiries  
and  
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Attachment



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

**INITIAL DECISION**

OAL DKT. NO. CSV 07333-21

AGENCY DKT. NO. 2022-355

**IN THE MATTER OF JAKE LIPKA,  
PENNSAUKEN TOWNSHIP,  
DEPARTMENT OF PUBLIC SAFETY.**

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**Yolanda Lawson**, Staff Representative, AFSCME New Jersey Council 63, for  
appellant Jake Lipka, pursuant to N.J.A.C. 1:1-5.4(a)(6)

**Michael J. DiPiero**, Esq., for respondent Pennsauken Township, Department of  
Public Safety (Brown & Connery, LLP attorneys)

BEFORE **SARAH H. SURGENT**, ALJ:

Record Closed: August 19, 2022

Decided: November 15, 2022

**STATEMENT OF THE CASE**

Appellant Jake Lipka (Lipka) appeals from respondent Pennsauken Township, Department of Public Safety's (Township) disciplinary action terminating his employment as a permanent part-time emergency medical technician (EMT) with the Township's Emergency Services (EMS) Department (Department). Lipka seeks reinstatement and full back pay from June 21, 2021, to present. The Township maintains that Lipka's

termination was warranted due to chronic absenteeism and neglect of duty, which disrupted the Department's operations and budget, demoralized other EMTs, and jeopardized public safety.

### **PROCEDURAL HISTORY**

On June 21, 2021, the Township served Lipka with a Preliminary Notice of Disciplinary Action (PNDA), notifying Lipka of the charges against him: (1) N.J.A.C. 4A:2-2.3(a)4, chronic or excessive absenteeism; (2) Township Policy 118 Section 4, being habitually absent or tardy for any reason; (3) N.J.A.C. 4A:2-2.3(a)7, neglect of duty; and (4) Township Fire Department Standard Operating Procedure (SOP) 108, Article IV, Section 3, neglect of duty, for reporting "off-duty twenty-eight shifts during 2020, and 2021." (P-3.) After a Departmental hearing on July 19, 2021, the Township sustained all of the charges, but reduced the number of reported off-duty shifts to twenty, stating that due to the COVID-19 pandemic (pandemic), "the initially counted shifts totaling eight (8) shifts that Mr. Lipka reported off are not being counted as part of the PNDA scope originally issued to the employee on June 21, 2021." (P-1.) By a Final Notice of Disciplinary Action (FNDA) dated July 28, 2020 (sic – 2021), the Township notified Lipka accordingly, and imposed a penalty of removal effective June 21, 2021. Ibid.

On August 11, 2021, Lipka timely requested a hearing. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on August 30, 2021, to be heard as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. During a pre-hearing conference, the matter was scheduled to be heard January 12 and 13, 2022, with the consent of the parties. However, one of the parties became too ill to attend the January hearing, which was then adjourned with the consent of both parties. Ultimately, the hearing was conducted remotely via video conference on June 9, 2022, due to the ongoing pandemic. The record was held open at the parties' request to allow them to order the transcript of the hearing and submit post-hearing briefs. Their briefs were submitted on August 19, 2022, and the record closed. On September 24, 2022, and three times thereafter, I timely requested an extension of the Initial Decision

forty-five-day deadline, due to my voluminous caseload, which, through an administrative error, was not conveyed to the Acting Director of the OAL until October 6, 2022. Therefore, by an Order of Extension Nunc Pro Tunc dated October 6, 2022, additional time was extended to complete this Initial Decision by November 17, 2022.

**FACTUAL DISCUSSION AND FINDINGS**

These salient points are not in dispute. I therefore **FIND** the following as **FACT**.

Lipka commenced his employment as a permanent part-time EMT with the Township’s Department on January 4, 2018. According to his attendance records, labeled “Approved Time Off,” Lipka took time off from his pre-scheduled shifts on the following dates, for the following reasons. (R-1.) They are listed by me in chronological order, with sick, quarantine, suspensions, and management-mandated personal time off for a fitness-for-duty (FFD) evaluation, with the identified problematic incidents bolded by me.

