

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2013 IL App (4th) 120682-U
NO. 4-12-0682
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
April 9, 2013
Carla Bender
4th District Appellate
Court, IL

MICHAEL A. SANDERS,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Sangamon County
THE CIVIL SERVICE COMMISSION; CHRIS)	No. 11MR210
KOLKER, in His Official Capacity as Chairman of the)	
Civil Service Commission; RAYMOND W. EWELL, in)	
His Official Capacity as Commissioner of the Civil)	
Service Commission; BARBARA J. PETERSON, in Her)	
Official Capacity as Commissioner of the Civil Service)	
Commission; ARES G. DALIANIS, in His Official)	
Capacity as Commissioner of the Civil Service)	
Commission; BETTY BUKRABA, in Her Official)	
Capacity as Commissioner of the Civil Service)	
Commission; THE DEPARTMENT OF HEALTHCARE)	
AND FAMILY SERVICES; and JULIE HAMOS, in Her)	
Official Capacity as Director of the Department of)	Honorable
Healthcare and Family Services,)	John Schmidt,
Defendants-Appellees.)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding the Civil Service Commission's decision to discharge plaintiff was not arbitrary or unreasonable.

¶ 2 In September 2010, the Department of Healthcare and Family Services (Department) sought to discharge plaintiff Michael A. Sanders for violating the Department's employee attendance policies. The Department asserted Sanders failed to comply with portions of the Department's employee handbook (Handbook) and the affirmative attendance policy

Memorandum of Understanding (Memo) between the Illinois Department of Central Management Services (CMS) and the American Federation of State, County & Municipal Employees (AFSCME). Upon reviewing the Department's discharge recommendation, CMS discharged Sanders, effective November 23, 2010.

¶ 3 Sanders requested a hearing pursuant to section 11 of the Personnel Code (20 ILCS 415/11 (West 2010)). The hearing commenced in December 2010 and concluded January 26, 2011, as a result of additional hearing dates needed to complete all of the evidence. In March 2011, an administrative law judge (ALJ) issued a recommended decision, finding the Department proved Sanders violated its attendance policy and Sanders' discharge was warranted. In April 2011, the Civil Service Commission, Chris Kolker, Raymond W. Ewell, Barbara J. Peterson, Ares G. Dalianis, and Betty Bukraba (collectively, the Commission), adopted the ALJ's proposal, finding the charges for discharge were proved and warranted Sanders' discharge. Following a July 2012 administrative review hearing, the circuit court affirmed the Commission's decision.

¶ 4 Sanders appeals, arguing the Commission's decision to discharge Sanders should be reversed because (1) the AFSCME Memo prohibits Sanders' discharge, (2) Sanders' discharge is "contrary to established case law regarding the AFSCME Memo," (3) the Commission violated Title 80, section 1.141, of the Illinois Administrative Code (80 Ill. Adm. Code 1.141(2010)) by interpreting and applying the AFSCME Memo inconsistently, (4) Sanders was denied the progressive discipline outlined in the AFSCME Memo, and (5) the Commission failed to consider as a mitigating factor Sanders' use of prescription sleep medication.

¶ 5 We affirm.

¶ 6

I. BACKGROUND

¶ 7

A. Sanders' Employment With CMS and the Department

¶ 8

In March 2010, Sanders started working as a data processing technician at the Department. Before working at the Department, Sanders was employed at CMS. In 2007, Sanders was discharged from CMS, but in August 2008, the Commission ordered him reinstated. Prior to Sanders' scheduled March 2, 2009, return to work, he was placed on paid administrative leave due to an anonymous allegation he called in a bomb threat to the workplace. After being cleared of the allegation, Sanders returned to work at CMS on June 26, 2009. Thereafter, Sanders was laid off from CMS and transferred to work at the Department.

¶ 9

On November 23, 2010, Sanders was discharged from the Department for violating employee attendance policies.

¶ 10

B. The Attendance Policies

¶ 11

1. *The Affirmative Attendance Policy Memorandum of Understanding*

¶ 12

In March 2009, CMS entered into an attendance policy with AFSCME, a collective-bargaining unit that represents the Department's employees. The Memo provides, in relevant part, as follows:

"Unauthorized absences shall be those absences for which time is not approved. The threshold between late arrival and unauthorized absence is one hour after starting time. Although tardiness is not considered an unauthorized absence under this agreement, employees are expected to report to work on time each day as scheduled. Any negotiated tardiness policies shall remain in full

force and effect during the life of the Master Agreement unless otherwise negotiated by the parties."

