

DECISION OF THE CIVIL SERVICE COMMISSION

Reconsideration

CSC Docket No. 2018-3206

The Jersey City Public Library, represented by Ronald C. Hunt, Esq., petitions the Civil Service Commission (Commission) for reconsideration of the attached final administrative decision, rendered on April 18, 2018, in which the Commission modified Shandor Wine's removal to a 45 day suspension and granted back pay, benefits, and seniority.

DPF-439 * Revised 7/95

preponderance of the evidence that Wine's conduct was egregious enough to warrant removal. Upon its *de novo* review of the record, the Commission agreed with the ALJ's determination regarding the charges but did not agree with the ALJ's recommendation to uphold the removal. In determining the proper penalty, the Commission found that while it was clear the Wine's actions were improper, other than the victim's belief, there was nothing in the record to support any sort of malicious or nefarious intent on Wine's part. Accordingly, the Commission imposed a 45 working day suspension.

In the instant matter, the appointing authority argues that the Commission erred by modifying the penalty of removal it had imposed on Wine. Additionally, it contends that the Commission should defer judgement of the witnesses' credibility to the ALJ. Specifically, it asserts that if Rogowska's testimony was found credible then the Commission should have found that Wine's actions were committed with malicious or nefarious intent. It contends that the medical records and the other photographs of the bruise support her testimony as well as the testimony from the witnesses. Further, it indicated that Wine's supervisor Teresa Fairly, testified that there were three separate incidents involving Wine prior to the incident in question. Although none of the incidents resulted in formal discipline, these incidents raise concerns with Wine's ability to work cooperatively with female co-workers. Moreover, the appointing authority argues that Wine's conduct was egregious in nature and that the penalty of removal was appropriate. In this regard it asserts that Wine is unsuitable for continued employment within its workforce and that the application of progressive discipline in this case would be contrary to the public interest and send a dangerous message to its staff.

In reply, Wine takes issue with Fairly's testimony concerning one of his alleged prior incidents. Wine argues that he was improperly subjected to a hostile work environment by Fairly and another co-worker. He asserts that his claims were not acted upon and that he was retaliated against.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding.

In the instant matter, the appointing authority argues that the Commission erred in modifying Wine's removal to a 45 day suspension. It contends that Rogowska's testimony, the testimony of the other witnesses, and the medical and photographic evidence all indicate that Wine's action in striking her in the chest was done with malicious or nefarious intent. The Commission does not agree. The

fact that Rogowska told co-workers about the incident and the fact that she received a bruise does not conclusively indicate that Wine intended to strike her with malicious or nefarious intent. Therefore, in the absence of such an intent, Wine's actions cannot be considered egregious enough to warrant removal and the concept of progressive discipline must be applied. Further, while the appointing authority relies on three prior incidents involving Wine, none of those incidents resulted in disciplinary action. In determining the proper penalty, the Commission imposed a major disciplinary action of a 45 day suspension which served as an indication that any further infractions committed by Wine would potentially subject him to removal from employment. Accordingly, based on the foregoing, the appointing authority has not presented any persuasive evidence or arguments that the Commission erred in its prior decision and its request for reconsideration is denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. The matter concerning backpay is currently pending a decision by the Commission.

ORDER

Therefore, it is ordered that the appointing authority's request be denied.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 16TH DAY OF JANUARY, 2019



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

c: Ronald C. Hunt, Esq.
Shandor Wine
Kelly Glenn
Records Center



STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of Shandor Wine,
Jersey City Public Library

CSC Docket No. 2016-4015
OAL Docket No. CSV 07699-16

ISSUED: MAY 4, 2018 (EG)

The appeal of Shandor Wine, a Building Maintenance Worker with the Jersey City Public Library, of his removal effective April 28, 2016, on charges, was heard by Administrative Law Judge Margaret M. Monaco (ALJ), who rendered her initial decision on February 1, 2018. No exceptions were filed by the parties.

Having considered the record and the attached ALJ's initial decision, and having reviewed the testimony and evidence presented before the Office of Administrative Law (OAL), and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on April 18, 2018, did not adopt the ALJ's recommendation to uphold the removal. Rather, the Commission modified the removal to a 45 working day suspension.