<b>Incident</b>	<b>Date / Time</b>	<b>Comment</b>
<b>1</b>	<b>Jan 5, 2020, 18:00 to 23:59</b>	<b>Called out, found own [text cut off]</b>
	Jan 5, 2020, 23:59 to 23:59	Off second half/over his hours [omitted from count during fair hearing (T54)]
<b>2</b>	<b>Jan 10, 2020, All Day</b>	<b>C/O Sick</b>
<b>3</b>	<b>Jan 19, 2020, 23:59 to 23:59</b>	<b>MXT to 01/18 [found own coverage (T54)]</b>
<b>4</b>	<b>May 9, 2020, All Day</b>	<b>Sick</b>
<b>5</b>	<b>May 10, 2020, All Day</b>	<b>Sick</b>
<b>6</b>	<b>May 12, 2020, All Day</b>	<b>Sick</b>
<b>7</b>	<b>May 15, 2020</b>	<b>C/O Sick</b>
<b>8</b>	<b>Jul 4, 2020, 06:00 to 12:00</b>	<b>[no comment listed]</b>
<b>9</b>	<b>Jul 18, 2020, All Day</b>	<b>C/O Sick</b>

<b>10</b>	<b>Jul 29, 2020, All Day</b>	<b>Per Chief</b>
	Aug 12, 2020, 12:00 to 18:00	Found own coverage
<b>11</b>	<b>Sep 18, 2020, All Day</b>	<b>[no comment listed]</b>
<b>12</b>	<b>Oct 2, 2020, All Day</b>	<b>C/O Sick</b>
<b>13</b>	<b>Oct 10, 2020</b>	<b>[no comment listed]</b>
<b>14</b>	<b>Oct 11, 2020, All Day</b>	<b>[no comment listed]</b>
	Oct 16, 2020, All Day	Quarantine
	Oct 18, 2020, All Day	Quarantine
	Oct 20, 2020, All Day	Quarantine
<b>15</b>	<b>Nov 21, 2020, All Day</b>	<b>Has to pick up mother and father from Airport</b>
	Nov 27, 2020, All Day	mxt 11-28-20 two open shifts
	Dec 4, 2020, All Day	Quarantine family member
	Dec 5, 2020, All Day	Quarantine family member
	Dec 6, 2020, All Day	Quarantine family member
	Dec 11, 2020 – Dec 13, 2020	Quarantine
	Dec 15, 2020, All Day	Quarantine
<b>16</b>	<b>Apr 3, 2021, All Day</b>	<b>“No reason – personal”</b>
<b>17</b>	<b>Apr 4, 2021, All Day</b>	<b>Put out by Capt. Paul / Personal</b>
<b>18</b>	<b>Apr 5, 2021, All Day</b>	<b>Personal</b>
<b>19, 20</b>	<b>Apr 10, 2021 – Apr 11, 2021</b>	<b>Personal</b>
<b>21</b>	<b>Apr 15, 2021, All Day</b>	<b>Personal</b>
<b>22</b>	<b>Apr 17, 2021, All Day</b>	<b>Personal</b>
<b>23</b>	<b>Jun 12, 2021, All Day</b>	<b>Personal</b>
	Jul 3, 2021 – Jul 4, 2021	Scheduling Error

(T50-R-1.) The off-duty shifts ultimately counted against Lipka in the FNDA, were not specifically delineated in the FNDA, but are included in R-1 and the testimony of record. I note that Lipka’s attendance record reflects twenty-three days were counted against him, as opposed to the twenty days counted against him in the FNDA. (P-1.)

The Township's Personnel Policy 118 governs "EMPLOYEE CONDUCT," and provides, in relevant part:

It shall be the duty of employees to maintain high standards of cooperation, efficiency and integrity in their work with the Township. If an employee's conduct falls below standard, he/she may be subject to disciplinary action.

Some general things for which an employee may be disciplined include, but are not limited to:

....

4. Being habitually absent or tardy for any reason.

....

21. Abuse of sick leave privileges by reporting sick when not sick or obtaining sick leave falsely or under false pretenses.

[(R-2) (emphasis added).]

The Township's Personnel Policy 119 governs "DISCIPLINARY ACTION" of Township employees, and provides, in relevant part:

The tenure of Township employees shall be based on reasonable standards of job performance and personal and professional conduct. Failure or refusal to meet these standards shall constitute just cause for disciplinary action including oral or written reprimand, suspensions, demotions, and dismissal.

Disciplinary action is not primarily intended to be punitive, but rather to maintain the efficiency and integrity of Township service. The nature and severity of the offense and the employee's prior record shall be considered.

Employees may be disciplined for areas detailed in the policy on EMPLOYEE CONDUCT pursuant to the policy on EMPLOYEE COMPLAINT AND REVIEW PROCEDURE for employee complaints, state or federal laws and codes, or pursuant to the procedures set forth below for other violations.

