	:	**STATE OF NEW JERSEY**
In the Matter of Adrian Figueroa, Jr., Camden County, Department of Parks	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC Docket No. 2023-428	:	Court Remand

ISSUED: October 12, 2022 **(SLK)**

The Superior Court of New Jersey, Appellate Division, in *In the Matter of Adrian Figueroa, Jr.*, Docket No. A-2686-20 (App. Div., August 16, 2022), remanded the issue as to the disposition of the charges and penalty imposed against Adrian Figueroa, Jr. to the Civil Service Commission (Commission) for a determination.

By way of background, Adrian Figueroa, Jr., a Laborer 1 (Laborer) with Camden County (County), was removed on charges of conduct unbecoming a public employee and other sufficient cause based on his guilty plea to harassment. The Final Notice of Disciplinary Action (FNDA) indicated that Figueroa had been arrested for sexual assault, a second-degree crime, did not notify the County of his arrest, had an unidentified person call out for him indicating that he was out of work sick, and had pled guilty to harassment – offensive touching. However, the FNDA did not separately charge Figueroa with misusing sick time, nor did it refer to any underlying facts relative to his harassment plea. Figueroa appealed his removal to the Commission and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case. At the OAL, there was testimony regarding the County's sick leave policy, which Figueroa objected to because the FNDA did not include any reference to any violation of the sick leave policy. The ALJ recommended sustaining the conduct unbecoming charge based on Figueroa's harassing behavior and use of

sick time and recommended that he be removed based on both his criminal harassment and use of sick time to attend court. The Commission adopted the ALJ's decision. In its remand decision, the Appellant Division indicated that the ALJ mistakenly concluded that Figueroa used sick time to attend court appearances, as it found no testimony or evidence to support those findings. It stated that it was unable to decide if the ALJ would have sustained the charges absent the ALJ's reliance on these mistaken findings. Similarly, the Appellant Division found that the ALJ's conclusion that progressive discipline was inappropriate "suffer[ed] from the same infirmity" as the ALJ made it clear that removal was warranted based on both Figueroa's criminal harassment and use of sick time to attend court appearances. Therefore, since the Commission did not address the ALJ's erroneous findings regarding Figueroa's misuse of sick time to attend the court hearing, but instead fully adopted the ALJ's decision, it vacated the Commission's decision and remanded the matter for further proceedings. The Appellate Division commented that it expressed no opinion as to whether the charges could be sustained on remand but indicated that any future disposition of the charges should be made without reference to any alleged violations of the sick time policy. It also commented that it was not addressing Figueroa's contention that the ALJ's failure to apply progressive discipline was reversible error, as progressive discipline can be waived if the conduct is so severe to warrant it, and that Figueroa had a prior disciplinary history.

Figueroa, represented by James Katz, Esq., argues that the ALJ's conclusion that he engaged in conduct unbecoming a public employee and other sufficient cause warranting his removal for a guilty plea to a petty disorderly persons (PDP) offense concerning an off-duty incident, absent any nexus to his position or responsibilities as a Laborer in the County Parks Department is arbitrary and capricious, which cannot be sustained and must be set aside. He states that the ALJ found that the charges were sustained and removal was appropriate based on his guilty plea to a PDP offense *and* misused sick time (emphasis in original). Therefore, Figueroa argues that the ALJ's decision does not suggest that there is justification to remove him based on his PDP offense alone. He asserts that the County has the burden to demonstrate a nexus between his guilty plea and his ability to continue to perform his duties as a Laborer and it fails to do so. Figueroa highlights that the County cannot point to any State law or regulation or County policy which requires termination for a plea to a PDP offense. He notes that a PDP offense does not constitute a crime in New Jersey. Figueroa states that there is nothing in the record that demonstrates that his guilty plea impacts his ability to perform his duties as a Laborer, harmed his co-workers or others doing business with the County, impaired management's ability to interact with the public or cause the County financial loss or damage to its reputation. To the contrary, Figueroa presents that his supervisor indicated that there were no issues with his work, he never received any public complaints about him, and he had no issues interacting with co-workers.