¶ 13 The Memo outlines the following progressive discipline system for unauthorized absences. For an employee's first unauthorized absence in which the employee calls in to work to notify his supervisor of his absence, the employee is subject to counseling. Discipline for subsequent violations ranges from an oral reprimand to a written reprimand to suspensions of increasing length. For a twelfth violation, an employee is subject to discharge. The Memo treats each unauthorized absence as a separate offense; however, the Memo specifies that each unauthorized absence without a call-in "shall be considered as two offenses."

¶ 14 Pursuant to the Memo, the union may request a joint union-management consultation at the last suspension prior to discharge. The consultation's purpose is to "provide guidance and counseling to the employee as to the need for their services, the consequences of continued unauthorized absences, the ability of services for problems, *** and the ability to request a leave of absence." The Memo specifies it "supersedes any other agreement(s) on this issue."

¶ 15 *2. The Employee Handbook Affirmative Attendance Policy*

¶ 16 The Department's Handbook also contains employee absence policies. Section 240.1 of the Handbook specifies misuse/abuse of time "involves unapproved absences of less than one-half day," which are subject to progressive and corrective disciplinary action. The Handbook further provides "[t]he threshold between late arrival and unauthorized absence is one hour after the starting time."

¶ 17 Section 240.2 of the Handbook, labeled "Unauthorized Absence Under

Affirmative Attendance," states "[u]nauthorized absences of one-half day or more, or unauthorized absences not called in pursuant to the Work Rules" are subject to corrective and progressive disciplinary action, but "[t]ardiness is not subject to this policy."

¶ 18 Section 205.2B of the Handbook provides that when an employee is unable to request an absence in advance, he must request use of authorized benefit time within one hour of the start of his work shift.

¶ 19 C. Sanders' Discharge

¶ 20 In August 2009, Sanders attended training on the implementation of AFSCME's attendance policy. According to Veronica Tozer, a CMS employee who participated in providing the August 2009 training, employees learned a failure to call in an absence within one hour of starting time would be considered an unauthorized absence without a call-in.

¶ 21 After commencing his job at the Department in March 2010, Sanders missed work on May 4 and 13, June 9, 17, 22, and 24, and September 3, 2010. On each of those days Sanders called in to report his absence; however, other than on June 17, 2010, Sanders failed to call within one hour of the time he was scheduled to start work. For each absence Sanders did not timely call in, the Department charged Sanders with two Memo attendance policy violations.

¶ 22 By his final unauthorized absence without a call-in on September 3, 2010, Sanders had progressed to the twelfth and final disciplinary step outlined in the Memo. The Department sought to discharge Sanders for violating the Memo affirmative attendance policy and sections 240.1, 240.2, and 205.2B of the Department's rules. After reviewing the Department's discharge recommendation, CMS discharged Sanders, effective November 23, 2010.

¶ 23

D. The Administrative Proceeding

¶ 24

In December 2010, Sanders filed a written hearing request. 20 ILCS 415/11 (West 2010). On December 18, 2010, Sanders' hearing before an ALJ commenced, during which the parties presented the following evidence.

¶ 25

1. *Evidence Regarding the Affirmative Attendance Policies*

¶ 26

Robb Craddock, CMS' deputy director of labor relations, testified he represents CMS in negotiating and administering over 25 collective-bargaining agreements (CBAs) covering more than 40,000 state employees. He negotiated the affirmative attendance Memo on behalf of CMS. According to Craddock, agencies are expected to use their discretion in applying the contract's language to situations they may encounter. Craddock further explained, where the Memo is silent on an issue addressed by the agency's rules, the agency's rules control. On the other hand, if the Memo addresses a specific issue, the terms of the Memo govern.

¶ 27

The Memo does not explicitly state that if an employee does not call within a one-hour time frame the employee will accrue an unauthorized absence. However, Craddock explained the absence of a specific provision in the Memo does not mean such a provision is void. For example, the Memo does not reference predisciplinary meetings, but employers are obligated to hold a predisciplinary meeting before implementing any discipline.