The degree of discipline administered will depend on the severity of the infraction and shall be in accordance with any applicable labor contract, and Township policies and procedures as well as the local, state or federal laws and regulations.

It is the responsibility of each supervisor and department head to evaluate thoroughly the circumstances and facts as objectively as possible and then apply the most suitable form of discipline.

.....

4. An employee may be subject to discipline for:

.....

d. Chronic or excessive absenteeism or tardiness

.....

f. neglect of duty

.....

5. Discipline shall be progressive in nature as follows, unless circumstances warrant otherwise:

a. informal, private discussion with the department head

b. written reprimand from the department head or his/her designee

c. suspension without pay

d. termination of employment

[(R-3) (emphasis added).]

The Township's Personnel Policy 134 governs employees' use of sick leave, and provides, in relevant part:



Unless otherwise set forth in a Collective Bargaining Agreement or employment contract, sick leave is hereby defined to mean the absence of an employee from duty because of personal illness that prevents his/her doing the usual duties of his position, or exposure to contagious disease, and [the] employee is expected to be home, except for time devoted to medical care or required nutritional needs.

....

Abuse of sick leave shall be cause for disciplinary action, and may constitute justifiable cause for dismissal. Habitual absenteeism or tardiness may be cause for discipline up to and including discharge.

[(R-4) (emphasis added).]

Article III of Lipka's Union's Collective Bargaining Agreement (CBA) Article III governs the "EQUAL TREATMENT" of its members, and provides that the Township and Union agree that "there shall be no discrimination or favoritism against any employee because of race, creed, color, religion, sex, age, marital status, national origin or political affiliation." (P-2.) Article III also provides that all employees covered by the agreement shall not be discriminated against by the Township or the Union because of the employee's membership or non-membership or activity or non-activity in the Union. Ibid.

Article XXVIII of the CBA governs the "DISCIPLINE" of Union employees, and provides, in relevant part:

- A. Discipline may include the following disciplinary actions.
  - 1. Oral reprimand.
  - 2. Written reprimand.
  - 3. Suspension (minor).
  - 4. Suspension (major).
  - 5. Discharge.
- B. No employee shall be disciplined without just cause.

[(P-4.)]

**SUMMARY OF RELEVANT TESTIMONY**

**Joseph Palumbo**

Joseph Palumbo (Palumbo), the Fire Chief for the Township, testified on behalf of the Township as follows. He has been the Fire Chief for over eleven years. (T13-T14.) On January 1, 2020, the Fire Department (FD) assumed management of the Township's Emergency Medical Services (EMS), which was previously a separate EMS municipal department, and at that time had thirty-six part-time and full-time EMTs. (T34-T35.) Following that EMS transition/merger, the FD management reviewed all EMS employees' records for the prior two years for, among other things, time and attendance and prior discipline. (T22; T27-T28.) Two employees were identified as having "excessive time and attendance issues," including Lipka. Ibid. Lipka had missed a total of twenty-eight shifts during that two-year period. (T28.) According to FD policy, EMS employees are required to submit their availability to work on a monthly basis to a staff officer at the EMS operation, and the employees are scheduled accordingly so that all shifts are covered. (T14-T15.) Although EMS employees were previously governed by a separate municipal department, they are not considered to be FD employees. (T34-T35.)

EMTs are scheduled for twelve-hour shifts. (T16.) When a part-time EMT, such as Lipka, becomes unavailable, a replacement must be found, which is very difficult and interferes with the local budget by causing unnecessary overtime. Ibid. It also interferes with the quality of life of the other EMTs who may be forced to report for duty or forced to work overtime, after their twelve-hour shift ends, which interferes with employees' health and well-being and EMS operations. (T16-T18.) In 2021, EMS responded to 7,600 ambulance calls, or roughly twenty to twenty-two ambulance responses every twenty-four hours. (T18.)

At the time of the merger review, Lipka had "the most excessive time and attendance issues" that were documented. (T15.) The above-referenced Township Personnel Policy 118, (R-2), which addresses abuse of sick leave, is distributed to all

employees. The above-referenced Township Personnel Policy 134, which also addresses abuse of sick leave, (R-4), is distributed to all Township employees, and was relied upon by the Township in bringing disciplinary action against Lipka because it was "commensurate with the collective bargaining agreement that [] Lipka is represented under." (T19-T20.) All employees are given an orientation program and are provided access to the Departmental and Municipal policies through an online platform that is available twenty-four hours per day, seven days per week.

