



STATE OF NEW JERSEY

In the Matter of Daren Figueroa,
Hoboken Public Library

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC DKT. NOS. 2022-2537 and 2022-
2899

OAL DKT. NOS. CSV 02966-22 and
04100-22

(Consolidated)

ISSUED: FEBRUARY 1, 2023

The appeals of Daren Figueroa, Building Maintenance Worker, Hoboken Public Library, 20 and 30 working day suspensions, on charges, were heard by Administrative Law Judge Matthew G. Miller (ALJ), who rendered his initial decision on December 28, 2022. No exceptions were filed.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting of February 1, 2023, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision.

ORDER

The Civil Service Commission finds that the actions of the appointing authority in suspending the appellant was justified. The Commission therefore affirms those actions and dismisses the appeals of Daren Figueroa.

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 1ST DAY OF FEBRUARY, 2023

Allison Chris Myers
Acting Chairperson
Civil Service Commission

Inquiries
and
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING

SUMMARY DECISION

**IN THE MATTER OF DAREN FIGUEROA,
HOBOKEN PUBLIC LIBRARY,**

OAL DKT. NO. CSV 02966-22
AGENCY DKT. NO. 2022-2537

**IN THE MATTER OF DAREN FIGUEROA,
HOBOKEN PUBLIC LIBRARY**

OAL DKT. NO. CSV 04100-22
AGENCY DKT.NO. 2022-2899

Marcia J. Mitolo, Esq. for petitioner (Limsky & Mitolo, attorneys)

Jeffrey Berezny, Esq. for respondent (Ruderman & Roth, attorneys)

Record Closed: December 22, 2022

Decided: December 28, 2022

BEFORE: **MATTHEW G. MILLER, ALJ**

STATEMENT OF THE CASE

Petitioner, Daren Figueroa, is employed as a Building Maintenance Worker at the Hoboken Public Library. These consolidated matters concern the imposition of a twenty-day suspension commencing on April 11, 2022 and a thirty-day suspension that is to be served at the discretion of the Library Director. The charges in both disciplinary matters were identical and the offenses were effectively the same.

Generally, the allegations against petitioner were that he failed to report for work, failed to give proper notice that he would not be returning to work, was late to work and failed to advise his supervisor of his absences/tardiness in a timely manner.

Mr. Figueroa does not contest the finding of guilt on the charges, only the penalties.

PROCEDURAL HISTORY

In Daren Figueroa v. Hoboken Public Library (Figueroa I), OAL DKT. NO. CSV 02966-22, petitioner was served with a Final Notice of Disciplinary Action ("FNDA") on or about April 6, 2022 and he filed an appeal requesting a fair hearing that same day. The matter was transmitted to the Office of Administrative Law ("OAL") on or about April 14, 2022 for hearing as a contested case. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

In Daren Figueroa v. Hoboken Public Library (Figueroa II), OAL DKT. NO. CSV 04100-22, petitioner was served with an FDNA on May 11, 2022 and he filed an appeal and requested a fair hearing on or about May 12, 2022. The matter was transmitted to the OAL on or about May 20, 2022 for hearing as a contested case.

A telephone conference was held in Figueroa I on May 17, 2022, while there had been no proceedings scheduled for Figueroa II.

Following the filing of a Motion to Consolidate by respondent to which petitioner consented, an Order to Consolidate was entered on June 15, 2022.

Additional conferences were held on June 24, 2022 and September 2, 2022. Respondent then filed this Motion for Summary Decision and following the filing of an opposition brief by petitioner and a reply brief by respondent, the record closed on December 22, 2022.

FINDINGS OF UNDISPUTED FACT

The following **FACTS** of the case are not in dispute:

1. Petitioner commenced his employment with the Hoboken Public Library (“HPL”) as a full-time Building Maintenance Worker (“BMW”) on December 4, 2017.
2. Petitioner has been the subject of multiple disciplinary actions during his tenure at the HPL. This includes separate suspensions of one, three and three days, but no major discipline. (Exhibit R-8)
3. On February 18, 2022, petitioner was served with PNDA #1 seeking a twenty working--day suspension. (Exhibit R-1)
4. On April 7, 2022, petitioner was served with PNDA #2 seeking a thirty working-day suspension. (Exhibit R-3)
5. On April 8, 2022, petitioner was served with FNDA #1 upholding all charges against him and suspending him for twenty working days to be served on Mondays and Wednesdays from April 11, 2022 through June 15, 2022. (Exhibit R-2)
6. On May 11, 2022, petitioner was served with FNDA #2 upholding all charges against him and suspending him for thirty working-days. (Exhibit R-4)
7. Although not involved in this case, a third PNDA was issued to petitioner on July 27, 2022 which seeks his removal from employment. This PNDA alleges violations of;

