

COMMONWEALTH OF PENNSYLVANIA

Stephen E. Leitkam : State Civil Service Commission

v. :

Department of Environmental Protection : Appeal No. 29579

Richard C. Thiele  
Attorney for Appellant

John J. Cantwell, Jr.  
Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Stephen E. Leitkam challenging his removal from regular Water Pollution Biologist 2 employment with the Department of Environmental Protection. Hearings were held July 19, August 30, and August 31, 2017, at the Civil Service Commission's Western Regional Office in Pittsburgh, Pennsylvania before Hearing Officer David Zurn.

The Commissioners have reviewed the Notes of Testimony and exhibits introduced at the hearing, as well as the Briefs submitted by the parties. The issues before the Commission are whether the appointing authority discriminated against appellant when determining whether to remove appellant and whether the appointing authority had just cause to remove him.

## FINDINGS OF FACT

1. By letter dated January 26, 2017, appellant was removed from his position as Water Pollution Biologist 2, regular status, effective January 31, 2017. The appointing authority charged appellant with violating Commonwealth Directive 505.7 and the appointing authority's Work Rules 1, 2, and 16.<sup>1</sup>

The appointing authority explained:

This disciplinary action is being taken because you engaged in unacceptable workplace conduct. In a written memorandum dated December 19, 2016 (Memo), you received a directive from your reviewing officer, Joel Koricich (Koricich). Koricich is the District Mining Manager for the Department's California District Mining Office (CDMO). Koricich's Memo instructed you to move your work projects, work files, and "reasonably maintained personal items" from your current CDMO office location to another CDMO

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<sup>1</sup> Commonwealth Directive 505.7, Section 13.1 pertains to personal conduct and provides, in relevant portion,

- (a) No employee of the Commonwealth is to engage in scandalous or disgraceful conduct or any other behavior on or off duty which may bring the service of the Commonwealth into disrepute. Violations of this nature or violations of the Commonwealth's human resource s management rules may result in disciplinary action.
- (b) Agencies, with the approval of the Secretary of Administration, may establish standards of conduct deemed necessary for the effective operation of that agency.

N.T. pp. 531-532; AA Ex. 24.

The appointing authority's Work Rules provide:

The following acts or conduct are specifically prohibited:

- 1) Failure to perform duty satisfactorily.
- 2) Failure to follow instruction, policy or procedure...
- 16) Insubordination, refusal to perform work assigned by a supervisor or disrespectful conduct toward supervisors.

AA Ex. 25.

office location. Koricich's Memo also instructed you that your office relocation was permanent and must be accomplished by December 30, 2016. As of the date of this official written notice, you have failed to relocate to your newly assigned CDMO office location. Therefore, you continue to disobey a written directive from your Department supervisor.

On January 12, 2017, you attended a pre-disciplinary conference. . . . You admitted that you had not relocated to your newly assigned CDMO office location as directed in Koricich's Memo. You were also dishonest in your responses to questions during the pre-disciplinary conference. Specifically, you alleged that two CDMO work projects...prevented you from complying with your supervisor's written order. Upon further review, it was determined that both of these two CDMO work projects were completed prior to the issuance date of Koricich's Memo. Therefore, neither of these two CDMO work projects prevented you from relocating to your newly assigned CDMO office location as directed by your Department Supervisor.

Comm. Ex. A.

2. The appeal was properly raised before this Commission and was heard under Sections 951(a) and 951(b) of the Civil Service Act, as amended.

3. On or about May 1, 2006, appellant began his employment with the appointing authority as an Environmental Trainee. Comm. Ex. E.
4. On or about May 26, 2007, appellant began working in the position of Water Pollution Biologist 2 in the California District Mining Office with the appointing authority. Comm. Ex. E; N.T. p. 299.
5. Appellant's job duties include working on public water supply complaint investigations and stream evaluations. N.T. p. 341.
6. By email dated May 12, 2016, California District Mining Manager Joel Koricich, who is appellant's supervisor, informed appellant several coworkers were being distracted by his possible medical issue. N.T. pp. 119, 125; AA Ex. 10.
7. By email dated May 12, 2016, appellant replied to Koricich indicating, in part, "I don't know if there is anywhere in the building where I could work for now that would keep me secluded from everyone else. I can't say that I find that appealing, but it seems to be the only viable option that would leave me with a job." N.T. pp. 121-122; AA Ex. 10.