DISCUSSION

The appellant was charged with conduct unbecoming a public employee. Specifically, the appointing authority asserted that the appellant pushed and elbowed a co-worker causing her to seek medical attention. Upon the appellant's appeal, the matter was transmitted to the OAL for a hearing as a contested case.

The ALJ set forth in her initial decision that on April 11, 2016, the appellant was working as a Building Maintenance Worker at the West Bergen Branch of the Jersey City Public Library. On that date, a co-worker of the appellant, Beata Rogowska, a Building Maintenance Worker, alleged that the appellant had assaulted her. She testified that as she was exiting the outside door of the library to purchase a cup of coffee, the appellant, who had been outside, forcibly walked in

the door that she had opened and struck her right lower breast area with his elbow. Rogowska stated that the appellant struck her chest with his elbow in a jab-like fashion and with such force that she was almost out of breath. Rogowska testified that she immediately informed Library Assistant Mary Bonner that the appellant had assaulted her. Bonner's testimony corroborated Rogowska's assertions. Rogowska also indicated that she called Building Maintenance Supervisor Teresa Fairley and informed her of the incident. Rogowski testified that the next morning a large bruise appeared where the appellant had struck her. She then went to her personal physician for an examination. She also returned to the library to show Fairley the bruise.

The appellant testified that he had no contact with Rogowski before or during the alleged incident. He denied encountering Rogowski at the library door and that anything occurred. Additionally, the appellant testified that in the past, Rogowski harassed him about his work and took pictures of his work.

The ALJ found the testimony of Rogowska, Fairley and Bonner to be forthright and found them to be credible witnesses. She found that Rogowska's testimony was consistent with the report of the incident she had authored. In addition, the visible bruise also supported Rogowska's testimony about the incident. Further, the ALJ found the appellant's testimony to be inherently improbable and not "hanging together" with, and discredited by, other credible evidence in the record. Based on the foregoing, the ALJ concluded that the appointing authority had sustained its burden of proving by a preponderance of the evidence that the appellant's conduct was unbecoming a public employee. With regard to the penalty, the ALJ found that although the appellant's only prior discipline consisted of a verbal warning, the appellant's action was egregious enough to warrant removal.

Upon its *de novo* review of the record, the Commission agrees with the ALJ's determination regarding the charges. However, the Commission does not agree with the ALJ's recommendation to uphold the removal. Rather, the Commission modifies the removal to a 45 working day suspension.

In determining the proper penalty, the Commission's review is *de novo*. In addition to considering the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). Although the Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway State Prison*, 81 N.J. 571, 580 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. See *Carter v.*

Bordentown, 191 N.J. 474 (2007). In the instant matter, the appellant had no prior disciplinary actions since his employment began in August 2015.¹ Moreover, given the actual incident in question, the Commission does not find removal to be appropriate under these circumstances. In this regard, while it is clear the appellant's actions were improper, other than the victim's belief, there is nothing in the record to support any sort of malicious or nefarious intent on the appellant's part. Accordingly, the Commission imposes a 45 working day suspension, which will serve as an indication that any further infractions committed by the appellant will potentially subject him to removal from employment.

Accordingly, the appellant is entitled to back pay, benefits and seniority after the imposition of the 45 working day suspension up to his date of reinstatement. With regard to counsel fees, since the appellant has not prevailed on the primary issues on appeal he is not entitled to an award of counsel fees. See *N.J.A.C. 4A:2-2.12*. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. See *Johnny Walcott v. City of Plainfield*, 282 N.J. Super. 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, while the penalty was modified, charges were upheld and major discipline imposed. Consequently, as the appellant has failed to meet the standard set forth in *N.J.A.C. 4A:2-2.12*, counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. In the interim, as the court states in *Phillips, supra*, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Civil Service Commission finds that the appointing authority's action in removing the appellant was not justified. Therefore, the Commission modifies the removal to a 45 working day suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority for the period after the imposition of the 45 working day suspension through the date of his actual reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing

¹ A verbal warning does not constitute discipline under Civil Service law and rules.

authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2-2.10*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

Counsel fees are denied pursuant to *N.J.A.C. 4A:2-2.12*.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R. 2:2-3(a)(2)*. After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF APRIL, 2018



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 07699-16

AGENCY DKT. NO. 2016-4015

**IN THE MATTER OF SHANDOR WINE,
JERSEY CITY PUBLIC LIBRARY.**

Shandor Wine, appellant, pro se

**Ronald C. Hunt, Esq., for respondent Jersey City Public Library (Hunt, Hamlin &
Ridley, attorneys)**

Record Closed: January 29, 2018

Decided: February 1, 2018

BEFORE MARGARET M. MONACO, ALJ:

STATEMENT OF THE CASE

Appellant Shandor Wine appeals his removal from employment as a building maintenance worker with respondent, the Jersey City Public Library (the Library). The Library took this action based upon the charge of conduct unbecoming a public employee stemming from an alleged incident that occurred on April 11, 2016, involving appellant and a coworker.

PROCEDURAL HISTORY

The Library issued a Preliminary Notice of Disciplinary Action (PNDA) dated April 13, 2016, informing appellant of the charge of conduct unbecoming a public employee issued against him. The PNDA alleged that on April 11, 2016, appellant physically elbowed Beata Rogowska at the Library's West Bergen Branch, which caused a visible bruise on her upper body. Following a departmental hearing, the Library issued a Final Notice of Disciplinary Action (FNDA) dated April 28, 2016, memorializing the determination that the charge was sustained and providing for appellant's removal from employment effective April 28, 2016. Appellant filed an appeal, and the Civil Service Commission transmitted the matter to the Office of Administrative Law, where it was filed for determination as a contested case. The hearing was held on September 29, 2016, October 27, 2016, and May 11, 2017. After the conclusion of the testimony, the record remained open for the receipt of transcripts of the hearing and post-hearing submissions. The Library filed a brief dated December 28, 2017, in support of its position. No brief was submitted by appellant by the required deadline, on which date the record closed.

FACTUAL DISCUSSION

At the hearing, the Library presented four witnesses: Larry Ross, Teresa Fairley, Mary Bronner, and Beata Rogowska. Appellant testified on his own behalf. Certain facts surrounding this matter are largely undisputed. Based upon a review of the testimony and the documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, I FIND the following FACTS.

Teresa Fairley is employed as the building maintenance superintendent, a position that she has held for eighteen years. In this capacity, she is responsible for supervising all maintenance workers at the Library's nine branches.

Appellant was a maintenance worker under Fairley's supervision. He was employed by the Library from August 31, 2015, until his termination on April 28, 2016.

(R-11.) Appellant initially worked at the Main Library Branch until that the branch was closed to the public for renovations. He later worked at various branches, including the West Bergen Branch.

Betea Rogowska was also a maintenance worker under Fairley's supervision. She has been employed by the Library for approximately nine years and worked at the West Bergen Branch at the time of the alleged incident.

Mary Bronner is a library assistant and has worked for the Library for fifteen years. She was working at the West Bergen Branch at the time of the alleged incident.

Larry Ross has been employed by the Library for five years as its personnel technician. He is in charge of the Personnel Office and oversees the day-to-day operations of personnel including, among other duties, disciplinary actions and management of health benefits.

The alleged incident occurred on April 11, 2016, at the West Bergen Branch. On that date, Fairley received a telephone call from Rogowska, who was crying and informed Fairley that she had been assaulted by appellant. Rogowska relayed that as she was going out of the library door to go to the store, appellant was coming in the door, and appellant elbowed her. After receiving the call, Fairley immediately went to the West Bergen Branch, where she spoke to both appellant and Rogowska regarding what happened. After this discussion, Fairley informed appellant that she was sending him to another branch for the remainder of his shift. Appellant elected instead to take the rest of the day off. Rogowska completed her shift. Fairley also spoke to Bronner, who relayed that she did not witness the incident but that Rogowska had told her that appellant elbowed her.