¶ 28

Terri Shawgo, the Department's bureau chief of the office of labor relations and bureau of training, testified she served on the statewide committee that negotiated the Memo with AFSCME. According to Shawgo, the Memo does not specify a time by which an employee must call in because the Memo applies to many state agencies that have different call-in policies. Because the Memo does not "speak to the specifics" of the Department's call-in procedures, the

Department's rules apply in that regard.

¶ 29 Shawgo explained an employee who is more than one hour late for work is no longer considered tardy but is charged with an unauthorized absence. Specifically, section 205.3B of the Handbook requires an employee to call within one hour of his starting time, and section 240.2 of the Handbook specifies that an unauthorized absence that is not called in pursuant to the work rules set forth in the Handbook is subject to corrective and progressive discipline.

¶ 30 Shawgo and Craddock testified when an employee fails to follow the call-in procedure, the employee accrues an unauthorized absence without call-in, and the employee is charged with two attendance violations in accordance with the Memo policy. If any employee calls in but lacks benefit time to cover his absence or fails to call in within the required time, the employee can be charged with an unauthorized absence with call-in under section 240.1 of the Department's rules. The Handbook tells employees they are responsible for tracking their time and knowing whether they have benefit time to cover their absence.

¶ 31 According to Craddock, the purpose behind counting an employee's absence without a call-in as a "double penalty" is to encourage employees to call in and allow supervisors to better plan around the employee's absence. When an employee fails to call in, Craddock explained, the employee's absence may require others to compensate for the employee's absence by working overtime or not being able to finish their own work.

¶ 32 *2. Sanders' Testimony*

¶ 33 Sanders testified he attended the August 2009 training regarding the Memo policy, which was led by Tozer and an AFSCME representative. Sanders agreed that, under the Memo

and the Department's rules, the threshold between tardiness and an unauthorized absence is one hour. He acknowledged he called in all but one of his absences more than one hour after his start time, testifying he was "not contesting the facts," of his case but rather, "the application of the [Memo] policy." According to Sanders, the Memo policy only required him to call in at some time on any day he was absent, and therefore, he should not have been charged with two violations for any of his absences. Sanders asserted the Department targeted him with a deliberate misinterpretation of the policy.

¶ 34 On June 17, 2010, the Department issued Sanders notice of a second written reprimand after Sanders failed to call in his absences within one hour of his starting time on May 4 and 13, 2010. Before the Department imposed discipline, Sanders contested the reprimand in a written response, arguing under the Department's affirmative attendance policy, Sanders should have only been given counseling and an oral reprimand. Sanders' written response also stated Tozer, who had transferred from CMS to the Department, would impose harsher than necessary discipline on him and would not follow any rule, regulation, policy, or procedure.

¶ 35 According to Sanders, prior to transferring to the Department, he began experiencing trouble sleeping because of the stress he felt over (1) his previous two discharges from CMS, (2) the false bomb threat allegation, (3) the pending federal litigation he instituted against CMS, and (4) his 2010 layoff from CMS. Sanders testified on February 2, 2010, his doctor prescribed him Ambien. On May 19, 2010, Sanders asked his doctor to increase his dosage, and she doubled it. After the doctor increased Sanders' dosage, he began having trouble waking up to go to work or call in. At the hearing, Sanders submitted a note dated November 22, 2010, purportedly from a doctor at Springfield Clinic stating she began prescribing Ambien for

Sanders at a dosage of 5 milligrams a day on February 2, 2010, and increased his dosage to 10 milligrams a day on May 19, 2010.

¶ 36 When Sanders received a second written reprimand for his May 2010 absences on June 17, 2010, he knew the Department considered an unauthorized absence without a call-in within one hour of starting time as two violations. However, when the AFSCME steward asked Sanders whether he wanted to file a grievance, Sanders declined. Sanders explained none of the previous grievances he had filed resulted in a favorable outcome, and filing one in this instance would have just caused him additional stress. Sanders believed the grievance procedure was "almost a form of harassment."

¶ 37 According to Sanders, on October 27, 2010, he participated in a telephone hearing in conjunction with his federal case against CMS. On October 28, 2010, the Department placed him on suspension pending discharge. Sanders believed the Department placed him on suspension to retaliate against him for pursuing his federal case. Sanders also believed CMS retaliated against him in 2007 when the Illinois Department of Employment Security stopped his unemployment benefits without a hearing after CMS protested Sanders' receipt of benefits. Further, Sanders claimed CMS employee Steve Miller connected Sanders to the alleged bomb threat. After Sanders was cleared of the bomb threat charges, CMS scheduled him to return to work on June 1, 2009. Sanders requested three weeks' time off "to relocate and get [himself] situated" before returning to work. However, Steve Miller denied Sanders' request for the third week of time. On June 26, 2009, the day after Sanders returned to work, Tozer and Miller initiated a formal disciplinary proceeding against Sanders "because of [his] demeanor" during his interaction with Miller. The proceeding resulted in Sanders' three-day suspension.