N.J.A.C. 4A:2-2.3(a)(1) (incompetence)

N.J.A.C. 4A:2-2.3(a)(2) (insubordination)

N.J.A.C. 4A:2-2.3(a)(4) (absenteeism/lateness)

N.J.A.C. 4A:2-2.3(a)(6) (conduct unbecoming)

N.J.A.C. 4A:2-2.3(a)(7) (neglect of duty)

N.J.A.C. 4A:2-2.3(a)(12) (other sufficient cause)

The general allegations were that he was absent without remaining sick leave on June 12, 2022 and from June 25, 2022 – June 29, 2022; that he neglected his duties on July 9 and 10, 2022; left work after approximately thirty minutes with a stomach ache on July 13, 2022 and was to remain out the next day; he then presented an amended note to keep him out until July 18, 2022; finally he advised that he had a COVID exposure and presented a note excusing him from work on July 20, 21 and 22, 2022. (Exhibit R-7)

8. Petitioner does not contest the findings of guilt in the two PNDAs involved in this matter but does contest the disciplinary action assessed by respondent.
9. This Motion, if granted, will resolve all issues as to all parties, at least as to the two disciplinary actions before the court.

CASE SUMMARIES AND DISCIPLINARY HISTORY

FIGUEROA I:

A PNDA was issued on February 18, 2022 seeking a twenty-day working suspension against petitioner alleging violations of N.J.A.C. 4A:2-2.3(a)(1) (incompetence); N.J.A.C. 4A:2-2.3(a)(4) (chronic/excessive absenteeism/lateness); N.J.A.C. 4A:2-2.3(a)(6) (conduct unbecoming a public employee); N.J.A.C. 4A:2-2.3(a)(7) (neglect of duty) and N.J.A.C. 4A:2-2.3(a)(12) (other sufficient cause). The PNDA also charged violations of the Employee Discipline Policy and Sick Leave Policy contained in the Employee Handbook. (Exhibit R-1)

Following a hearing on March 31, 2022, an FNDA was issued on April 6, 2022 upholding all charges and suspending Mr. Figueroa for twenty working- days to be served on Mondays and Wednesdays from April 11, 2022 through June 15, 2022. The FNDA described the incidents thusly;

Mr. Figueroa took sick leave from January 21, 2022 until February 13, 2022. Mr. Figueroa was to return to work on

Monday, February 14, 2022 at 7:30 a.m. On February 14, 2022, he did not report for work or notify his supervisor or the Main Office that he would not be reporting to work on his scheduled return date in accordance with Library policy. At 8:24 a.m., Mr. Figueroa's supervisor telephoned Mr. Figueroa. Mr. Figueroa did not answer. At 9:49 a.m., Mr. Figueroa texted his supervisor that he was on the telephone with his doctor. At 11:18 a.m., Mr. Figueroa's supervisor called Mr. Figueroa, who said he was at the doctor's office. At about 12:00 p.m. on February 14, 2022, Mr. Figueroa came to the Library in person and advised he needed sick leave that day and that he will return to work the next day, Tuesday, February 15, 2022. He provided the Library with a doctor's note excusing him from work on February 14, 2022. On Tuesday, February 15, 2022, Mr. Figueroa was scheduled to work at 2:00 p.m. He did not report for work and did not notify his supervisor or the Main office that he would not be reporting for work in accordance with Library's policy. That evening, at about 7:00 p.m., Mr. Figueroa advised his supervisor by text message that he has a doctor's note for February 15, and February 16, 2022, but did not submit the doctor's note as required by Library's policy. Mr. Figueroa did not report for work on February 16, 2022.

Mr. Figueroa was scheduled to report for work at 12:30 p.m. on February 17, 2022. He did not report for work or notify his supervisor or the Main office that he would not be reporting to work in accordance with Library policy. On February 17, 2022 at about 5:00 p.m., he provided a doctor's note dated February 17, 2022 substantiating his need for sick leave from February 15 until February 22, 2022, with a return to work date of February 22, 2022.