On April 12, 2016, Rogowska did not report to work and went to her personal physician, Dr. Majchrzak, who issued a Health Certificate requesting that Rogowska be excused from work from April 12 to April 19, 2016. (R-13.) The Health Certificate memorialized Rogowska's advice that she was "assaulted at work by coworker."

Rogowska brought this documentation to her employer and completed an Employer's First Report of Injury form on April 12, 2016. (R-6.) In the form, Rogowska described her injuries as a "bruised, sore breast" and "pain in the chest." With regard to how the injury occurred, Rogowska reported that, "[a]s [she] was walking out thru [the] doorway, [appellant] walked in directly at [her], pushing his way thru and struck [her] with [his] elbow in [her] breast."

On April 12, 2016, Rogowska was also examined by the Library's workers' compensation physician with CarePoint Health Medical Group (CarePoint). CarePoint generated a report of her examination dated April 12, 2016, which is signed by a physician and was faxed to Ross's office. (R-8.) That form states that Rogowska recounted that she was "assaulted by coworker" and refers to "his elbow into her [right] breast." The doctor recorded on the form that Rogowska had a right "breast bruise" and the doctor's diagnoses included a right breast "contusion."

On April 12, 2016, Rogowska called Fairley and relayed that she was at the doctor's office and had a bruise. Rogowska sent Fairley pictures of the bruise on her telephone, and Fairley requested that Rogowska come to the library so that she could physically see the bruise. Rogowska went to the library and showed the Library director and Fairley a bruise on her right breast. The bruise Fairley observed that day, which is where Rogowska said appellant had elbowed her, appeared like the bruise depicted in the photographs introduced as R-9 and R-10. Those photographs show a large black-and-blue bruise on Rogowska's breast.

Rogowska authored and submitted an Incident Report, dated April 12, 2016, in which she reported that on April 11, 2016, she was "assaulted" by appellant "as [she] was walking out from [the] library." (R-5.) In this regard, Rogowska stated that appellant "in [the] last moment walked directly at [her] in the doorway, pushing [her] out of his way and struck [her] in [her] breast with his elbow." She further reported that the incident "[l]eft [her] in shock, as [she] simply wasn't expecting it to happen"; appellant "then kept on walking, didn't apologize"; and "[f]ollowing that day [a] bruise appeared on [her] right breast" and the "[w]hole area is sore and painful."

On April 12, 2016, Fairley completed an Employer's First Report of Injury form in which she reported that, according to what was told to her, the "injury happened because a male employee pushed" Rogowska. (R-7.)

On April 18, 2016, Rogowska had a second appointment with Dr. Majchrzak, who issued a Health Certificate requesting that Rogowska be excused from work from April 18 to April 30, 2016. (R-12.) The Health Certificate memorialized Rogowska's advice regarding an "assault at work." Rogowska was on sick leave for two to three weeks, commencing from the day after the incident.

After Ross received Rogowska's Incident Report, he drafted the PNDA dated April 13, 2016, charging appellant with conduct unbecoming a public employee. (R-1.) Following a departmental hearing on April 20 and 25, 2016, an FNDA was issued memorializing the determination that the charge was sustained and providing for appellant's removal effective April 28, 2016. (R-2; see R-3; R-4.)

In addition to the evidence that forms the foundation of the above findings of fact, a summary of other pertinent testimony follows.

The Testimony

Teresa Fairley

Fairley testified that when she spoke to Rogowska at the library on April 11, 2016, Rogowska relayed that as she was going out the door of the library, appellant was coming in the door, and appellant elbowed her. She described that Rogowska was upset, nervous, and shaking. When Fairley spoke to appellant, he denied that he elbowed Rogowska. Fairley testified that she first saw Rogowska's injury the next day, April 12, 2016.

Fairley described that, prior to the April 11, 2016, incident, Rogowska and appellant complained about each other off and on, and there was "a little bickering between them." Rogowska would complain that appellant was not performing his work.