When the EMS employee records were examined for time and attendance and prior discipline, Palumbo did not know Lipka personally. (T20.) Lipka's attendance record was what drew Palumbo's attention to it, and he found it "significant enough . . . to warrant action to remedy . . . an ongoing problem." (T20.) There is a recognized expectation that if an employee is scheduled for work that they will work, which is clearly imparted to employees at the commencement of their employment. (T21.) "Looking at the cumulative nature of the . . . time and attendance violations that . . . Lipka had amassed," warranted the major discipline of termination, because it was "inexcusable" and directly interfered with the operation of services and public safety. (T22-T23; T31-T32.)

On cross-examination, Palumbo conceded that for two of Lipka's missed shifts, Lipka found his own coverage for leave time on January 5, 2020, and August 12, 2020, and stated that those days were still counted against him. (T28; R-1.) In addition, Palumbo conceded that eight of the alleged PNDA, twenty-eight reported missed shifts were forgiven for pandemic/quarantine reasons in the FNDA. (T29-T30; R-1.) Thus, out of the thirty-three above-cited absences, that amount was reduced to twenty in the FNDA, and then reduced by Palumbo to eighteen absences during the plenary hearing, by removing the July 3–4, 2021 scheduling error. (T33-T34; R-1.) However, with R-1 in hand, Palumbo identified twenty-three absences which were considered to be inexcusable, as highlighted in bold, above. (T50-T55; R-1.) Palumbo described Lipka's work as an EMT as "average." (T30.) Palumbo conceded that during the course of the pandemic, "it's been very competitive to get EMTs to work, especially part-timers, . . . "to

say the least.” (T31.) “It has never been more difficult to find qualified and capable employees to sustain these operations. It’s very difficult.” (T31.)

At my urging on re-direct to clarify the exact unexcused absences, Palumbo was asked to explain the “personal” days specifically. (T48-T49.) Palumbo explained that they were unexcused, because Palumbo was informed “in an official capacity” by another EMT, who “was a close and personal friend of [] Lipka’s that Lipka had been involved in a serious motor vehicle accident,” “at that time had a significant alcohol issue,” and “he was despondent and was ordered [by his parents] to leave his . . . residence where he lived with his mother and father.” (T49.) In consultation with EMS management Captain Paul (Paul) and Lieutenant White (White) regarding “the level of attention that [] Lipka was bringing to his work,” they concluded that Lipka needed to “take some time off and seek a fitness for duty evaluation prior to re-engaging in the duties of an EMT due to the critical nature of th[e] work.” (T49-T50.) Lipka’s primary care physician deemed him fit for duty on April 17, 2021. (T50.)

Palumbo stated “I was looking at the cumulative nature of this employee’s work performance. And adding in the sheer amount of time that he had reported off or brought cause to be off . . . that recreated an interference with the continuity of our operation.” (T60) (*sic passim*). He added, “we work very diligently to be as accommodating and as empathetic to all of our employees. And we have over eighty between the fire and EMS operation[s],” (T60), but “[t]he sheer amount of time off. We just met the terminal end of our patience with [] Lipka.” (T61.) “We have thirty-six other completely compliant and functional [EMS] employees. And this one employee was requiring a tremendous amount — an egregious amount of time and attention to manage on a daily if not week — weekly, if not daily basis. And it was an interference with our operation.” *Ibid.* (*sic passim*). Although one other employee was also initially terminated for excessive absenteeism, he was reinstated after his Departmental hearing because his conduct “was not nearly as egregious as [] Lipka’s,” who was “[b]y far the worst” offender when it came to attendance. (T63.)

No testimony was adduced about Township Fire Department SOP 108, Article IV, Section 3, (R-5), and the Township did not seek to admit that SOP into evidence. (T20; T34.) Palumbo identified the disciplinary record that was on file for Lipka, including that which was transmitted by the former EMS operations. (P-6).

**Lipka**

Lipka testified on his own behalf, as follows. He had worked for the Township's EMS for "just under four years." (T37.) He had never been spoken to by anyone about an attendance problem. Ibid. He only found out that his attendance was an issue when he was terminated, via an email with termination records sent by Paul. (T37–T38.) Contrary to the documentary disciplinary evidence, (P-6), Lipka stated that he was never "called into an office to speak to anybody or anything of that nature." (T37.) After Lipka received Paul's email, the Departmental hearing occurred. (T38.) He had never seen his attendance records prior to being terminated. (T39; R-1.) Lipka stated that he was "put out" on personal leave, that is, he was told by Paul not to come to work, from April 4, 2021, to April 17, 2021. (T39–T40; R-1.) However, Lipka also claimed that no one from EMS spoke with him personally, and he did not know why he was "put out," "[o]ther than there was a personal circumstance that happened outside of work. And they told me not to work till I received a fit for duty form." (T40.) Lipka was "shocked." Ibid. He also had "no idea" how the charge for "neglect of duty" related to him. (T40–T41.) He claimed that he performed "above and beyond" his call of duties. (T41.)