The following discipline was imposed;

Mr. Figueroa has been employed by the Hoboken Public Library as a Building Maintenance Worker since December 4, 2017. He has an extensive history of absenteeism and tardiness without notice. Mr. Figueroa has repeatedly violated Library policies, leaving the Library to address staffing shortages caused by his no call, no show; the repetitiveness of his behavior despite corrective disciplinary action warrants a twenty (20) working-day suspension without pay. The twenty (20) working-day suspension will be served at the discretion of the Library Director on Mondays and Wednesdays beginning on Monday, April 11, 2022 and ending on (including Wednesday, June 15, 2022.

(Exhibit R-2)

FIGUEROA II

A PNDA was issued on April 7, 2022 seeking a thirty working day suspension against petitioner, again alleging violations of N.J.A.C. 4A:2-2.3(a)(1) (incompetence); N.J.A.C. 4A:2-2.3(a)(4) (chronic/excessive absenteeism/lateness); N.J.A.C. 4A:2-2.3(a)(6) (conduct unbecoming a public employee); N.J.A.C. 4A:2-2.3(a)(7) (neglect of duty) and N.J.A.C. 4A:2-2.3(a)(12) (other sufficient cause). The PNDA also charged violations of the Employee Discipline Policy and Sick Leave Policy and Tardiness policy contained in the Employee Handbook. (Exhibit R-3).

A hearing was waived and an FNDA was issued on May 11, 2022 upholding all charges and suspending Mr. Figueroa for thirty working-days. The FNDA described the incidents thusly;

By Preliminary Notice of Disciplinary Action dated February 18, 2022, the Hoboken Public Library brought disciplinary charges against Mr. Figueroa seeking a twenty (20) working-day suspension without pay for chronic absenteeism without notice, among other things.

Despite service of disciplinary charges seeking a significant suspension, Mr. Figueroa continued to engage in the same conduct. On multiple days, he reported to work late or was absent from work without notifying the Main Office or his supervisor as required.

- On Wednesday, February 23, 2022, Mr. Figueroa was scheduled to report to work at 7:30 a.m. He did not report to work until 8:12 a.m. and did not call before he came to work to advise he would be late.
- On March 10, 2022, Mr. Figueroa was late to work returning from his lunch break. He clocked out at 3:30 p.m. and therefore was due back to work at 4:00 p.m. He clocked in at 4:15 p.m. and did not notify his supervisor that he would be returning to work late after his lunch break.
- On Friday, March 11, 2022, Mr. Figueroa was scheduled to report to work at 9:30 a.m. He did not report to work as scheduled. He reported for work at 10:09 a.m., 39 minutes late. He did not notify his supervisor that he would be late until 9:44 a.m.

- On Monday, March 14, 2022, Mr. Figueroa was scheduled to report to work at 7:30 a.m. He did not report to work as scheduled. He did not notify the Main Office or his supervisor that he would not be coming to work that day until 10:00 a.m., when he notified his supervisor that he was not reporting for work because he needed to address a medical issue.
- On Saturday March 19, 2022, Mr. Figueroa was scheduled to report to work at 9:30 a.m. He did not report to work as scheduled. He reported for work at 10:11 a.m., 41 minutes late. He did not notify his supervisor that he would be late.
- On Wednesday, April 6, 2022, Mr. Figueroa was scheduled to report to work at 7:30 a.m. He did not report to work as scheduled. He reported for work at 7:45 a.m., 15 minutes late. He did not notify his supervisor that he would be late.

The following discipline was imposed;

Mr. Figueroa has been employed by the Hoboken Public Library as a Building Maintenance Worker since December 4, 2017. He has an extensive history of absenteeism and tardiness without notice. Mr. Figueroa has repeatedly violated Library policies, leaving the Library to address staffing shortages caused by his tardiness and absences without notice in accordance with Library policy. The repetitiveness of his behavior despite corrective disciplinary action, including the service of a Preliminary Notice of Disciplinary Action seeking a twenty (20) working-day suspension without pay, warrants a thirty (30) working-day suspension without pay.

THE LIBRARY PLACES MR. FIGUEROA ON NOTICE THAT HIS FAILURE TO SIGNIFICANTLY IMPROVE HIS ATTENDANCE AND TARDINESS WILL RESULT IN THE TERMINATION OF HIS EMPLOYMENT.

The thirty (30) working-day suspension without pay will be served at the discretion of the Library Director.