Fairley articulated her instruction to maintenance workers regarding such complaints; namely, the worker should take a picture with a cell phone so that Fairley could see and have proof that the worker did not do what they were supposed to do. Fairley had seen picture(s) of appellant's work taken by Rogowska. Appellant never showed Fairley any photographs of a lack of work by Rogowska. Prior to the incident, Fairley was not aware of anything physical between appellant and Rogowska, and Fairley had never received a complaint of them arguing.

Fairley testified that she never had any problems with Rogowska as an employee and never received any complaints about Rogowska from other employees. Fairley described that she started having a problem with appellant after the closure of the Main Library Branch and his assignment to the smaller branches. Prior to the incident involving Rogowska, Fairley had received complaints of appellant and a female employee arguing at the Lafayette Branch, and she physically had to go to that branch on two occasions. She described that appellant and that employee both complained about the other; the female employee complained about appellant not doing his work; and Fairley believed that they got into shouting matches. Fairley went to the Lafayette Branch on one occasion, which she believed concerned the employee's complaint of appellant not doing his work. On the second occasion, the library's branch head contacted Fairley concerning a problem between appellant and the same employee, and Fairley and the Library director went to the branch. Both appellant and the other employee were given verbal warnings. Fairley did not remember appellant ever calling her to come to the Lafayette Branch or appellant calling to complain about the employee at the Lafayette Branch, but noted that they both complained once she arrived.

Mary Bronner

Bronner testified that on April 11, 2016, Rogowska informed her that she was going to the store to get coffee. Appellant was then outside in front of the library cleaning. Bronner described that within minutes of Rogowska's advice, Rogowska ran back in the library and said, "Mary, he hit me, he hit me." Bronner ask "Who?" and Rogowska replied "Shawn." Rogowska relayed that she was coming in the door and appellant elbowed her in the chest. Rogowska demonstrated that appellant extended

his right elbow in a jerking fashion similar to a jab. Bronner described that Rogowska appeared upset. Rogowska then ran into the kitchen and made a telephone call. When appellant came in the library, Bonner asked appellant whether he did it and appellant replied "no." Bonner testified that, prior to the incident, Rogowska and appellant both complained to her about the other's work patterns. Rogowska would complain about appellant not doing his work, and appellant would complain about Rogowska complaining about him not doing his work properly.

Betea Rogowska

Rogowska testified with the assistance of an interpreter and described the incident that occurred on April 11, 2016. Rogowska testified that she arrived at work at 7 a.m. and appellant arrived late at approximately 7:20 a.m. At approximately 9 a.m., Rogowska was going out of the library to purchase a cup of coffee. Appellant was then outside the library holding a broom and a pan in his hands. Rogowska described that the main entrance of the library has two sets of doors and a small hallway between them. The door closer to the inside of the library is kept open and the door leading out to the street is closed. Rogowska testified that she entered the area between the two sets of doors and opened the door to exit the library. Appellant, who could see Rogowska through the glass portion of the door, quickly approached the door. As Rogowska was exiting, appellant forcibly walked in the door that Rogowska had opened, and appellant pushed Rogowska and struck Rogowska's right lower breast area with his elbow. Rogowska described that appellant struck her chest with his elbow in a jab-like fashion and with such force that she was almost out of breath. Rogowska testified that she said to appellant, "What are you doing, are you crazy?" and appellant laughed and kept on walking. Rogowska described that, after the incident, she told Bronner that appellant had attacked her in the doorway, and she also called Fairley, during which she relayed similar advice and was crying. Fairley arrived at the branch and Rogowska spoke to her about what happened. Rogowska testified that physically she was feeling "horrific" and was "in shock" and, although Rogowska was not feeling well, "she tried to hang on" and continued to work until the end of her shift at 3:00 p.m.

Rogowska testified that a bruise on her right breast started coming out toward the morning of the next day, April 12, 2016, and R-9 is a photograph of the bruise that she took that day. She went to her family doctor on April 12, 2016, who examined her and prescribed medication. She also saw the Library's physician that day and came to the library, where she showed the bruise to Fairley and the Library director. Rogowska stated that the bruise became larger and darker with time, and R-10 is a photograph of the bruise that she took approximately two days after the incident. She testified that the bruise is where appellant struck her with his elbow; nothing else occurred that could have caused the bruise; and the visible injury to her chest lasted for almost three weeks.