When asked by his representative if he would like to say anything on his own behalf, Lipka stated the following:

Just the fact of this happening out of nowhere. And after working from my memory I worked a significant amount of hours that weekend prior to being terminated. Try -- moving my schedule so that other people could come in and fill a shift that was empty. I worked in over twenty-fours that weekend. And when I woke up Monday morning, after returning home from work at 6:00 am, I woke up to an email saying that I was terminated.

So, over the course of my time at [the Township] I've changed my schedule around so that they could fill shifts, somebody could come in at a certain time that they were able to. And I would rearrange my schedule accordingly to fill shifts.

[(T41) (sic passim).]

As to his absences on Fridays, Saturdays, and Sundays, Lipka stated: "I would work the weekend. I changed my schedule about a year and a half prior to being terminated due to being in paramedic school," such that his regular shifts were Fridays, Saturdays, and Sundays, and those would necessarily have been the days that he called out sick, if he called out sick. (T41–T42.)

On cross-examination, Lipka agreed that it was neglect of duty on his part to not show up for work when he was scheduled. (T42–T43.) As to his "personal" days, as opposed to sick days, Lipka stated that he was ordered not to go to work pending a FFD examination, due to "mental health" reasons that were brought to Lipka's supervisor's attention by co-workers who were Lipka's friends. (T43–T44.) He "assumed" that his co-workers were worried about him and were "worried that [he] couldn't do [his] job." (T44.)

He agreed that he's "missed a lot of work," "[in] a degree," (T44–T45), due to "Covid going on and having to manage school, work, [and] family. (T45.) He agreed that not all of his days off were due to Covid-19, and that he never told his supervisors that he had any other medical condition that he needed an accommodation for. Ibid. He agreed that he understood the importance of "showing up" when he was scheduled to work, and he agreed that it put "a strain" on his fellow EMTs when he missed so much work. Ibid.

**CREDIBILITY DETERMINATIONS AND FURTHER FINDINGS OF FACT**

I.

I must weigh the credibility of the witnesses to determine the ultimate issues. Credibility is the value that a fact finder gives to a witness's testimony. An ALJ's findings of fact as to issues of credibility of a witness's testimony may not be rejected or modified unless the record demonstrates that the findings are arbitrary, capricious or unreasonable, or are not supported by sufficient, competent, credible evidence in the record. N.J.S.A. 52:14B-10(c).

"Credibility involves more than demeanor. It [contemplates] the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances." State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955) (quoting In re Perrone's Estate, 5 N.J. 514, 522 (1950)).

A fact finder is expected to base credibility decisions on their common sense and life experiences. State v. Daniels, 182 N.J. 80, 99 (2004). Credibility is not dependent on the number of witnesses who appeared, State v. Thompson, 59 N.J. 396, 411 (1971), and a fact finder "is not bound to believe the testimony of any witness, in whole or in part," State v. Muhammad, 182 N.J. 551, 577 (2005) (internal quotation marks omitted). Rather, they "may reject what in their conscientious judgment ought to be rejected and accept that which they believe to be credible." Ibid. Testimony may be disbelieved but may not be disregarded at an administrative proceeding. Middletown Twp. v. Murdoch, 73 N.J. Super. 511, 523 (App. Div. 1962). "The interest, motive, bias, or prejudice of a witness may affect [their] credibility and justify the [trier of fact] . . . in disbelieving [their]

testimony.” State v. Salimone, 19 N.J. Super. 600, 608 (App. Div. 1952) (internal quotation marks omitted).

In this case, I **FIND** that Palumbo's testimony was credible. He testified spontaneously, candidly, and not necessarily in lockstep with Township's FNDA. For example, Palumbo identified more excessive absences in R-1 than were listed as twenty on the FNDA. I **FIND** that Lipka's testimony was elusive and less credible. For example, he testified, contrary to his own testimony and his documented disciplinary history, that no one spoke with him about the incidents leading to his mandated personal time off to obtain a FFD evaluation. However, it is commendable that he admitted he was "put out" on personal leave for mental health reasons, that his absences put a strain on the rest of the EMTs when he missed so much work, and that missing such work could be considered neglect of duty.