If Mr. Figueroa appeals this thirty (30) working-day suspension to the Civil Service Commission, the Library will hold the thirty (30) working-day suspension without pay in abeyance pending a decision by the Civil Service Commission.

(Exhibit R-4)

FIGUEROA DISCIPLINARY HISTORY

It is uncontested that petitioner's disciplinary history is as follows:

1. Date of Offense: February 9, 2019; Date of Discipline: February 11, 2019; Offense: failure to lock and secure doors; Discipline: written warning
2. Date of Offense: February 10, 2019; Date of Discipline: February 11, 2019; Offense: thirty minutes late to work; Discipline: written warning
3. Date of Offense: July 23, 2019; Date of Discipline: July 23, 2019; Offense: thirty minutes late to work; Discipline: written warning
4. Date of Offense: July 28, 2019; Date of Discipline: July 29, 2019; Offense: neglect of duty (failure to bins out for delivery); Discipline: written warning
5. Date of Offense: October 25, 2019; Date of Discipline: October 25, 2019; Offense: two hours late for work; Discipline: verbal warning
6. Date of Offense: March 7, 2020; Date of Discipline: March 7, 2020; Offense: thirty minutes late for work; Discipline: verbal warning
7. Date of Offense: March 23, 2020; Date of Discipline: March 23, 2020; Offense: failure to report to work; Discipline: written warning
8. Date of Offense: September 19, 2020; Date of Discipline: September 21, 2020; Offense: failure to report to work; Discipline: written warning¹
9. Date of Offense: November 6, 2020; Date of Discipline: November 6, 2020; Offense: insubordination by entering the building while awaiting the results of a COVID-19 test in direct contravention of instructions. Discipline: written warning
10. Date of Offense: February 2, 2021; Date of Discipline: February 3, 2021; Offense: failure to report to work; Discipline: one day suspension
11. Date of Offense: September 16, 2021; Date of Discipline: September 16, 2021; Offense: failure to report to work; Discipline: three-day suspension

¹ There is some confusion concerning this disciplinary action given that multiple years were referenced in the notice. However, it seems to be most likely that its placement in this timeline is correct. Given the number of offenses and the limited nature of the discipline rendered, the importance of this specific instance is very limited. (Exhibit R-8 at HPL00405-406)

12. Date of Offense: November 13, 2021; Date of Discipline: November 13, 2021; Offense: reported more than ninety minutes late to work; Discipline: three-day suspension
13. Date of Offense: January 3-4, 2022; Date of Discipline: January 5, 2022; Offense: failure to report to work on January 3, 2022, failure to return to work in a timely manner on January 4, 2022; Discipline: written warning

(Exhibit R-8)

MOTION

Respondent has filed a Motion for Summary Decision, arguing that:

In only under five years since being hired, it is undisputed that the Employee has engaged in extensive, continuing and repetitive and documented misconduct of failing to fulfill the duties of his position which includes chronic and excessive absenteeism and lateness, failure to report absence, lying to his employer, sleeping late, violation of library policies, and insubordination. Although the Employee's continued misconduct warrants termination, this matter involves only a 20-day and 30-day suspension.

Petitioner opposes the Motion, arguing that the manner in which the Library handled Mr. Figueroa's discipline ignored the fact that a severe injury was the precipitating cause of his recent attendance issues and that it is clear that rather than working towards the goal of progressive discipline (to correct work-related behaviors), respondent is simply looking for an excuse to terminate him. Ultimately, while;

It is acknowledged that there were serious deficiencies in Figueroa's work performance, however, it should not have risen to the level of multiple months' suspension. It is difficult to address each notice of discipline separately. The matter should be judged as a whole and the entire length of the discipline should be reduced.

LEGAL POSITIONS

PETITIONER:

Petitioner argues that despite Mr. Figueroa's acknowledged history of attendance related issues, the discipline in both of these cases should be reduced because respondent "did not comply with the standards for progressive discipline and the Civil Service standards for discipline".

Here, where petitioner's infractions "cannot be said to be egregious", it is argued that with the severity of the penalties, the library "essentially bypassed the progressive disciplinary process" with an eye towards dismissing Mr. Figueroa as it is attempting to accomplish with the subsequent July 27, 2022 FNDA. There was no justification to jump from a three-day suspension to a twenty-day suspension, particularly when it was known that petitioner was "severely injured at the time".