8. In June 2016, Human Resources employee Renata Mosley<sup>2</sup> reviewed the May email exchange between Koricich and appellant. N.T. p. 619, AA Ex. 2.
9. On August 5, 2016, Mosley emailed Disability Services Coordinator Elizabeth Martinec<sup>3</sup> informing her there was an employee who may be a candidate for an accommodation under the Americans with Disabilities Act (hereinafter “ADA”). N.T. pp. 23, 542-543, 624; AA Ex. 1.
10. Also on August 5, 2016, Koricich emailed Martinec informing her appellant presented several personnel issues, including a potential medical condition meeting the ADA requirements. N.T. pp. 25, 122, 125; AA Ex. 2.
11. By letter dated August 9, 2016, Martinec informed appellant he may qualify as having a disability in need of an accommodation. She enclosed a Request for Accommodation, HIPAA Release,<sup>4</sup> and Health Care Provider Questionnaire for appellant to get

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<sup>2</sup> Renata Moseley is the Manager of Employee Relations, Services, and Safety with the Office of Administration Human Resources, Conservation and Environment Delivery Center. N.T. pp. 536-527.

<sup>3</sup> Martinec’s job duties include processing ADA accommodation requests. N.T. p. 21.

<sup>4</sup> The acronym “HIPAA” is not clarified in the record.

completed. On October 7, 2016, Martinec emailed appellant a second copy of the Request for Accommodation, HIPAA Release, and Health Care Provider Questionnaire. N.T. pp. 27, 29-32; AA Exs. 3, 4.

12. Via fax received October 11, 2016, appellant returned his Request for Accommodation Form. On the form, appellant stated:

The only thing I can think of [as an accommodation] would be if I could be set up somewhere else in the building, away from others and possibly behind a closed door.

N.T. p. 39; AA Ex. 7.

13. On November 14, 2016, a fax arrived from appellant's health care provider including the completed Health Care Provider Questionnaire. The health care provider indicated appellant suffered from a chronic medical condition and stated, "Patient would be best accommodated by being able to work in an office away from other coworkers who are frustrated with his behaviors." N.T. pp. 40-41; AA Ex. 8.

14. By letter dated November 15, 2016, Martinec advised appellant his medical condition would be accommodated by allowing him to work in a designated office space, away from other coworkers. N.T. pp. 42-43; AA Ex. 9.
15. On December 20, 2016, Koricich emailed appellant and directed him to relocate his workspace to an area in the southwestern corner of the office by December 30, 2016. Appellant replied to the email and stated, "Okay, thank you." N.T. pp. 45, 151, 142-145, 149-150, 219, 267; AA Exs. 13, 15.
16. As of December 30, 2016, appellant had not completed the relocation of his workspace. N.T. pp. 163, 345-346, 439; AA Ex. 16.
17. In early January 2017, Mosley learned appellant had been granted an ADA accommodation requiring him to relocate his workspace. She was also notified appellant was not following the directive to relocate his workspace. N.T. pp. 601, 603, 627.
18. By email dated January 10, 2017, Mosley notified appellant of his Pre-Disciplinary Conference (hereinafter "PDC") scheduled for January 12, 2017, to discuss charges of failure to perform job

duties satisfactorily, failure to follow instructions, policy, or procedure, and insubordination, refusal to perform work signed by a supervisor or disrespectful conduct toward supervisors. N.T. p. 548; AA Ex. 23.

19. On January 12, 2017, appellant attended his PDC. N.T. pp. 450, 473-474, 484, 547.
20. During his PDC, appellant stated he forgot the deadline for compliance was December 30, 2016. N.T. pp. 452-454, 559.
21. During his PDC, appellant said he had not complied with the directive to relocate his workspace and was not working out of the new location because he was focused on two work related assignments: Bailey Mine and Enlow. N.T. pp. 171, 467, 489-490, 560.
22. After the PDC, Human Resource Analyst Jennifer Wright took multiple photographs of appellant's work areas to determine if he had relocated his workspace. Upon Mosley's review of those photographs, she concluded appellant had not

fulfilled the directive to relocate to his new workspace even as of his January 12, 2017 PDC. N.T. pp. 455-456, 460, 464-466, 484, 490-495, 501, 513-514; 565-567, 633, 643-644; AA Exs. 30(a) through 30(ff), 30(u) through 30(FF).