## II.

Based upon the foregoing credibility determinations and the competent, credible evidence of record, I further **FIND** the following **FACTS**. Over an approximate fifteen-month period, Lipka had the above-identified twenty-three indisputable absences from work. I **FIND** that his absenteeism was excessive and put a strain on the EMS staffing, morale, operations, and budget. Although Lipka urges that the personal days he was ordered to take by Paul should not be counted against him, I **FIND** that those days and the need for the FFD evaluation were triggered by Lipka's own conduct and EMS management's concern that Lipka could not safely and properly perform his duties.

## LEGAL ANALYSIS AND CONCLUSIONS

### I.

A civil service employee's rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C.



4A:1-1.1 to 4A:10-3.2. The Act is an inducement to attract qualified individuals to public service positions and is to be liberally construed toward attainment of merit appointments and broad tenure protections. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576, 581 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583, 586 (App. Div. 1972). However, "[t]here is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998).

Indeed, a civil service employee who commits a wrongful act related to their employment may be subject to discipline, which may be a reprimand, suspension, or removal from employment, depending upon the incident. N.J.S.A. 11A:1-2c; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2(a). Public entities should not be burdened with an employee who fails to perform their duties satisfactorily or engages in misconduct related to their duties. N.J.S.A. 11A:1-2c. Thus, a public entity may impose major discipline upon a civil service employee, including termination/removal from their position. N.J.S.A. 11A:1-2c; N.J.A.C. 4A:2-2.2(a).

In appeals concerning major disciplinary action such as termination, the appointing authority bears the burden to prove the FNDA charges by a preponderance of the competent 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). 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) (internal quotation marks 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). OAL hearings on civil service removal appeals are de novo, both as to guilt and the penalty to be imposed. Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980); W. New York v. Bock, 38 N.J. 500, 522, n.1, n.3 (1962).

### The Charges

Although the Administrative Code does not specifically define the general causes for major discipline delineated in N.J.A.C. 4A:2-2.3(a), those general causes have been defined by well-established case law.

1. N.J.A.C. 4A:2-2.3(a)4: Chronic or excessive absenteeism or lateness
2. Township Policy 118, Section 4: Being habitually absent or tardy for any reason

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 [their] 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." Bock, 38 N.J. at 522. 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. Such conduct is particularly serious on the part of employees whose job is to protect the public safety and where the [employees] serve precise shifts to afford continuous protection." Ibid. (emphasis added). 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 Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 333 (App. Div. 1998).

It is indisputable that over an approximate fifteen-month period, Lipka was absent from work on at least twenty-three occasions, from January 5, 2020, through June 12, 2021. Those call-out days do not include his eight call-out days for COVID-19 quarantining, which were not counted against him. Lipka maintains that the six missed shifts between April 4, 2021, through April 17, 2021, associated with Paul's order to get a FFD evaluation should not be counted against him, because he was "put out" by Paul. However, even accepting Lipka's claim that those absences were related to mental health issues does not excuse those absences, because Lipka took fourteen days to obtain his FFD examination from his own physician, and 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, 345 N.J. Super. at 675 (noting that under New Jersey's Law Against Discrimination, "excessive 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 [their] 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 Hous. Auth., 92 N.J.A.R.2d (CSV) 750, 752 (emphasis added).]

See also Bellamy v. Township of Aberdeen, Dep't of Pub. Works, 96 N.J.A.R.2d (CSV) 770 (noting that excessive employee absences, even with good cause, impair the work of the political subdivision employer and may justify an employee's removal); Luckey v. Dep't of Pub. 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); LaBour v. Hous. Auth. 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); Weil v. Atlantic County Dep't of Pub. Safety, 97 N.J.A.R.2d (CSV) 413 (holding removal appropriate for excessive unauthorized absences even if those absences are related to medical condition). The Township, 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." Ibid. 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." Ibid.

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 workplace. See Harris v. Woodbine Dev. Ctr., CSV 04885-02, 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 County, Runnells Specialized Hosp., 97 N.J.A.R.2d (CSV) 295.