The timing of the second PNDA, which was filed the day after the issuance of the first FNDA is also brought into issue and included incidents that had occurred between the issuance of the first PNDA and the hearing concerning same. It is argued that the timing sequence was used to justify the issuance of the second suspension and was deliberately designed to deprive petitioner of the "opportunity to ameliorate his behavior", which, it is argued, he has done.

In sum, the manner in which respondent treated Mr. Figueroa was contrary to the "core concept of progressive discipline" and that it never took petitioner's injury into account nor provide "any time for the impact of the discipline to take effect". Rotondi v. Dept. of Health and Human Services, OAL DKT. CSV 385-88 (Sept. 29, 1988). Ultimately, the respondent's goal "was not the success of the employee in this case...(but was) to terminate employment".

RESPONDENT:

Respondent argues that the discipline imposed on Mr. Figueroa was appropriate and should stand since it was not unreasonable, arbitrary or offensively excessive. Ducher v. Dept' of Civil Serv., 7 N.J. Super. 156 (App. Div. 1950).

In conjunction with that argument, it notes that courts "have consistently held that excessive absenteeism need not be accommodated, and that attendance is an essential function of most jobs." Muller v. Exxon Rsch. & Eng'g Co., 345 N.J. Super 595, 605-06 (App. Div. 2001). Attendance issues, including chronic absences and habitual tardiness have been found to be just causes for dismissal. Town of W. New York v. Bock, 38 N.J. 500, 522 (1962). This is true even when there are good cause reasons for same, including "claimed medical conditions". Bellamy v. Twp. Of Aberdeen, Dep't of Pub. Works, 96 N.J.A.R. 770 (1996).

With Mr. Figueroa's "prior extensive disciplinary history" and the progressive nature of same, the imposition of twenty and thirty-day suspensions was actually very reasonable, and his actions as detailed in the FNDAs could clearly have supported his termination. Therefore, given the totality of the circumstances, this discipline should be upheld.

CERTIFICATION OF DAREN FIGUEROA:

In support of his position, Mr. Figueroa supplied a certification. (Exhibit P-1).

In it, he noted that he has been employed as a full-time Building Maintenance Worker of the library since December 4, 2017. He explained that while he was traveling to work on an electric scooter on January 21, 2022, he struck a pothole and was injured.

After a telephone consultation with a doctor on the day of the accident, he presented to an emergency room the following day and was ultimately diagnosed with

spondylosis and four fractured ribs. He was able to return to work, but only with physical restrictions. (Exhibit R-9)

Figueroa then certified that his supervisor advised him that due to the nature of his duties, he could not return to work with restrictions, which caused him to miss additional days until he was fully cleared and because of this, he exhausted his twelve days of sick leave by February, 2022.

LAW AND ANALYSIS

The New Jersey Supreme Court has modified and clarified the analysis required when considering a motion for summary decision/judgment. In Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), the Court adopted the summary judgment standard utilized by Federal courts:

Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." [Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986).] . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. Liberty Lobby, supra, 477 U.S. at 250, 106 S. Ct. at 2511, 91 L. Ed. 2d at 213. The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law," Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214, the trial court should not hesitate to grant summary judgment.

[Id. at 540.]

The burden is on the moving party to exclude all reasonable doubt as to the existence of any genuine issue of material fact, and all inferences of doubt are drawn against the moving party and in favor of the non-moving party. Saldana v. DiMedio, 275 N.J. Super. 488, 494 (App. Div. 1994). The critical question therefore is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one-sided that one party must prevail as a matter of law." Brill, supra, 142 N.J. at 533 (citation omitted). If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See, Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998).

In analyzing this Motion under the Brill standard, I **FIND** that same must be granted and the discipline imposed by respondent upheld.

The issue to be decided is whether the twenty-day and subsequent thirty-day suspensions imposed by the Library are justified and whether they comply with the guidelines and aims of the progressive discipline system. In cases such as these, the burden of proof rests on the appointing authority to demonstrate by a preponderance of the evidence that the disciplinary action was justified. Atkinson v. Parsekian, 37 N.J. 143(1962). Unless the penalty is unreasonable, arbitrary, or offensively excessive, it should be permitted to stand. Ducher v. Dep't of Civil Serv., 7 N.J. Super. 156 (App. Div. 1950).

Vital to this discussion, however, is what is NOT going to be decided and that is any potential discipline arising from the issuance of the third PNDA. While I fully appreciate petitioner's concern regarding same (and, obviously, without yet knowing his guilt or innocence of the charges), the severity of any discipline that may be imposed as a result of that subsequent PNDA is not before me. My only role is to decide the propriety of the two penalties imposed by respondent that are the subject of these consolidated cases.