¶ 38 3. *Evidence Regarding the Disciplinary Process Applied to Sanders*

¶ 39 Ardella Siders, Sanders' supervisor in the Department's bureau of information systems, testified in 2010, Sanders was the only one of approximately 16 employees working in the unit who failed to call in absences within the required time. According to office of labor relations and bureau training bureau chief Terri Shawgo, the Department followed its affirmative attendance policy and the Memo affirmative attendance policy in applying progressive discipline to Sanders. The Department considered Sanders' failure to call in his absence within one hour of his starting time on May 4, 2010, as two offenses. Thus, the Memo policy specified Sanders should receive an oral reprimand rather than counseling. On May 13, 2010, Sanders was absent again and failed to call in his absence within the first hour. The Department again deemed Sanders' failure to call in within one hour as two offenses and issued Sanders a second written reprimand for a step-four violation.

¶ 40 Before the Department issued Sanders' reprimand, Sanders sent a "rebuttal to the proposed discipline," dated May 27, 2010, to Anita Corey, the Department's bureau chief of information systems. Sanders' rebuttal explained he was taking prescription sleep medication and had been advised it played a role in his failure to call in. Corey met with Sanders in a predisciplinary meeting in May 2010. Sanders did not provide a copy of his prescription or the name of his doctor so the Department could verify his claim.

¶ 41 On June 9, 2010, before the Department issued Sanders' second written reprimand for his May 2010 absences, Sanders missed work again and failed to call within one hour of his start time. This third incident placed Sanders at the sixth level of discipline under the Memo policy, which was a three-day suspension. On June 17, 2010, the same day that the Department

issued Sanders' second written reprimand, Sanders was absent again. Although he timely called in, Sanders did not have available benefit time to cover all of the time he requested, so he received an unauthorized absence. This unauthorized absence placed Sanders at the seventh disciplinary step. On June 22, 2010, Sanders again failed to call in an absence within one hour of his start time, which progressed Sanders to the ninth disciplinary step.

¶ 42 On June 24, 2010, Sanders again failed to call in an absence within the required time, placing Sanders at the eleventh disciplinary step, which warranted a 20-day suspension. Sanders' suspension went into effect on July 19, 2010. At the time the Department issued Sanders' suspension, Shawgo spoke to Sanders about his unauthorized absences. Shawgo explained the Department's application of the attendance policies, warning Sanders that he was near discharge. In addition, for each discipline it issued, the Department provided Sanders a copy of the section of the attendance policy he was charged with violating and a written notice of the discipline imposed.

¶ 43 Sanders did not dispute he called in late, nor did he provide any reason he was unable to call in his absences within one hour of his start time. Rather, Sanders expressed to Shawgo his belief the Department was misinterpreting the Memo policy by counting his unauthorized absences without a call-in as two steps in the disciplinary process. Sanders believed because he called in at some point during each day he was absent, each absence should only have resulted in one step in the disciplinary process.

¶ 44 After Sanders received the second written reprimand, he requested Tozer be prohibited from participating in future decisions concerning personnel actions against him. According to both Shawgo and Tozer, however, Tozer was not assigned to Sanders' case or

involved in his discharge.

¶ 45 On September 3, 2010, Sanders again failed to appear at work and failed to call in his absence within the first hour of his start time. As Sanders' supervisor, Corey was the "final decision-maker" regarding Sanders' discipline other than the directors of CMS and the Department. In reviewing Sanders' disciplinary history, Corey concluded Sanders had failed to demonstrate a change in his behavior. Thus, she concluded the appropriate level of discipline was suspension pending discharge. Shawgo testified Sanders' disciplinary history at CMS did not factor into the discipline he received while working for the Department.

¶ 46 Theresa Bietsch, the Department's administrator for personnel and administrative services, testified she signed the disciplinary notices issued to Sanders, including the notice of discharge, on the Department director's behalf. Bietsch placed her own initials on the documents. Sanders disputed Bietsch's testimony, insisting Tozer signed and initialed the documents.