Rogowska testified that she has not had any discipline problems during the nine years that she worked at the Library. She described having disputes or problems with appellant about work prior to the incident, such as appellant coming in late and failing to complete his work. She also described Fairley's instruction to take a photograph to demonstrate that appellant was not doing his work and to send the photograph to Fairley, which Rogowska did. She did not know if appellant knew that she was taking pictures of him.

Shandor Wine

Appellant testified that he arrived at work at 7 a.m. on April 11, 2016, and undertook his usual duties. He saw Rogowska that morning at about 7 a.m. and did not speak to her. Appellant described that he was outside sweeping the front of the library at approximately 8:30 a.m. and, after he finished sweeping, appellant went back inside the library and cleaned the bathroom and dusted. Rogowska was then inside the library. According to appellant, he had no contact with Rogowska and he did not say anything to her. Appellant testified that it was "a usual day" and he did not learn of the incident until Fairley and the union vice president (Theresa Smith) arrived on April 11, 2016. He described that he was "surprised and shocked" and thought, "what are they trying to pull now?" Appellant testified that when Ms. Smith asked appellant what happened involving Rogowska, he replied "nothing," and said, "I never came in contact with her. Not that I recall." According to appellant, Ms. Smith went to see if Rogowska

had any type of markings or bruising, and she told appellant that there were none when she returned. Appellant also spoke with Fairley on April 11, 2016, about the incident. Appellant testified that Fairley asked, "did I bump her or was I going out the door," and he responded, "No. Not that I recall. I didn't. I didn't go through the door at the same time at all. It never happened." At the hearing, appellant denied encountering Rogowska at the library door and stated that there was never an occasion when they were both at the library door as described by Rogowska. Appellant testified that he had no physical contact with Rogowska that day; her testimony about him hitting her in the chest with his elbow was false; and the information in the documentation indicating that Rogowska was assaulted by a coworker and describing the incident (e.g., R-5; R-8; R-8) is also untrue. According to appellant, Fairley also looked at Rogowska's chest area on April 11, 2016, and her testimony that she did not see the area until April 12, 2016, was not true. Appellant testified that after leaving work on April 11, 2016, he attempted to obtain a restraining order against Rogowska, but he could not obtain it because the court was out on April 11 and 12, 2016. (See A-1.) He described speaking to an officer at the "municipal courthouse" and, according to appellant's handwritten note on A-1, appellant was told that he "could not put in TRO," and the officer "sent [him] to West District station." Appellant did not later return to obtain a restraining order.

Appellant testified that he had prior incidents with Rogowska. According to appellant, during his first week at work in August 2015 Rogowska confronted him about using her trash bags, and she physically took the bags out of his hands; appellant reported the incident to the director, who "dismissed it" and "laughed it off." He also described Rogowska taking pictures of his work on April 4, 2016, and appellant making a report to the branch manager on April 6, 2016, that Rogowska was "harassing" him and had thrown his work gloves in the toilet. He disputed that Fairley had come to the Lafayette Branch on two occasions regarding appellant and the employee at that branch. Appellant further testified that the reason Fairley and the Library director had to come to that branch on March 1, 2016, was because he had called to complain about a labor dispute that he was having with the other worker. According to appellant, he informed them of the dispute when they arrived at the branch; he complained about the worker standing and drinking coffee; and the worker did not complain about him. Appellant testified that he also advised them that it was a hostile work environment; they

"dismissed" it and told him to just stay away from the employee; and the Library management subsequently started retaliating against him for complaining about the labor dispute.

Analysis and Additional Findings of Fact

In this matter, the Library bears the burden of proving the disciplinary charge against appellant by a preponderance of the credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); see In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, and according to a reasonable probability of truth. Jackson v. Del., Lackawanna & W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). 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) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Precisely what is needed to satisfy this burden necessarily must be judged on a case-by-case basis.