It cannot be disputed that Lipka's employer had a right to expect that he would be present at work as pre-scheduled, and be willing and able to perform the job for which he had been employed. It is also indisputable that Lipka's absences disrupted the Township's EMS operations, budget, and the quality of life and morale of Lipka's fellow EMTs. The Township 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 Township has demonstrated, by a preponderance of the competent credible evidence, that Lipka's conduct constitutes a violation of N.J.A.C. 4A:2-2.3(a)4, Chronic and Excessive Absenteeism, and that the charge must be **SUSTAINED**. For the same reasons, I also **CONCLUDE** that Lipka's conduct violated the Township's Personnel Policy 118, Section 4, for "[b]eing habitually tardy or absent for any reason," and that charge is also **SUSTAINED**.

3. N.J.A.C. 4A:2-2.3(a)7: Neglect of Duty

4. Township Fire Department SOP 108, Article IV, Section 3, Neglect of Duty

Neglect of duty has been interpreted to mean "any conduct where an employee neglects to perform an act required by his or her job title or was negligent in its discharge." In re Middleton, 2008 N.J. AGEN LEXIS 62, \*6 (Jan 17, 2008). "Neglect of duty can arise from an omission or failure to perform a duty and includes official misconduct or misdoing, as well as negligence. Generally, the term 'neglect' connotes a deviation from normal standards of conduct." In re Holder, 2021 N.J. AGEN LEXIS 217, \*69 (July 2, 2021) (citing In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977)). Neglect of duty implies nonperformance of some official duty imposed upon a public employee, not merely the commission of an imprudent act. Rushin v. Bd. Of Child Welfare, 65 N.J. Super. 504, 515 (App. Div. 1961).

Under these circumstances, and by Lipka's own admission, I **CONCLUDE** that the Township has met its burden to prove by a preponderance of the competent credible evidence that Lipka neglected his duty by failing to report for duty and/or making himself unavailable for duty due to his own conduct for twenty-three pre-scheduled shifts over a fifteen-month period, and that the charge must be **SUSTAINED**.

However, as to violating Township Fire Department SOP 108, Article IV, Section 3, neglect of duty, the Township offered no testimony about the SOP and did not seek its

admission into evidence. I therefore **CONCLUDE** that the Township did not meet its burden to prove that charge by a preponderance of the competent credible evidence, and that the charge should be **REVERSED**.

II.

Once a determination has been made that an employee violated a statute, rule, or regulation concerning their employment, the concept of progressive discipline requires consideration. In re Stallworth, 208 N.J. 182, 195-96 (2011); Bock, 38 N.J. at 523. When deciding what disciplinary action is an appropriate penalty, the fact finder shall consider the nature of the sustained charges and the employee's past record. Bock, 38 N.J. at 523-24. The employee's past record is said to encompass their reasonably recent history of promotions or commendations on the one hand, and on the other hand, any "formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated . . . by having been previously called to the attention of and admitted by the employee." Ibid. Consideration as to the timing of the most recently adjudicated disciplinary history should also be given. Id. at 524.

However, the theory of progressive discipline is not a fixed rule to be followed without question. In re Carter, 191 N.J. 474, 484 (2007). "[S]ome disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." Ibid. The question for the fact finder is whether the disciplinary action is so disproportionate to the offense, considering all the circumstances, to shock one's sense of fairness. Ibid. Removal has been upheld where the acts charged, with or without a prior disciplinary history, have warranted imposition of that sanction. Ibid. Hence an employee may be removed, without regard to progressive discipline, if their conduct was egregious. Ibid.; In re Herrmann, 192 N.J. 19, 33-34 (2007). Indeed, progressive discipline "is not a necessary consideration when . . . it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest." Herrmann, 192 N.J. at 33.

In light of my legal conclusions on the sustained charges, I **CONCLUDE** that Lipka's absenteeism was so egregious as to warrant automatic removal, without regard to progressive discipline, because Lipka's absences disrupted the Township's EMS operations, budget, the quality of life and morale of Lipka's fellow EMTs, and the health and safety of the public.

However, even if the concept of progressive discipline were applied, I **CONCLUDE** that Lipka's conduct in this case warrants removal.