Figueroa presents that it is undisputed that the offense did not occur at work or involve anyone associated with the County and, instead, the incident occurred off-

duty and concerned a private matter with someone he knew. He indicates that the ALJ's decision omits any analysis regarding the relationship between the off-duty conduct and his ability to perform his duties and there is no evidence as to what the harassment-related contact consisted of as the County's witnesses had no knowledge about it. Instead, the ALJ simply concludes that County government employees should not be engaged in criminal activity, which he was not since a PDP offense is not a crime. He argues that the ALJ's finding that there was sufficient cause for termination was based on a personal subjective view and implicit bias since there was no finding of a relationship between the alleged misconduct and his duties.

Figueroa submits *In the Matter of Andrew Ross* (MSB, decided September 21, 1993) as an analogous situation where a Senior Correctional Police Officer was removed for a municipal court conviction of simple assault, a disorderly persons offense, where the Merit System Board found that the charge of conduct unbecoming could not be sustained solely based on a conviction of a disorderly persons offense. He notes that although public safety officers are held to a higher standard, he indicates that this heightened standard has never been applied to civilian employees, like himself, who are performing manual, unskilled labor. Figueroa asserts that there is not a single case upholding a removal in a case like this, which is why the County has not cited one. He presents that there are a wide variety of analogous cases where the Courts have refused to uphold forfeiture of employment or denial of pension payments for criminal misconduct, absent a demonstrated relationship between the misconduct committed and the employee's job. Figueroa provides *State v. Hopka*, 203 *N.J.* 222 (2010) where an off-duty Police Officer engaged in criminal sexual conduct with a woman he was previously dating and faced forfeiture and permanent disqualification from public office. However, he indicates that the Supreme Court rejected the claims as "there was no relationship between defendant's employment as a police officer, the trapping of that office, or his work-related connections, and the commission of the offense to which he pled guilty, or to his victim[.]" He submits *In re Hess*, 422 *N.J.* Super. 27 (App. Div. 2011) where the Appellate Division overturned the pension board's denial of pension benefits based on a guilty plea for third-degree assault by auto because the "conviction was unrelated to her official duties." Figueroa provides *State v. Pavli*k, 363 *N.J.* 307 (App. Div, 2003) where the defendant, a Laborer was convicted of simple assault, criminal mischief and harassment during a violent domestic dispute with his grandfather. The Appellate Division rejected the claim that forfeiture of public office under *N.J.S.A.* 2C:51-2(a)(2) was required for a conviction "of an offense involving or touching such office" as it found that there was no nexus between his conduct and employment where he came into direct contact with members of the police department, whose members were victims of his conduct when he occasionally was called upon to work in the municipal building. He argues that if a nexus warranting removal could not be found in these cases, it cannot be found in this matter.

Figueroa argues that the ALJ's conclusion that his misconduct is so egregious that progressive discipline is unwarranted and he must be removed from his position,

is arbitrary and unreasonable, inconsistent with Commission precedent, and must be set aside. He asserts that the Commission historically has relied on the concept of progressive discipline. Figueroa asserts that the ALJ's refusal to consider progressive discipline suffers from the same infirmity as his findings that the charges were sustained because it was based on both his guilty plea and the erroneous finding that he used sick time to attend court appearances. Figueroa believes that there is no record to support that his guilty plea is so egregious that the application of progressive discipline is inappropriate as the only record fact is the guilty plea itself. Figueroa states that the County made a strategic decision to not offer any evidence regarding the underlying conduct which resulted in the guilty plea and there is nothing more than his plea to a PDP offense in the record. Therefore, he contends that absent any nexus to his position, the ALJ's decision does not demonstrate the type of egregious misconduct the Commission has found necessary to bar the application of progressive discipline.