As a baseline, when determining the appropriate penalty to be imposed, the Board must consider an employee's past record, including reasonably recent commendations and prior disciplinary actions. Bock, 38 N.J. 500 (1962). Depending on the conduct

complained of and the employee's disciplinary history, major discipline may be imposed. *Id.* at 522-24. Major may include removal, disciplinary demotion, suspension or fine no greater six-months. N.J.S.A. 11A:2-6(a); N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.4.

A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number and proximity of prior disciplinary infractions evaluated by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential. See generally, *In re Stallworth*, 208 N.J. 182 (2011).

The concepts of progressive and major discipline have no fixed definitions and are case specific. As noted in *In re Carter*, 191 N.J. 474 (2007);

Even so, we have not regarded the theory of progressive discipline as a fixed and immutable rule to be followed without question. Instead, we have recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. See, *Rawlings v. Police Dep't of Jersey City*, 133 N.J. 182, 197-98, 627 A.2d 602 (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense). In doing so, we have referred to analogous decisions to discern the test to be applied. See *Id.* at 197, 627 A.2d 602. Thus, we have noted that the question for the courts is "whether such punishment is 'so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness.'" *In re Polk License Revocation*, 90 N.J. 550, 578, 449 A.2d 7 (1982) (considering punishment in license revocation proceeding) (quoting *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 313 N.E.2d 321, 327, 356 N.Y.S.2d 833 (1974)).

Id. at 484-85.

Both the concept and application of progressive discipline were explored in great detail in *In re Stallworth*, 208 N.J. 182 (2011). There, the court noted that a worker's

disciplinary history can be used to both “ratchet-up” or “support” the imposition of a more severe penalty or to mitigate that penalty. Id. at 196, cit. In re Hermann, 192 N.J. 19, 30-33. While there are “major” cases where the conduct is so egregious that the progressive disciplinary system may be bypassed, when it does not reach that level of severity, the system must be applied. In re Stallworth, 208 N.J. at 196-97, cit. Bock, 38 N.J. at 522-23. See also, In re Carter, 191 N.J. 474, 483-84 (2007).

Vitally;

Under the concept of *progressive discipline*, one act of misconduct may result in “minor discipline” merely because it was a first offense, whereas the same misconduct, if repeated, could justify the imposition of “*major discipline*,” including, termination. In other words, different penalties can be imposed for the same misconduct depending on the employee’s record. Thus, the contextual nature of the prior offenses is a relevant consideration when analyzing an employee’s disciplinary record and renders incomplete and inadequate the Commission’s imposition of discipline based on a summary conclusion that the employee’s prior disciplinary record contains “only” one incidence of “major” disciplinary action.

Stallworth, 208 N.J. at 198-99.

In support of Mr. Figueroa’s claim that the punishments are improperly excessive, he points to Rotondi v. Dep’t of Health and Human Serv., OAL Dkt. No. CSV 385-88 (September 29, 1988). In particular, this quote;

The concept of progressive discipline has its genesis in case law. See, West New York v. Bock, 38 N.J. 500 (1962). The term was nurtured to an operational reality by the former Civil Service Commission. The core of this concept is the nature, number and proximity of prior disciplinary infractions evaluated by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential. This can be stimulated by effective on-the-job training and motivated by the appropriate rewards or as necessary the imposition of sanctions. Termination of employment is the penalty of last resort reserved for the most

severe infractions or habitual negative conduct unresponsive to intervention.

Id. at 8.

As was also noted in In the Matter of Yobe, 2011 N.J. CSC LEXIS 1130, case law suggests “that the courts will not adhere to rigid discipline guidelines” but will take into consideration all of the surrounding factors, including the nature, severity and frequency of the acts (which is also inclusive of the employee’s past disciplinary history). Id. at 11. Or, as was stated in In re Laban, 2012 N.J. Super. Unpub. LEXIS 1742;

The number and remoteness or timing of the offenses and their comparative seriousness, together with an analysis of the present conduct, must inform the evaluation of the appropriate penalty. Even where the present conduct alone would not warrant termination, a history of discipline in the reasonably recent past may justify a greater penalty; the number, timing, or seriousness of the previous offenses may make termination the appropriate penalty.

Id. at 11, quot. Stallworth, 208 N.J. at 199.