23. After the PDC, Mosley asked Koricich if either the Bailey Mine or Enlow assignment had prevented appellant from moving to the new office. Koricich wrote a witness statement indicating appellant had completed the Bailey Mine and Enlow assignments prior to the directive to relocate his workspace was issued. N.T. pp. 169-172, 561-562; AA Ex. 19.
24. Mosley reviewed the PDC findings and the information gathered after appellant's PDC. She then offered a disciplinary recommendation to Executive Deputy Secretary John Stefanko.<sup>5</sup> Stefanko determined it was appropriate to remove appellant. N.T. pp. 579-580.
25. As of January 30, 2017, appellant had not completed his move to his new work location. N.T. pp. 60, 357-358.

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<sup>5</sup> Mosley did not testify about what specific discipline she recommended.

26. Effective January 30, 2017, appellant was removed from employment. Comm. Ex. E; N.T. p. 178.

### DISCUSSION

At issue before the Commission is whether the appointing authority discriminated against appellant based upon his disability when it removed him from his Water Pollution Biologist 2, regular status, position. Also at issue is whether the appointing authority had just cause to remove appellant.

We begin with appellant's discrimination claim. Appellant argues he was discriminated against because the appointing authority utilized his chronic medical condition and disability accommodation as a reason to terminate his employment. Appellant testified on his own behalf.<sup>6</sup>

With respect to discrimination claims, the Civil Service Act addresses "traditional discrimination" which encompasses claims based upon race, disability, or other non-merit factors. *Price v. Luzerne/Wyoming Counties Area Agency on Aging*, 672 A.2d 409, 411 n. 4 (Pa. Commw. 1996); *Pronko v. Department of Revenue*, 114 Pa. Commw. 428, 539 A.2d 462 (1988); 71 P.S. § 905a. In claims of

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<sup>6</sup> Appellant presented the testimony of Surface Mine Conservation Inspector Anne Hong in an effort to show management intimidated him and caused his failure at work. Hong provided her personal opinion that she felt appellant was "set up to fail." N.T. p. 706. However, she has no direct knowledge of any management employee, including Plassio, stating appellant was being set up to fail or be removed. N.T. pp. 709-710. Hong's testimony is rejected as not credible. The Commission has the inherent power to determine the credibility of witnesses and the value of their testimony. *McAndrew v. State Civil Service Commission (Department of Community and Economic Development)*, 736 A.2d 26 (Pa. Commw. 1999).

Appellant also presented the testimony of Permit Reviewer Robert Sporcic to show he was intimidated. Sporcic testified about statements made during prior disciplinary meetings. N.T. pp. 722, 720-721. The alleged statements are not relevant to the disciplinary action at issue. Thus, the Commission shall not consider Sporcic's testimony.

“traditional discrimination” the appellant must prove a *prima facie* case of discrimination by producing sufficient evidence which, if believed, indicates it is more likely than not discrimination has occurred. *Henderson v. Office of the Budget*, 126 Pa. Commw. 607, 560 A.2d 859 (1989); *Department of Health v. Nwogwugwu*, 141 Pa. Commw. 33, 594 A.2d 847 (1991). Once a *prima facie* case of discrimination has been established, the burden shifts to the appointing authority to present a legitimate, non-discriminatory explanation for the employment action. Appellant always retains the ultimate burden of persuasion and must demonstrate the proffered merit reason is merely a pretext for discrimination. *Id.*

In this instance, appellant and the appointing authority do not dispute the following facts. Appellant had a medical condition that was creating a distraction for his coworkers. N.T. pp. 119, 125. In August 2016, when the appointing authority became aware of the issue, Martinec sent appellant the required paperwork for a possible accommodation. N.T. p. 27; AA Ex. 3. After appellant had not returned the paperwork, Martinec emailed appellant new copies of the same paperwork. N.T. pp. 29-32; AA Ex. 4. Soon thereafter, appellant faxed his Request for Accommodation form, on which he stated allowing him to work in an area away from his coworkers and possibly behind a closed door would be an appropriate accommodation. N.T. p. 39; AA Ex. 7. On November 14, 2016, a fax arrived from appellant’s health care provider indicating appellant suffered from a chronic medical condition and an appropriate accommodation would be to allow him to work in an office located away from his coworkers. N.T. pp. 40-41; AA Ex. 8.