Figueroa presents a sampling of recent Commission decisions where it applied progressive discipline and set aside removal penalties for allegedly far more egregious conduct than in this matter. He cites *In the Matter of Glenn Nolen* (CSC, decided May 18, 2022) where the penalty for a Laborer where a supervisor had to step between two workers for fear of physical altercation was reduced from removal to six working days. Figueroa submits *In the Matter of Edwin Dye* (CSC, decided March 24, 2021) where the penalty of removal for a Building Maintenance Worker who struck a pedestrian in a City-owned vehicle was reduced to five days as there was no intent to harm. He provides *In the Matter of Shandor Wine* (CSC, decided January 16, 2019) where a Building Maintenance Worker, who pushed and elbowed a co-worker, had her removal reduced to a 45-day suspension because "there is nothing in the record to support any sort of malicious or nefarious intent on the appellant's part." Figueroa cites *In the Matter of Jimmy Gonzalez* (CSC, decided September 21, 2011) where the removal of a Correctional Police Officer for degrading and insulting words directed towards a female officer which created a hostile work environment, kicking in a bathroom door and intentionally bumping the female officer in the hall was reduced to 90 days. He supplies *In the Matter of Cecilia Owens* (CSC, decided October 7, 2009) where the removal of a Human Services Assistant for fighting with her supervisor was reduced to 30 days since the appellant was not the instigator and possessed a clean work record. Figueroa presents *In the Matter of Wanda Hunt* (CSC, decided April 3, 2013) where the removal of a Senior Therapy Program Assistant, which involved a physical and verbal altercation, including a 30 minute tirade with a co-worker where patients were present, was reduced to four months. He cites *In the Matter of Daniel Carroll* (CSC, decided June 30, 2021) where the Commission found progressive discipline appropriate for a Police Officer where the Commission reduced a 60-day suspension to a 45-day suspension where the Police Officer was involved in a verbal altercation with a motorist, who failed to exhibit a level of professionalism and decorum expected of a law enforcement officer. Figueroa asserts that this matter involves a case where there is no record evidence of any harm,

harassing conduct or nefarious intent, and, therefore, he believes that it is inconceivable that the Commission would find his guilty plea so severe to render him unsuitable for his Laborer position.

Figueroa submits other cases which he contends involves more egregious conduct than his case where the New Jersey Supreme Court and Appellate Division upheld the application of progressive discipline to reduce recommendations of employee termination. He cites *Thurber v. City of Burlington*, 191 *N.J.* 487 (2007) which affirmed the Merit System Board's reduction of termination to a six-month suspension for reckless driving committed by the Deputy Municipal Court Administrator. Figueroa presents *New Jersey Department of Corrections v. Torres*, *N.J. Super* 421 (App. Div. 1978) which affirmed the Commission's reduction of a Correctional Police Officer's removal to a 60-day suspension for sleeping on duty due to his unblemished work record and other mitigating factors. He also provides several other unpublished decisions where the courts have upheld the Commission's decision to reduce terminations to suspensions under the principles of progressive discipline.

Figueroa argues that it is impossible to reconcile the denial of progressive discipline where there is no evidence of misconduct other than a guilty plea based on the aforementioned cases. He presents that he is a five-year civilian Laborer whose record has been spotless for three years prior to the December 2018 incident as his disciplinary history only consists of a February 2015 three-day minor discipline suspension for using excess force cleaning off his windshield, causing it to shatter, and a December 2015 major discipline concerning a suspended driver's license which he reinstated without incident. He asserts that his guilty plea was *sui generis*, for which he was punished, and unrelated to his position. Figueroa reiterates that there have been no issues with his co-workers, superiors or the public. Further, his current supervisor has had no issues with him. Therefore, he contends that this matter should be considered minor discipline where he receives no more than a five-day suspension. Figueroa states that although such a penalty may not appear "progressive" in light of one prior major discipline, the current infraction is based on completely different circumstances than the misconduct for his prior discipline and he has already been punished for it. He presents *Dye, supra*, where the Commission reduced a removal of a Building Maintenance Worker to a five-day suspension for involvement in an automobile accident hitting a pedestrian in a City-owned vehicle during the work day, for which the worker was liable, although there was no evidence of intent to cause harm. In that matter, the Commission noted that although the appellant had at least three prior major penalties, including having signed a Last Chance Agreement, and the five-day penalty may not appear to be "progressive," in nature, "the current infraction is based on different circumstances and misconduct than his prior major discipline infractions, and absent those prior disciplines, an even lesser suspension may have been warranted." Therefore, he argues that the same rationale should apply to him.

In response, the County, represented by Howard L. Goldberg, First Assistant County Counsel, presents that Figueroa was terminated from his position as a Laborer for various charges related to his arrest, incarceration, and subsequent guilty plea to the downgraded charge of harassment-offensive touch. It states that the ALJ recommend that Figueroa be removed following a hearing, which the Commission adopted. The County indicates that while there was testimony that Figueroa, or someone on his behalf, called him out "sick" while he was in jail, the ALJ mistakenly stated in his opinion that he called out "sick" to attend court hearings