As was detailed by respondent, a history of tardiness and/or absenteeism, even with good cause, can justify removal. See generally, Rivera v. State, 2022 N.J. Super. Unpub. LEXIS 1304 at 4, certif. den., 2022 N.J. LEXIS 1087. See also, In re Harvey, 2022 N.J. Agen. LEXIS 539 at 27-28 (discussing the impact of absenteeism and tardiness on governmental functions).

Before discussing the base issue of whether the totality of the discipline imposed by respondent was justified, I would first note that the “continuous conduct” argument made by petitioner is unpersuasive in this instance. While recognizing the flexible nature of progressive discipline as discussed in In re Carter, the court in In re Kines, 2014 N.J. Super. Unpub. LEXIS 2844, did not agree that a continuing litany of offenses should necessarily be combined into a single disciplinary action. In Kines, the petitioner, a police officer, “characterize(d) her absences as one period of misconduct for which only one corresponding penalty should be imposed”. The court, however, observed that;

Kines's periods of absenteeism extended over a course of months after she was counseled for her conduct. That alone warrants the City's imposition of two suspensions, as they mirror two separate time periods during which Kines was warned against additional absences.

Id. at 7.

Here, the breakdown of the violations covered by the FNDA's reflects a consistent course of conduct by Mr. Figueroa, but there is also a logical point of separation between the first and second actions.

The first FNDA covered conduct from January 21, 2022 through February 18, 2022. It was at that point, after a litany of stops and starts, when petitioner failed to return to work as scheduled on February 17, that the first PNDA was issued.

The second FNDA covered the period following his return to work (which ultimately occurred on February 22, 2022) and continued through April 6, 2022. In fact, it took all of one day for the issues to recur, with the initial allegation of misconduct covering Mr. Figueroa's tardiness to work on February 23.

Given the nature of the offenses and even taking into account the near unbroken chain of violations, I **FIND** that that was a logical demarcation between the issuance of the initial PNDA and the second PNDA and that the assessment of separate suspensions rather than a single one is supported by the evidence.

As for the length of the discipline, the first factor that must be reviewed is Mr. Figueroa's thirteen incident disciplinary history prior to the violations which led to the discipline assessed here. He was hired by respondent on December 4, 2017 and his first disciplinary issue occurred on February 9, 2019, with his first tardiness/absenteeism issue taking place the following day, February 10, when he received a written warning for being thirty minutes late. After about a five-month lull, his issues returned, with four violations in mid-2019, three of which were for absence/tardiness.

There was then a break from late October, 2019 until March 7, 2020, when he was again tardy. That was followed shortly thereafter with an unexcused absence on March 23. Following an insubordination issue in November, 2020, he failed to report to work on February 2, 2021 (which led to his first suspension) and again on September 16, 2021 (which led to his second suspension), was late on November 13, 2021 (which led to his third suspension) and then had yet another absence/tardiness issue on January 3-4, 2022.

It was only at this point that the events which led to Mr. Figueroa's current problems began. Assuming for the purposes of this Motion petitioner's claims concerning the scooter accident on January 21, 2022 and the injuries sustained in same are true, I still **FIND** that the excuses proffered for his disciplinary violations are weak. Following the accident, petitioner took sick leave from January 21, 2022 through February 13, 2022, and he was to return to work on Monday, February 14, 2022 at 7:30 a.m. What ensued over the next three days is simply unjustifiable, no matter the nature of his injury or his physical condition.

To put it bluntly, if Mr. Figueroa was healthy enough to communicate with and visit his doctor, then he was healthy enough to communicate with his supervisor. The fact that he failed to do so in a timely manner on from February 14, 2022 through February 17, 2022 despite his recent history of tardiness and absenteeism related discipline, more than justifies the imposition of the twenty-day penalty. This was not just a single instance of having a problem on his first scheduled day back, nor was the issue with the fact that his absence was medically justifiable. Rather, the issue was the clear, knowing violation of the Library's policies and procedures and that for an entire week, respondent had no idea whether it would have a staffing issue or not.

As for the second set of discipline, tellingly, Mr. Figueroa was forty-two minutes late on second day back to work (and this was after having been served with the first PNDA four days earlier). This was followed roughly two weeks later with allegations of four separate instances of tardiness/unexcused absence that took place over the ten-day period from March 10 through March 19, 2022. That was topped off by a final allegation

of tardiness that took place on April 6, 2022 after which the second PNDA was issued the next day.