In undertaking this evaluation, it is necessary for me to assess the credibility of the witnesses for purposes of making factual findings as to the disputed facts. Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality or internal consistency and the manner in which it "hangs together" with the 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," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521-22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may also reject testimony as

"inherently incredible" and when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Further, "[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

In judging the strength of the evidence and evaluating the demeanor and credibility of the witnesses, I found Rogowska, Fairley, and Bronner to be forthright and credible witnesses. They presented persuasive and substantially consistent testimony as to the pertinent facts. Rogowska's testimony was also consistent with the report that she authored, and the advice that she relayed, shortly after the incident. The record is bereft of credible evidence suggesting that Fairley or Bronner harbored a motive or bias to fabricate their version of the relevant facts. Plainly, on balance, appellant has the greater stake in the outcome of this proceeding since it involves the propriety of his removal from employment. Although it was apparent that appellant and Rogowska had prior disagreements about work, I found Rogowska's testimony concerning the events that occurred to be credible and probable. The credible evidence reveals that Rogowska reported the incident to Bronner and Fairley shortly after Rogowska alleged it occurred. And, Fairley and Bronner credibly described that Rogowska was visibly upset, crying and shaking. The accuracy of Rogowska's report is further corroborated by the visible bruise in the area where she claimed that appellant had struck her, which is depicted in the photographs, referred to in the doctor's report, and supported by Fairley's testimony recounting her personal observation of the bruise.

Succinctly stated, I found appellant's testimony regarding the events that transpired on April 11, 2016, to be inherently improbable and not "hanging together" with, and discredited by, other evidence in the record. A canvas of the totality of the

evidence casts substantial doubt on the accuracy, reliability, and believability of appellant's version that he had no contact with Rogowska at the doorway, which is irreconcilable with the injury sustained by Rogowska. Simply put, I afford more weight to Rogowska's testimony recounting what occurred, and Fairley's testimony describing problems she experienced with appellant at the Lafayette Branch, than to the account offered by appellant.

Based upon a review of the testimony and documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, I **FIND** the following additional pertinent **FACTS**:

When Rogowska was exiting the door of the library, appellant walked in the door and physically pushed Rogowska and jabbed her chest with his elbow. Appellant took this action with such force that it resulted in a large bruise or contusion on Rogowska's breast, which required medical attention and resulted in Rogowska being out of work for two to three weeks.

LEGAL ANALYSIS AND CONCLUSIONS

The Civil Service Act and the regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1, et seq. A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether appellant is guilty of the charge brought against him and, if so, the appropriate penalty, if any, that should be imposed. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

An appointing authority may discipline an employee for conduct unbecoming a public employee. N.J.A.C. 4A:2-2.3(a)(6). Although the term "conduct unbecoming a public employee" is not defined in the New Jersey Administrative Code, it has been described as an "elastic" phrase that includes "conduct which adversely affects the morale or efficiency" of the public entity or "which has a tendency to destroy public

respect for [public] employees and confidence in the operation of [public] services.” In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (citation omitted); see Karins v. City of Atl. City, 152 N.J. 532 (1998). Unbecoming conduct need not be predicated upon a violation of the employer’s rules or policies and may be based merely upon a violation of the implicit standard of good behavior. See City of Asbury Park v. Dep’t of Civil Serv., 17 N.J. 419, 429 (1955); In re Tuch, 159 N.J. Super. 219, 224 (App. Div. 1978).

I **CONCLUDE** that the Library has shouldered its burden of proving, by a preponderance of the credible, competent evidence, that appellant’s conduct was unprofessional and unbecoming a public employee. Appellant’s actions fall significantly short of the type of conduct that the public has the right to expect from a public employee. Clearly, appellant knew that it is unacceptable and unbecoming conduct to engage in aggressive physical contact with a coworker, and his conduct was unwarranted, unjustified, and unreasonable. By engaging in the conduct he did, appellant failed to exercise good judgment and to act in a responsible manner with due regard to the safety of others. He failed to exercise tact and restraint during his encounter with Rogowska. Appellant engaged in conduct that has the likelihood of eroding the public’s perception, respect, confidence, and trust in a public employee, and adversely impacts the environment and the proper operation of the Library. Significantly, appellant’s actions placed Rogowska at risk of harm and resulted in injurious consequences.