¶ 47 Craddock signed Sanders' notice of discharge for cause, effective November 23, 2010, on CMS director Sledge's behalf. Craddock testified he knew of the allegation that Sanders made a bomb threat while employed at CMS but the allegation did not factor into the Department's discharge decision. Craddock did not know of Sanders' pending federal litigation against CMS.

¶ 48 E. The ALJ's Recommendation

¶ 49 In March 2011, the ALJ issued a recommended decision, finding the Department had proved (1) Sanders violated its attendance policy and (2) discharged was warranted. The ALJ found although the Memo did not explicitly state an employee's failure to call in within one hour of the employee's start time would be treated as two offenses, Sanders had not presented

evidence showing the Memo prohibited the Department from enacting such a policy.

Specifically, the ALJ noted section 205.2(b) of the Handbook specified an employee must call in to request time off within one hour of the start of the workday. Further, the ALJ found the evidence indicated (1) the Memo was intentionally written in a broad fashion to accommodate multiple agencies' call-in procedures, (2) Sanders was specifically trained on the Department's call-in requirements before receiving discipline for his absences, (3) Sanders refused to work with the Department to address his absences following his initial disciplinary events, and (4) Sanders was the only employee in his unit who would call in absences more than one hour after the starting time.

¶ 50 With respect to Sanders' claim the Department applied the Memo to Sanders in a retaliatory fashion, the ALJ noted Sanders was discharged from the Department, not CMS, and "the preponderance of the evidence in [Sanders'] case indicate[d] that Sanders was not discharged as a form of retaliation," but rather, because Sanders repeatedly missed work at the Department and neglected to call in within one hour of his starting time. In sum, the ALJ stated, "Sanders knew the manner in which the attendance policy was applied" and his repeated absences in May, June, and September 2010 were unauthorized, thus warranting Sanders' discharge following his September 3, 2010, unauthorized absence. The ALJ recommended the charges had been proved and warranted Sanders' discharge.

¶ 51 F. The Commission's Final Administrative Decision

¶ 52 In April 2011, the Commission adopted the ALJ's proposed decision, finding the charges for discharge were proved and warranted Sanders' discharge.

¶ 53 G. The Circuit Court Proceedings Affirming The Commission's Decision

¶ 54 In May 2011, Sanders filed a complaint for administrative review of the Commission's decision. 735 ILCS 5/3-103 (West 2010). Later that month, Sanders filed (1) a motion for amendment of complaint for administrative review and (2) a corrected motion for amendment of complaint, seeking to amend his original complaint to include the Department as a named party-defendant. The circuit court initially dismissed the case with prejudice in July 2011 pursuant to defendants' section 2-619 motion to dismiss (735 ILCS 5/2-619 (West 2010)), based on Sanders' failure to name and have summons issued on all necessary parties. In January 2012, this court remanded Sanders' case on appeal for the limited purpose of consideration of Sanders' motion to amend complaint. *Sanders v. Illinois Civil Service Comm'n*, No. 4-11-0760 (Jan. 19, 2012) (unpublished order remanding). In March 2012, the circuit court allowed Sanders' motion to file an amended complaint. Following a July 2012 hearing, the circuit court affirmed the Commission's decision.

¶ 55 This appeal followed.

¶ 56 II. ANALYSIS

¶ 57 On appeal, Sanders argues the Commission's decision should be reversed. Specifically, Sanders asserts (1) the AFSCME Memo prohibits Sanders' discharge, (2) Sanders' discharge is "contrary to established case law regarding the AFSCME [Memo]," (3) the Commission violated section 1.141 of the Rules of the Illinois Civil Service Commission by interpreting and applying the AFSCME Memo inconsistently, (4) Sanders was denied the progressive discipline outlined in the AFSCME Memo, and (5) the Commission failed to consider "as a mitigating factor" Sanders' use of Ambien. Defendants contend we should deem

Sanders' arguments forfeited based on Sanders' failure to comply with Illinois Supreme Court Rules 341(h) (eff. July 1, 2008) and 342 (eff. Jan. 1, 2005). We address the parties' arguments in turn.