The following day, by letter dated November 15, 2016, appellant was advised his accommodation request was granted and he would be assigned to work in a designated office space away from coworkers. N.T. pp. 42-43, 139; AA Ex. 9.

On December 20, 2016, appellant received an email from Koricich explaining his new workspace location was in the southwestern corner of the office and providing a December 30, 2016 deadline to relocate his workspace. N.T. pp. 47, 142-143; AA Exs. 13, 14. Appellant acknowledged receiving the directive and deadline. N.T. p. 152; AA Ex. 15.

As of December 30, 2016, appellant had not completed a relocation of his workspace. N.T. pp. 163, 345-346, 439; AA Ex. 16. On January 12, 2017, appellant attended his Pre-Disciplinary Conference (hereinafter “PDC”) to discuss charges of failure to perform job duties satisfactorily, failure to follow instructions, policy, or procedure, and insubordination, refusal to perform work signed by a supervisor or disrespectful conduct toward supervisors because he had not relocated his workspace. N.T. pp. 450, 473-474, 484, 437-548; AA Ex. 23. Effective January 30, 2017, appellant was removed from employment. Comm. Ex. A; N.T. p. 178.

When making a claim of “traditional discrimination,” an appellant must initially present a *prima facie* case of discrimination by producing sufficient evidence which, if believed, indicates it is more likely than not discrimination has occurred. *Henderson, supra; Nwogwugwu, supra*. We have been advised, “[g]iven the critical role of circumstantial evidence in discrimination proceedings, the *prima facie* case cannot be an onerous one.” *Henderson*, 126 Pa. Commw. at 616, 560 A.2d at 864. In this instance, appellant has met his initial burden by presenting testimony and evidence indicating he requested and received an accommodation for his disability and was later removed from his employment for failing to follow instructions related to the implementation of the accommodation. Once a *prima facie* case of discrimination has been established, the burden shifts to the appointing

authority to present a legitimate, non-discriminatory explanation for the employment action. Appellant always retains the ultimate burden of persuasion and must demonstrate the proffered merit reason is merely a pretext for discrimination. *Id.*

In response to appellant's discrimination claim, the appointing authority presented the testimony of District Mining Manager Joel Koricich and Director of Mining Operations William Plassio. Koricich and Plassio both credibly testified appellant's removal was not related to his accommodation request or disability. N.T. pp. 224, 306-307.

With respect to providing a legitimate, non-discriminatory reason for removal, the appointing authority presented the testimony of Koricich, Plassio, Disability Services Coordinator Elizabeth Martinec, Environmental Group Manager Jeffrey Kost, Human Resource Analyst Jennifer Wright, and Manager of Employee Relations, Services, and Safety with the Office of Administration Human Resources, Conservation and Environment Delivery Center Renata Mosley. According to the appointing authority, the legitimate, non-discriminatory reasons for removal are appellant's failure to follow the directive to relocate his workspace and providing dishonest information during his PDC.

As it relates to appellant's failure to relocate his workspace, Koricich and Plassio provided credible testimony regarding the directive and compliance deadline. Koricich's December 20, 2016 memorandum provided the directive to relocate to an office space in the southwestern corner of the office away from other coworkers and provided a December 30, 2016 deadline to relocate his workspace. *See Findings of Fact 14, 15.* Koricich and Plassio testified the December 30, 2016, deadline allowed appellant sufficient time to comply with the directive to relocate

his workspace. N.T. pp. 145, 304-305. Although it should take only one day for an employee to relocate a workspace, appellant was provided with additional time so he would not feel rushed and have time to perform his job duties during the relocation process. Koricich testified the appointing authority could not allow appellant an unlimited amount of time to relocate his workspace because appellant had requested the accommodation and the medical situation had been occurring for several months. N.T. p. 153.