The only remaining issue concerns the penalty that should be imposed. It is beyond debate that appellant’s past disciplinary record may be considered for guidance in determining the appropriate penalty, and the principle of progressive discipline is applied in this state. See Bock, 38 N.J. at 522. The seriousness of appellant’s infraction must also be balanced in the equation of whether removal or something less is appropriate under the circumstances. See Henry, 81 N.J. at 580. The New Jersey Supreme Court has recognized that the principle of progressive or incremental discipline is not a “fixed and immutable rule” that must be applied in every disciplinary setting. In re Herrmann, 192 N.J. 19, 33 (2007); In re Carter, 191 N.J. 474, 484 (2007). Rather, “some disciplinary infractions are so serious that removal is appropriate

notwithstanding a largely unblemished prior record." Carter, 191 N.J. at 484. Progressive discipline is not a necessary consideration "when the misconduct is severe, 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 this regard, "progressive discipline has been bypassed when an employee engages in severe misconduct, especially when . . . the misconduct causes risk of harm to persons or property." Ibid.; see, e.g., Henry, 81 N.J. at 580; Bowden v. Bayside State Prison, 268 N.J. Super. 301, 306 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994). The courts have also upheld the dismissal of employees for engaging in conduct unbecoming to their position without regard to whether or not the employee had a substantial past disciplinary record. Herrmann, 192 N.J. at 34; see Div. of State Police v. Jiras, 305 N.J. Super. 476 (App. Div. 1997). Public-safety concerns may also bear upon the propriety of an employee's removal from employment. See Carter, 191 N.J. at 485.

The evidence demonstrates that during his approximate eight months of employment, appellant had received at least one verbal warning stemming from his interactions with the employee at the Lafayette Branch. Although appellant's disciplinary record in and of itself would not warrant a severe penalty, the seriousness of appellant's infraction is a critical consideration in this case. While the incident involved a short duration of time, this does not mitigate the gravity of appellant's dereliction. Appellant's actions were highly inappropriate and inexcusable, and violated the standards of proper conduct expected of a public employee. Appellant's irresponsible conduct resulted in injurious consequences to Rogowska and cannot be countenanced. His unauthorized actions were antithetical to the proper functioning of the Library, violated his basic obligations as a public employee, and demonstrate appellant's unfitness to perform his duties. Appellant's failure to acknowledge or appreciate the inappropriateness and severity of his misconduct serves as further support for the conclusion that appellant is unsuitable for continuation in his position. Based upon the totality of the circumstances, I **CONCLUDE** that appellant's unbecoming conduct is of a sufficiently egregious nature to warrant his termination.

ORDER

I **ORDER** that the charge of conduct unbecoming a public employee be and hereby is **SUSTAINED**. I further **ORDER** that, based upon the aforesaid sustained charge, appellant be and hereby is removed from his employment with the Jersey City Public Library effective April 28, 2016.

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.

DATE

Date Received at Agency:

Date Mailed to Parties:

jb


MARGARET M. MONACO, ALJ


February 1, 2018

FEB 2 2018


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

List of Witnesses

For Appellant:

Shandor Wine

For Respondent:

Larry Ross

Teresa Fairley

Mary Bronner

Beata Rogowska

List of Exhibits in Evidence

For Appellant:

A-1 Memorandum to Municipal Court from Deidra Carvin dated April 7, 2016

For Respondent:

R-1 Preliminary Notice of Disciplinary Action dated April 13, 2016

R-2 Final Notice of Disciplinary Action dated April 28, 2016

R-3 Memorandum from Larry Ross to appellant dated April 28, 2016

R-4 Memorandum from Larry Ross to Edwin Perez dated April 28, 2016

R-5 Incident Report dated April 12, 2016

R-6 Employer's First Report of Injury dated April 12, 2016

R-7 Employer's First Report of Injury dated April 12, 2016

R-8 Workers' Compensation First Assessment report

R-9 Photograph

R-10 Photograph

R-11 Employment History

R-12 Health Certificate dated April 18, 2016

R-13 Health Certificate dated April 12, 2016