¶ 58 A. Defendants' Contention We Should Deem Sanders' Arguments Forfeited

¶ 59 Initially, defendants contend this court should deem Sanders' arguments forfeited because Sanders' brief fails to comply with Illinois Supreme Court Rules 341(h) (eff. July 1, 2008) and 342 (eff. Jan. 1, 2005). Specifically, defendants point out Sanders' brief lacks (1) a nonargumentative statement of facts, (2) a standard for reviewing the Commission's decision, (3) a summary of points and authorities relied on, and (4) an appendix that complies with Rule 342.

¶ 60 Rule 341(h) requires an appellant's brief to contain, among other things, (1) a summary of points and authorities relied on, (2) a concise statement of the applicable standard of review for each issue, with citation to authority, and (3) a statement of facts setting forth, without argument or comment, the facts necessary to an understanding of the case. Ill. S. Ct. R. 341(h) (eff. July 1, 2008). Rule 342 sets forth the documents that should be included in an appendix to the appellant's brief, including a copy of the judgment appealed from, any opinion, memorandum, or findings of fact filed or entered by the trial judge or by an administrative agency, and any pleadings or other materials from the record which are the basis of the appeal or pertinent to the appeal. Ill. S. Ct. R. 342(a) (eff. Jan. 1, 2005).

¶ 61 "The rules of procedure concerning appellate briefs are not mere suggestions, and it is within this court's discretion to strike the plaintiff's brief for failing to comply with Supreme Court Rule 341." *Crull v. Sriratana*, 388 Ill. App. 3d 1036, 1045, 904 N.E.2d 1183, 1190 (2009). Nonetheless, striking a brief is a harsh sanction, and Sanders' noncompliance with the

rules here is not so flagrant as to hinder our review. With respect to Sanders' statement of facts, we agree his characterization of some of the Department's and AFSCME's actions is argumentative. This court need not consider any statement that is argumentative. *Beitner v. Marzahl*, 354 Ill. App. 3d 142, 146, 819 N.E.2d 1266, 1270 (2004). Thus, we will ignore Sanders' arguments concerning AFSCME and the Department contained in his statement of facts. Likewise, we will disregard the documents Sanders attached in the appendix of his brief that were not admitted into evidence at the administrative hearing, such as the "layoff e-mails" and the police report concerning the bomb threat incident. See *Jenkins v. Wu*, 102 Ill. 2d 468, 484-85, 468 N.E.2d 1162, 1170 (1984) (striking affidavits that were not filed in the trial court).

¶ 62 In addition, we will ignore the portion of Sanders' brief wherein Sanders engages in an extensive personal attack of Tozer, as Sanders' accusations are unsupported by the record. See *McCauley v. City of Rockford*, 207 Ill. App. 3d 244, 250, 565 N.E.2d 729, 733 (1990) (striking portion of the plaintiff's brief containing a "scurrilous" allegation).

¶ 63 B. Sanders' Argument The Commission's Decision Should Be Reversed

¶ 64 Sanders argues this court should reverse the Commission's administrative decision finding Sanders' discharge was appropriate.

¶ 65 1. *Standard of Review*

¶ 66 Our review of the Commission's decision is governed by the Administrative Review Law. 735 ILCS 5/3-101 to 3-113 (West 2010). We review an administrative agency's decision regarding discharge pursuant to a two-step process. *Department of Human Services v. Porter*, 396 Ill. App. 3d 701, 718, 921 N.E.2d 367, 380. First, we review the Commission's factual findings. *Id.* The Commission's findings of fact are deemed *prima facie* true and correct,

and we will reverse only if those findings are against the manifest weight of the evidence.

Department of Juvenile Justice v. Civil Service Comm'n, 405 Ill. App. 3d 515, 522, 939 N.E.2d 54, 60 (2010).

¶ 67 Second, we determine whether the Commission's findings of fact provide a sufficient basis for the agency's conclusion that cause for discharge does or does not exist.

Department of Juvenile Justice, 405 Ill. App. 3d at 521, 939 N.E.2d at 59-60. Section 1.170 of Title 80 of the Illinois Administrative Code (80 Ill. Adm. Code 1.170(2010)) defines "[c]ause for discharge" as consisting "of some substantial shortcoming that renders the employee's continuance in his or her position in some way detrimental to the discipline and efficiency of the service and that the law and sound public opinion recognize as good cause for the employee no longer holding the position." We will not overturn an administrative agency's discharge determination unless that determination "is arbitrary, unreasonable, or unrelated to the requirements of service." (Internal quotation marks omitted.) *Department of Juvenile Justice*, 405 Ill. App. 3d at 522, 939 N.E.2d at 60.