Lipka's unrefuted prior disciplinary history includes a one-day suspension on April 2, 2019, for failure to complete mandatory online training for a third time. (R-6.) It also includes a one-day suspension on July 29, 2020, for failure to follow a supervisor's orders, resulting in an ambulance accident with a parked vehicle on July 11, 2020, where the police had to be called. Ibid. In addition to that one-day suspension, Lipka was also suspended from driving EMS vehicles for six weeks, from July 24, 2020, through September 4, 2020, for that motor vehicle accident, insubordination, and for making a "K-turn" with an ambulance into wet grass and sinking into and getting stuck in a hole in the grass while the ambulance was occupied with a patient in transport to a hospital on July 10, 2020. Ibid. That patient had to be rescued by another ambulance to reach the hospital, and the stuck ambulance was put out of service and had to be removed by a tow truck. Ibid. Lipka was also barred from picking up any additional shifts from July 26, 2020, through August 2, 2020, and on July 24, 2020, he was ordered to meet with EMT Michael McKinsey (McKinsey) for two sessions of driver remediation. Ibid. As of September 3, 2020, Lipka had not contacted McKinsey about driver remediation, and the EMS charts showed that Lipka drove an ambulance on September 2, 2020, in violation of his driving suspension. Ibid. Lipka's driving privileges were then further suspended until he had his two driver remediation sessions with McKinsey and clearance from the then EMS Chief, Michael Coyle. Ibid.

Contrary to Lipka's testimony that no one met with him or discussed the incidents which "put him out," a memo in his disciplinary file reveals the following:

Memos were received from Connor, Steve and Brendan. Chief Palumbo was given copies of the memos and advised of the situation

At approx. 0920 hours, I received a return phone call from Eric Hicken<sup>1</sup> (Project HOPE) and gave him information about what had occurred and seeing what services they could provide. He said that he could get him to a doctor and that this would get him a "foot in the door" and that they would cover 3 visits

Contact was made with Jake Lipka and he came into the building short before 1000 hrs. Sandi and I met with him and expressed concern about his actions and events from the weekend. He again stated that he called the number that I gave him the day before and that they did not return his call. He was told again that he needed to get help and that we were trying to get him the help he needed. I called Eric Hicken using the office phone and then gave Jake the phone. Sandi and I stepped out of the room to allow him to speak in private. Eric texted him the Dr's contact information (this was confirmed on 04/07/2021 in a phone conversation with Eric)

Received a phone call from Jake. Stated that he met with Chris Sharpe was asking what was needed so that he could come back to work. He was advised that I needed a fitness for duty report.

[Ibid. (sic passim).]

Under the totality of the facts and circumstances in this case, and Lipka's recent and significant prior disciplinary history, I **CONCLUDE** that termination is the only appropriate penalty, both under the egregious misconduct and progressive discipline standards. Lipka's chronic absenteeism and neglect of duty wreaked havoc on the

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<sup>1</sup> A cursory internet search revealed that "Mission Hope NJ is a non-profit organization serving the EMS, Fire, Police and Dispatchers through a network of resources, programs and support as well as providing education on mental health, reducing the stigma surrounding mental health and suicide prevention and awareness." Eric Hicken is Mission Hope's Vice President/Founder. <https://www.linkedin.com/in/eric-hicken-0881b629> (last visited October 18, 2022).



Township's EMS operations, budget, and his fellow EMTs, and jeopardized public health and safety.

**ORDER**

It is therefore **ORDERED** that the charges in the July 28, 2021, FNDA are hereby **SUSTAINED**, with the exception of violating Township Fire Department SOP 108, Article IV, Section 3, neglect of duty, which is hereby **REVERSED**; and it is further **ORDERED** that Lipka be and is hereby removed from his position as a Township EMT, effective June 21, 2021; and it is further **ORDERED** that Lipka's petition of appeal is hereby **DISMISSED**.

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

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

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

November 15, 2022  
DATE

  
\_\_\_\_\_  
SARAH H. SURGENT, ALJ

Date Received at Agency: November 15, 2022

Date Mailed to Parties: November 15, 2022 (emailed)

SHS/kl

**APPENDIX**

**WITNESSES**

**For appellant**

Jake Lipka

**For respondent**

Joseph Palumbo

**EXHIBITS**

**For appellant**

- P-1 Final Notice of Disciplinary Action, dated July 28, 2020 (sic – 2021)
- P-2 Article III of Union's Collective Bargaining Agreement
- P-3 Preliminary Notice of Disciplinary Action, dated June 17, 2021
- P-4 Article XXVIII of Union's Collective Bargaining Agreement

**For respondent**

- R-1 Lipka's Attendance Record, January 5, 2020, through July 4, 2021
- R-2 Township Personnel Policy 118 — Employee Conduct
- R-3 Township Personnel Policy 119 — Disciplinary Action
- R-4 Township Personnel Policy 134 — Sick Leave
- R-5 Not in evidence
- R-6 Lipka's EMS disciplinary file