Although he was given sufficient time to relocate his workspace, appellant failed to do so. N.T. pp. 146-147, 222, 228-229, 231-232, 273. Koricich testified appellant's failure to follow the directive to relocate his workspace was disrespectful and insubordinate. N.T. pp. 178-179. Kost credibly testified there was no reason to believe appellant was unable to relocate his workspace. N.T. p. 350. Thus, the Commission finds appellant's failure to follow the directive to relocate his workspace is a legitimate, non-discriminatory reason for the personnel action.

With respect to the appointing authority's second asserted legitimate non-discriminatory reason, Wright and Mosley credibly testified about appellant's January 12, 2017 Pre-Disciplinary Conference (hereinafter "PDC"). The purpose of the PDC was to discuss charges of failure to follow a direct order to relocate his workspace by December 30, 2016. N.T. p. 484. During the PDC, appellant explained he had not complied with the order to relocate his workspace because he was focused on two large work projects, Bailey Mine and Enlow. N.T. pp. 489-490, 559.

After appellant's PDC, Koricich was informed by both Mosley and Wright that appellant stated he had not completed the relocation of his workspace because he had to complete two work assignments, Bailey Mine and Enlow. N.T. p. 171. On January 17, 2017, Koricich advised Mosely that both the Bailey Mine and Enlow projects were, in fact, completed prior to appellant's receipt of the directive to relocate his workspace. N.T. p. 173; AA Ex. 19. Thus, the Commission finds appellant's false response during his PDC constitutes a legitimate, non-discriminatory reason for the personnel action.

In summation, upon review of the record, the Commission finds appellant has not presented sufficient evidence to establish discrimination. Specifically, appellant has not presented sufficient evidence to show the appointing authority improperly utilized appellant's disability or accommodation request to remove him from employment. The Commission further finds the appointing authority has presented legitimate, non-discriminatory reasons for the removal: Appellant's failure to comply with the directive to relocate his workspace and his subsequent provision of false information during his PDC. *See Nwogwugwu, supra*. Appellant has not presented any evidence indicating the appointing authority's legitimate, non-discriminatory reasons for the discipline were merely pretext for discriminatory action. *Id.*

Although the appointing authority established legitimate, non-discriminatory reasons for the disciplinary action, it must still present just cause for removal. The appointing authority bears the burden of proving just cause for removal of a regular status employee and must prove the substance of the charges underlying the removal. *Long v. Commonwealth of Pennsylvania Liquor Control Board*, 112 Pa. Commw. 572, 535 A.2d 1233 (Pa. Commw. 1988). Factors

supporting the just cause removal of a civil service employee must be related to the employee's job performance and touch in some logical manner upon the employee's competency and ability to perform his job duties. *Woods v. State Civil Service Commission*, 590 Pa. Commw. 337, 912 A.2d 803 (2006).

In the removal letter, the appointing authority charged appellant with unacceptable workplace conduct based upon his failure to follow a written directive to relocate his workspace and providing dishonest responses to questions during his PDC. Comm. Ex. A. The appointing authority presented the testimony of Koricich, Plassio, Wright, and Mosley.

We begin with the first charge of unacceptable workplace conduct because of his failure to follow a direct order. As explained above, appellant did not comply with the directive to relocate his workspace by December 30, 2016. Koricich and Plassio testified they consider appellant's failure to follow the directive either blatant disrespect or a decision to ignore the directive, which constituted insubordination. N.T. pp. 224, 272. Koricich and Plassio both testified appellant's removal was based upon his inability to follow the directive to relocate his workspace. N.T. pp. 224, 297, 300, 303.

Mosley testified appellant did not follow personnel rules because he disregarded a directive issued by his chain of command, which constituted insubordinate behavior. N.T. pp. 585-586. Mosley reviewed the PDC findings and additional information gathered afterwards, then offered a disciplinary recommendation to Executive Deputy Secretary John Stefanko. N.T. pp. 572-574,

640, 656-657. Mosley stated appellant's failure to relocate his workspace by December 30, 2016, then by January 12, 2017, and even by the date of his termination, indicates he never took the directive seriously. N.T. pp. 666-667.