¶ 68 Here, Sanders does not contest he failed to appear at work and to call in all but one of his absences within one hour of his start time. However, Sanders argues he should not have been discharged based on provisions of the AFSCME Memo and the fact he was taking prescription sleep medication. Thus, our review concerns the second step in the review process—namely, whether the Commission's discharge decision was "arbitrary, unreasonable, or unrelated to the requirements of service." (Internal quotation marks omitted.) *Department of Juvenile Justice*, 405 Ill. App. 3d at 522, 939 N.E.2d at 60.

¶ 69 2. *Whether the AFSCME Memo Prohibited Sanders' Discharge*

¶ 70 Sanders first argues the AFSCME Memo prohibited his discharge because under the Memo, each of his absences without a call-in should have been deemed one violation instead of two; thus, Sanders contends, he did not accrue 12 unauthorized absences.

¶ 71 The evidence presented at Sanders' hearing established the following. Pursuant to the Memo, "unauthorized absences shall be absences for which time is not approved." The Memo further specifies the threshold between late arrival and unauthorized absence is one hour after an employee's starting time. Employees are subject to progressive discipline for unauthorized absences "with call-in." Unauthorized absences "without call-in shall be considered as two offenses."

¶ 72 In the ALJ's recommended decision, which the Commission adopted, the ALJ found although the Memo did not specifically address the time frame in which an employee must call in an absence, the Memo did not prohibit the Department from enacting a one-hour call-in policy. The Commission's finding is supported by the evidence. Craddock, who negotiated the affirmative attendance Memo on behalf of CMS, explained where the Memo is silent on an issue, the agencies' rules control. Shawgo likewise testified because the Memo does not "speak to the specifics" of the Department's call-in procedures, the Department's procedures govern that issue. Sanders did not present evidence contradicting Craddock or Shawgo's testimony.

¶ 73 We note Sanders insists Craddock and Tozer provided "deliberately false testimony" regarding the interpretation and application of the Memo attendance policy. However, on administrative review, "a reviewing court *must not* reweigh the evidence or assess the credibility of witnesses." (Emphasis in original.) *Maun v. Department of Professional*

Regulation, 299 Ill. App. 3d 388, 401, 701 N.E.2d 791, 801 (1998).

¶ 74 Based on the foregoing, the Commission's decision was not unreasonable.

¶ 75 3. *Whether Sanders' Discharge Was Contrary to Established Case Law*

¶ 76 As a corollary, Sanders contends his discharge is "contrary to established case law regarding the AFSCME [Memo]." Specifically, Sanders cites the following three federal cases in which the courts upheld the discharge of employees who accumulated 12 or more unauthorized absences within a 24-month period: *Foster v. Adams*, 2011 WL 308471 (C.D. Ill. Jan. 27, 2011); *Wyche v. Illinois Department of Human Services*, 2008 WL 4866354 (N.D. Ill. June 3, 2008); and *Smith v. Illinois Department of Human Services*, 2008 WL 4679456 (N.D. Ill. May 8, 2008). As defendants point out, however, all three cases are unpersuasive because generally, Illinois courts are not bound by federal court decisions. See *Better Government Ass'n v. Blagojevich*, 386 Ill. App. 3d 808, 814-15, 899 N.E.2d 382, 388 (2008) ("[W]e are not required to follow these federal court decisions. Instead, we may choose to do so if we find them persuasive."). Moreover, (1) *Wyche* and *Smith* were decided in 2008, before CMS and AFSCME entered into the Memo, and thus neither case involved the language of the Memo policy at issue in Sanders' case, and (2) none of the decisions address whether a Department employee can be charged with two unauthorized absences under the Memo if he fails to call in an absence within one hour of his start time. Therefore, we conclude Sanders' discharge was not contrary to established case law.

¶ 77 4. *Whether The Commission Violated the Illinois Administrative Code*

¶ 78 Sanders also argues the Commission "is not uniformly interpreting and applying the AFSCME Memo and is thus violating" Title 80, section 1.141 of the Illinois Administrative

Code (80 Ill Adm. Code 1.141 (2010)). That portion of the Illinois Administrative Code provides "[t]he Commission shall give full recognition and effect to provisions of collective bargaining agreements" and "[p]rovisions of collective bargaining agreements supersede contrary provisions of the Personnel Code, Personnel Rules and Rules of the Civil Service Commission." 80 Ill. Adm. Code 1.141 (2010).