The County provides that the Appellate Division remanded this matter to determine whether the charges, and more specifically, the removal penalty, should be upheld absent any reference to sick time issues, apparently because the ALJ's mistaken finding that Figueroa sick call was to attend court hearings rather than his being in jail. The Court noted that its determination to vacate was reached "because the CSC summarily affirmed the ALJ's findings and conclusions even though he mistakenly found Figueroa 'used sick time to attend several court hearings' and 'use[d] sick time to attend court appearances.' "

The County argues that the finding of "guilty" for conduct unbecoming and other sufficient cause was well-supported by the evidence and should be sustained, even without any reference to sick time abuse issues. It presents the Statement in Lieu of Brief that was filed on behalf of the Commission to the Appellate Division which succinctly summarized the facts:

> On December 18, 2018, Figueroa was arrested and charged with committing sexual assault, a second-degree crime under *N.J.S.A.* 2C:51-2. He was incarcerated that day and remained in jail for three days. On December 19, 2018 and December 20, 2018, when Figueroa was in jail, an unknown individual informed Camden that Figueroa was sick and would not be at work. Figueroa did not notify Camden of his arrest or incarceration. On December 21, 2018, Camden suspended Figueroa without pay.

The County indicates that the Appellate Division was "unable to divine if the judge would have sustained the conduct unbecoming charges absent his reliance on these mistaken findings [that he used sick time to attend court hearing]." It asserts that a closer reading of the ALJ's opinion answers that question, where the ALJ indicates "Appellant suggests that imposing a penalty less than removal is appropriate. He asserts that there is no harm to respondent by imposing a suspension. Respondent argues that appellant's behavior alone warrant removal even if the charge is a petit disorderly persons offense. I wholeheartedly agree."

The County states that several things are evident here. It provides that initially, it was Figueroa's unlawful behavior, notwithstanding the downgraded charge, that provided cause for his removal. Further, the County contends that

despite the ALJ's mistake about the sick-time call out being to attend court hearings, it is not disputed that he used sick time improperly. Additionally, it indicates that a full review of the record shows clearly that the sick-time issue was no more than a supplemental part of the charges of conduct unbecoming and was not determinative as to the penalty of removal. Moreover, the County asserts that the Commission did not "summarily" affirm the ALJ's initial findings but did, in fact, conduct its own independent review and concluded that removal was appropriate. It states that there is no reason to disturb that finding on remand.

CONCLUSION

In this matter, the record indicates that on or about December 18, 2018, Figueroa was arrested, which lead to him being charged with *N.J.S.A.* 2C:14-2(c)1, sexual assault, a second-degree crime. Thereafter, on July 10, 2019, Figueroa pled guilty to *N.J.S.A.* 2C:33-4(b), which is a PDP offense with purpose to harass another by subjecting another to striking, kicking, shoving, or other offensive touching, or threatening to do so. Thereafter, the County removed Figueroa from his Laborer 1 position on charges of conduct unbecoming a public employee and other sufficient cause.

Upon the Commission's independent evaluation of the record after the remand from the Appellant Division, including the ALJ's initial decision, the parties' briefs, and other documentation, the Commission sustains the charges of conduct unbecoming a public employee and other sufficient cause. Specifically, Figueroa pled that he continually bumped, touched or harassed the victim. Even though Figueroa engaged in this conduct off-duty in a private matter, this was conduct unbecoming a public employee in that it is well settled public policy that all public employees are expected to exhibit appropriate behavior, both on and off the job, in order to project a positive image to the public that they serve and the taxpayers who fund their positions. *See In the Matter of Matthew Green* (MSB, decided June 7, 2006). Moreover, even though Figueroa pled guilty to a PDP offense, which is not a crime, one does not need to commit a crime to engage in conduct unbecoming an employee. Additionally, the record indicates that his duties involved being out in the field in various parks on a daily basis. Further, he often had interactions with the public because while he was out in the parks, people would often go up to Laborers and let them know about things or ask them questions. Moreover, Laborers are often out in the parks without a partner or supervisor. Therefore, the Commission finds that the charge of other sufficient cause is sustained as, contrary to Figueroa's assertion, there is a nexus between this conduct and his position as a Laborer as the public has the right to interact with public employees without concern that they are engaging with an employee who is a person who acts with purpose to harass another.

In determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the

concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In assessing the penalty in relationship to the employee's conduct, it is important to emphasize that the nature of the offense must be balanced against mitigating circumstances, including any prior disciplinary history. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (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 this matter, Figueroa's prior disciplinary record indicates that on February 3, 2014, he used excessive force cleaning off the windshield of his truck causing the windshield to shatter. Further, he keyed his radio and transmitted the following message to every employee in Public Works, including the Director, along with every other employee from various departments working the snow storm, "You have to be white to get a new vehicle around here." Figueroa was charged with incompetency, incompetency, inefficiency or failure to perform duties and conduct unbecoming a public employee. This led to him receiving a three-day minor disciplinary suspension.

Additionally, the record indicates that on December 7, 2015, it had come to the County's attention that Figueroa's license was suspended and restored approximately five or more times since his employment with the County began.[1] Although Figueroa notified the County of his most recent suspension, in December 2015, he failed to notify it of this vital information on all [occasions].[2] This led to sustained charges against Figueroa for conduct unbecoming a public employee, other sufficient cause, and violating County policies regarding authorized use of County vehicles and changing vital information, where he agreed to a four-month suspension, which is major discipline.

Figueroa argues that the ALJ errored by finding his conduct so egregious that he did not apply the principles of progressive discipline, and therefore, his removal is not warranted. Further, he provides that there is no statute, regulation or policy which requires his removal and he submits cases where removals were reduced to suspensions after the principles of progressive discipline were applied. It is clear that the appellant's misconduct is egregious and worthy of removal. The PDP and his subsequent actions to conceal it are serious breaches for a public employee, and cannot be lightly regarded. Moreover, the Commission finds that even if the principles of progressive discipline are applied, his removal is warranted. Further,

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[1] Personnel records indicate that Figueroa began his employment with the County on May 29, 2013.
[2] The copy of the FNDA stops at the word "All." It is presumed from the context of the FNDA that the County was indicating that Figueroa did not notify it on the other occasions his driver's license was suspended.

while his removal may not be automatically required, there is also no statute, regulation or policy that bars his removal.[3] Additionally, the cases that he submits do not support his claim that removal is not appropriate as his penalty must be evaluated based on the totality of the unique facts of this matter. Specifically, Figueroa was only a five-year employee at the time of the latest incident. In this relatively short time, he has three times engaged in conduct unbecoming a public employee. The first time involved an incident where he used inappropriate racial language that was heard by many co-workers. Further, his driver's license was suspended five times, and more importantly, he failed to inform the County of each suspension even though his duties as a Laborer 1 involved using County vehicles, which led to a four-month suspension, which is major discipline. Additionally, only three years later, Figueroa pled guilty to behavior which involved continually bumping, touching or harassing a victim. Regardless of Figueroa's position, he has progressively demonstrated that he does not exhibit conduct that the public expects of its public employees and, therefore, his removal is warranted. The fact that as a Laborer 1 he can interact with the public without any co-workers or supervisors present, only provides further cause for his removal.

Referring to Figueroa's argument concerning *Dye, supra*, where Dye only received minor discipline for his latest incident even though he had a significant disciplinary history and had signed a Last Chance Agreement, this matter is distinguishable as Dye's latest incident involved accidental behavior while this matter involves intentional conduct by Figueroa. As such, the rationale for *Dye* is not present in this matter contrary to Figueroa's assertion. Regardless, as indicated above, penalties are reviewed *de novo*, and the facts and circumstances of one matter cannot generally be used in regard to another matter. In other words, prior Commission decisions regarding disciplinary penalties are merely instructive, and not precedential.

Finally, the Commission notes that, as instructed by the Appellate Division, it has made the above determinations without regard to any of the alleged sick-leave violations.

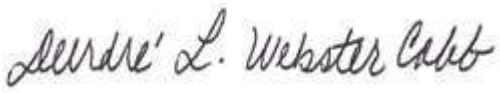
ORDER

[3] Moreover, the appellant's citation to cases involving forfeiture under *N.J.S.A.* 2C:51-2 is misplaced. Forfeiture under that statute is only where public employees are found guilty of certain criminal offenses. Only a court may determine forfeiture of public employees. However, regardless of whether a public employee is subject to the forfeiture statute, he or she is subject to disciplinary charges under Civil Service law and rules, and may be removed on such charges. Stated differently, the standards for forfeiture are inapplicable to the appellant's case and thus, cannot be utilized in an effort to argue for a lesser penalty.

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Adrian Figueroa, Jr.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 12TH DAY OF OCTOBER, 2022



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