In response, appellant explained he did not deliberately refuse to comply with the directive in his December 19, 2016 memorandum. N.T. p. 736. He testified he could not explain why he missed the deadline to relocate his workspace, but it may have been because he read the letter quickly. N.T. pp. 736-373. Appellant stated he tried to comply with the directive and was slowly moving files to the new work area. N.T. pp. 751-752. Appellant asserts he would have requested additional time to relocate his workspace if he had realized there was a deadline for compliance. N.T. p. 756. The Commission notes this explanation conflicts with the statement he made during his PDC, where he stated he had forgotten the December 30, 2016 deadline. *See* Finding of Fact 20.

Additionally, the Commission notes appellant is aware of the importance of following orders issued by his chain of command because he had recently been disciplined for similar behavior. Specifically, On November 23, 2016, appellant was issued a level-two Alternative Discipline in Lieu of Suspension equivalent to a three-day suspension for disobeying direct orders from his chain of command. Comm. Ex. A; N.T. pp. 159; AA Ex. 17. The disciplinary letter indicated it was appellant's final warning and future similar misconduct may result in his removal. Comm. Ex. A; N.T. p. 159; AA Ex. 17.

We find Koricich, Plassio, Wright, and Mosley to be credible witnesses. Appellant received a direct order to relocate his workspace by December 30, 2016 and failed to comply. Both Koricich and Plassio credibly testified appellant's

removal was based upon his failure to follow a direct order. Further, appellant had recent discipline with a final warning for similar misconduct. The Commission finds appellant's testimony unpersuasive. Thus, the appointing authority has presented sufficient evidence to support the charge of failure to follow a direct order.

The appointing authority also charged appellant with providing false information during his PDC. Wright and Mosley credibly testified that during his PDC, appellant stated, in relevant portion, he had not complied with the directive to relocate his workspace because he had been focusing on two work projects: Bailey Mine and Enlow. N.T. pp. 489-490, 559. After appellant's PDC, Koricich provided credible information stating the Bailey Mine and Enlow assignments had both been completed prior to the issuance of appellant's directive to relocate his workspace. N.T. p. 173; AA Ex. 19. In response, appellant testified he does not recall the PDC the same way as either Wright or Mosley. N.T. p. 800.<sup>7</sup>

We find Wright, and Mosley credible that appellant stated he had two work assignments preventing him from completing the relocation of his workspace. We find Koricich credible that both assignments were complete prior to the issuance of the directive. The Commission finds appellant's testimony unpersuasive. Thus, the appointing authority has presented sufficient evidence to support the charge of providing false information during his PDC.

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<sup>7</sup> Appellant does not provide testimony indicating what he specifically recalls from his PDC.

Upon review of the record, appellant's refusal to comply with the directive to relocate his workspace and his blatant provision of dishonest information in an attempt to justify his noncompliance, clearly reflects negatively upon his ability to perform his job duties. *See e.g., Woods, supra.* Thus, the appointing authority has provided just cause for appellant's removal. In summation, appellant has not met his burden of proof to show he was discriminated against based upon his medical condition and disability accommodation. *Nwogwugwu, supra.* Additionally, the appointing authority has presented just cause for appellant's removal. *Long, supra.* Accordingly, we enter the following:

#### CONCLUSIONS OF LAW

1. Appellant has failed to present evidence establishing discrimination violative of Section 905.1 of the Civil Service Act, as amended.
2. The appointing authority has presented evidence establishing just cause for removal under Section 807 of the Civil Service Act, as amended.

#### ORDER

AND NOW, the State Civil Service Commission, by agreement of its members,<sup>8</sup> dismisses the appeal of Stephen E. Leitkam challenging his removal from regular Water Pollution Biologist 2 employment with the Department of

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<sup>8</sup> Commission Chairman Teresa Osborne, who took office March 22, 2019, did not participate in the discussion of or decision for this appeal.

Environmental Protection and sustains the action of the Department of Environmental Protection in the removal of Stephen E. Leitkam from regular Water Pollution Biologist 2 employment, effective January 31, 2017.

State Civil Service Commission

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Gregory M. Lane  
Commissioner

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Bryan R. Lentz  
Commissioner

Officially Mailed: August 22, 2019  
Emailed: August 22, 2019