¶ 79 In support of his claim the Commission acted inconsistently, Sanders cites *Illinois Department of Corrections v. Barrett* (Ill. Civil Service Comm'n No. DA-26-11 (Mar. 31, 2011)), a case involving the discharge of an employee who worked for the Illinois Department of Corrections (DOC). As explained by Craddock and Shawgo, however, the Memo was drafted to apply to many state agencies that have different call-in policies. Thus, the decision in *Illinois Department of Corrections* concerning the DOC's call-in policies has no bearing on the case at bar.

¶ 80 Moreover, the record indicates the Commission properly considered and determined the Memo did not supercede the Department's one-hour call-in policy. As explained by Craddock, (1) the Memo applies to various state agencies, which are expected to use discretion in applying the Memo to situations they encounter and (2) where the Memo is silent on an issue, existing agency rules control that issue. Further, Shawgo testified because the Memo does not "speak to the specifics" of the Department's call-in procedures, the Department's rules govern that issue. Thus, Sanders has failed to show the Commission violated Title 80, section 1.141, of the Illinois Administrative Code.

¶ 81 5. *Whether Sanders Was Denied Progressive Discipline As It Is Specified In The Memo*

¶ 82 Sanders next argues the Department failed to apply the progressive discipline set

forth in the Memo because the Department "warped the implementation of the AFSCME Memo such that the progressive discipline it imposed was reduced to a 2-step procedure." Sanders contends the Department's one-hour call-in requirement "has abolished unauthorized absence with a call in" because, according to Sanders, an unauthorized absence does not exist within the first hour of an employee's work shift. Sanders is mistaken. As Shawgo explained, an employee could receive an unauthorized absence with call-in if an employee calls in within the first hour of work but does not have benefit time to cover his absence—like Sanders did on June 17, 2010.

¶ 83 Shawgo testified as to how each of Sanders' absences progressed Sanders through the Memo's progressive discipline system. During the disciplinary process, Sanders met with both Corey and Shawgo. In addition, for each disciplinary action, the Department provided Sanders with a written copy of the charges against him and the relevant attendance policy provisions. In light of the foregoing, the Commission's discharge decision was not unreasonable.

¶ 84 6. *Whether the Commission Failed To Consider Sanders' Prescription Sleep Medication*

¶ 85 Finally, Sanders claims the Commission's decision should be reversed because the Commission failed to consider as a mitigating factor Sanders' use of prescription sleep medication. According to Sanders, on May 19, 2010, his physician increased his dosage of Ambien from 5 to 10 milligrams. Within the next 35 days, Sanders accrued four of his seven attendance infractions.

¶ 86 The evidence at Sanders' hearing established that, although Sanders' May 26, 2010, response to his written reprimand explained he was taking sleep medication, Sanders did not provide documentation to the Department to support his claim. Shawgo testified when she issued Sanders his 20-day suspension, he failed to provide a reason he could not meet the

Department's call-in requirement. Moreover, as defendants point out, Sanders did not request a consultation with management to address his sleeping problem, although the Memo specifically allowed for such a consultation.

¶ 87 Sanders argues his use of prescription sleep medicine caused him to miss work and thus his unexcused absences were "unintentional"; however, Sanders has not presented evidence indicating either the Memo or the Handbook specifies an employee's unexcused absences must be intentional to be subject to progressive discipline. Indeed, Craddock testified the purpose behind the rule requiring an employee to call in his absence within one hour of his shift is to allow supervisors to better plan around an employee's absence, which can require others to work overtime. Whether intentional or unintentional, Sanders' failure to report to work and failure to call in within one hour of his start time had the potential to impair the Department's ability to operate efficiently. See *Marzano v. Cook County Sheriff's Merit Board*, 396 Ill. App. 3d 442, 447, 920 N.E.2d 1205, 1209 (2009) ("Management's right to discipline and ultimately to discharge an employee for absenteeism and tardiness is based on its right to operate efficiently.").

¶ 88 In light of the foregoing, the Commission's decision to discharge Sanders, even in light of Sanders' use of prescription sleep medicine, was not arbitrary or unreasonable.

¶ 89 III. CONCLUSION

¶ 90 For the reasons stated, we affirm the circuit court's affirmance of the Commission's judgment.

¶ 91 Affirmed.