I **FIND** that the accident-related injuries sustained by Mr. Figueroa, while painful I am sure, are ultimately irrelevant to the discipline meted out by respondent. He was not disciplined for being injured or using his sick leave (even when it was exhausted). Rather, he was disciplined for either failing to advise or tardily advising his supervisor of those attendance related issues. None of these issues were emergent and even if an isolated incident was emergent, the other nine or so issues were not.

What is clear from the evidence is that petitioner had faced discipline for his attendance issues as far back as only February, 2019 and as recently as November, 2021 had received his third related suspension for same. This was clearly a continuing problem and I **CONCLUDE** that it is not an inappropriate jump from a three-day suspension to a twenty-day suspension, particularly given the nature of the offenses detailed in the initial PNDA, which grouped together multiple offenses into one.

I further **CONCLUDE** that the thirty-day suspension imposed as a result of the second FNDA was also appropriate. When he reported late to work on February 23, Mr. Figueroa knew just that just five days earlier respondent had filed a disciplinary action seeking to suspend him for twenty days for substantially similar conduct. Then, just two weeks later, he had four more tardiness/absenteeism issues over a ten-day period.

While I agree that the purpose of the progressive disciplinary system is not only punish the employee, but also to attempt to correct his behavior, even when petitioner was aware of the pending discipline, his behavior, even in the immediate short term, failed to improve. As with the suspension imposed following the initial FNDA, I **FIND** that respondent was well justified in imposing a thirty-day suspension.

I **FIND** that these two suspensions clearly comply with the standards enunciated in West New York v. Bock, 38 N.J. 500 (1962). See also, Selph v. Newark Housing Authority, 94 N.J.A.C. 2d (CSV) 420 and Hendrix v. City of Asbury, 2001 N.J. Agen LEXIS 188, adopted 2001 N.J. Agen LEXIS 883.

As a note of caution, however, this upholding of the proposed discipline should not be considered indicative of any potential approval or disapproval of any discipline (or findings of guilt, for that matter) that may be imposed arising out of the most recent PNDA. This decision only reflects findings specific to the two FNDA's before the court.

CONCLUSION

Given the totality of the evidence, I **CONCLUDE** that there are no genuine issues of material fact that remain in dispute between the parties, and I hereby **FIND** that respondent has proven by a preponderance of the evidence that the twenty-day suspension and the proposed thirty-day suspension are reasonable and that petitioner has failed to proffer any disputed material facts or argument to demonstrate that it was unreasonable.

ORDER

Based on the foregoing, it is hereby **ORDERED** that respondent's Motion for Summary Decision be and is hereby **GRANTED** and it is further;

ORDERED that petitioner, Daren Figueroa, be and is hereby suspended from his employment as a Building Maintenance Worker at the Hoboken Public Library for a total of fifty working-days to be served at the discretion of the Library Director² and it is further;


ORDERED that for the purposes of future progressive discipline, that these suspensions shall be considered as a separate twenty-day suspension per the April 6, 2022 FNDA and a separate thirty-day suspension per the May 11, 2022 FNDA.

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

² If the twenty-day suspension assessed in the April 8, 2022 FNDA has already been served, then petitioner shall receive credit for same.

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.



December 28, 2022

DATE

MATTHEW G. MILLER, ALJ

Date Received at Agency:

December 28, 2022

Date Mailed to Parties:

December 28, 2022

sej

APPENDIX

EXHIBITS

FOR PETITIONER:

P-1 Certification of Daren Figueroa

FOR RESPONDENT:

- R-1 February 18, 2022 PNDA
- R-2 April 6, 2022 FNDA
- R-3 April 7, 2022 PNDA
- R-4 May 11, 2022 FNDA
- R-5 June 15, 2022 Order of Consolidation
- R-6 September 5, 2022 Scheduling Order
- R-7 July 27, 2022 PNDA
- R-8 Daren Figueroa Disciplinary History
- R-9 Daren Figueroa Doctor Notes
- R-10 Employee Attendance Reports
- R-11 Personnel System New Hire Record
- R-12 Building Maintenance Worker Job Specifications
- R-13 Collective Bargaining Agreement
- R-14 Employee Handbook with Acknowledgement of Receipt
- R-15 January 20, 2019 Sick Time Use Memorandum
- R-16 September 10, 2021 Covid Policy Memorandum
- R-17 April 5, 2022 Payroll Memorandum