



STATE OF NEW JERSEY

In the Matter of Daniel Borrero-
Melendez, Juvenile Justice
Commission

CSC DKT. NO. 2023-84
OAL DKT. NO. CSR 05753-22

**DECISION OF THE
CIVIL SERVICE COMMISSION**

ISSUED: FEBRUARY 1, 2023

The appeal of Daniel Borrero-Melendez, Senior Correctional Police Officer, Juvenile Justice, Juvenile Justice Commission (JJC), removal, effective March 2, 2022, on charges [REDACTED] as before Administrative Law Judge Sarah H. Sargent (ALJ), who rendered her initial decision granting the appointing authority's motion for summary decision on December 29, 2022. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, including a thorough review of the exceptions and reply, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of February 1, 2023, remanded the matter to the Office of Administrative Law (OAL) for further proceedings.

The Commission finds that the ALJ's granting the appointing authority's motion for summary decision was not warranted in this matter. In this regard, under Executive Orders 283 and 290, "covered high-risk congregate settings must maintain a policy that requires covered workers to provide adequate proof that they are up to date with their COVID-19 vaccinations." However, "[t]he policies adopted by covered settings . . . must provide appropriate accommodations, to the extent required by federal and/or state law, for employees who request and receive an exemption from vaccination because of a . . . sincerely held religious belief, practice, or observance."

Here, the appellant requested a religious accommodation to the requirement of receiving the vaccine. He was denied and nevertheless still refused to get vaccinated and was thus subjected to discipline. However, in issuing the summary decision opinion in favor of the JJC, the ALJ made no finding as to whether the accommodation request was validly denied. In other words, there was no finding as

to whether granting the requested accommodation would have amounted to an undue hardship to the JJC. Rather, the ALJ framed the matter as being concerned only with whether the appellant violated the JJC's vaccination policy. The appellant, however, forcefully argues that he was wrongfully disciplined because the JJC should not have denied his accommodation. In this regard, it is worth noting that in his accommodation request, the appellant offered to get regularly tested, wear a mask, and socially distance. Whether those measures would amount to an undue hardship to the JJC is unclear, as the ALJ did not engage in any fact-finding as to that issue. As such, the Commission remands the matter to the OAL for a hearing to establish facts as to the appropriateness of the accommodation denial and how or if those facts impact any determination as to the appellant's guilt regarding the charges.

ORDER

The Civil Service Commission remands this matter to the Office of Administrative Law for further proceedings as outlined above.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 1ST DAY OF FEBRUARY, 2023

Allison Chris Myers

Allison Chris Myers
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
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

SUMMARY DECISION

OAL DKT. NO. CSR 05753-22

AGENCY DKT. NO. ~~N/A~~
2023-84

IN THE MATTER OF
DANIEL BORRERO-MELENDEZ,
JUVENILE JUSTICE COMMISSION.

Daryl J. Kipnis, Esq., for appellant Daniel Borrero-Melendez (Kipnis Law Offices,
attorneys)

Kathryn B. Moynihan, Deputy Attorney General, for respondent Juvenile Justice
Commission (Matthew J. Platkin, Attorney General of New Jersey, attorney)

BEFORE SARAH H. SURGENT, ALJ:

Record Closed: November 18, 2022

Decided: December 29, 2022

STATEMENT OF THE CASE

Appellant Daniel Borrero-Melendez (Borrero) appeals from respondent Juvenile Justice Commission's (JJC) disciplinary action terminating his employment as a Senior Correctional Police Officer (SCPO) for refusing to get COVID-19 vaccinations and provide

proof of them after his request for a religious exemption was denied. The JJC moves for summary decision. Borrero opposes the motion.

PROCEDURAL HISTORY

After his termination, Borrero timely requested a fair hearing on July 12, 2022,¹ with the Civil Service Commission (CSC) and the Office of Administrative Law (OAL), to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. It was assigned to this Administrative Law Judge (ALJ) on July 20, 2022. After several telephone conferences, the JJC moved for summary decision by letter-brief dated August 16, 2022, with an accompanying certification and exhibits. (R-A to R-F). By letter-brief dated October 14, 2022, with an accompanying certification and exhibit, (A-1), Borrero opposed the motion. By letter brief dated October 28, 2022, the JJC replied. On November 1, 2022, oral arguments were held on the motion remotely, due to the ongoing COVID-19 pandemic (pandemic). At the request of the parties, written closing arguments were submitted on November 18, 2022, and the record closed on that date.

FACTUAL DISCUSSION AND FINDINGS

These salient points are not in dispute. I therefore **FIND** the following **FACTS**:

Prior to his termination, Borrero was employed by the JJC as an SCPO for approximately five years. (A-1 at 1). He was assigned to the New Jersey Training School (NJTS) in Monroe Township. (A-1 at 6; R-B at 1). The JJC provides "care, custody, and rehabilitative services to youth committed to the agency by the courts." <https://www.njoag.gov/about/divisions-and-offices/juvenile-justice-commission-home/> (last visited Dec. 1, 2022). The NJTS is the JJC's largest facility, housing approximately 200 male juveniles. <https://www.njoag.gov/about/divisions-and-offices/juvenile-justice->

¹ By letter dated December 6, 2022 (following his September 28, 2022, email) Borrero consented to tolling the 180-day return to payroll rule, N.J.S.A. 40A:14-201(a), by thirty-seven days, from and including September 22, 2022, through and including October 28, 2022. (A-2). Thus, Borrero would not be eligible to return to payroll until February 16, 2023.

commission-home/juvenile-justice-commission-facilities/ (last visited Dec. 1, 2022). It is “a secure facility with a state of the art perimeter fence and 24-hour armed roving patrol.” Ibid. Borrero’s duties included overseeing the safety, security, treatment and daily living of juvenile residents, transporting juvenile residents outside of the facility, and monitoring juveniles’ quarters for prohibited possessions or contraband. (R-B at 1).

In response to the evolving COVID-19 variants, on January 19, 2022, New Jersey Governor Philip D. Murphy (Governor) issued Executive Order 283 (EO 283), effective immediately, requiring, among other things, that “covered high-risk congregate settings” adopt policies requiring covered workers “to provide adequate proof that they are up to date with their COVID-19 vaccinations.” Exec. Order No. 283 (Jan 19, 2022), 54 N.J.R. 295(a); <https://www.nj.gov/infobank/eo/056murphy/pdf/EO-283.pdf>. (last visited Dec. 1, 2022). “High-risk congregate settings” include state and county correctional facilities, and “all congregate care settings operated by the [JJC], which includes secure care facilities and residential community homes.” Ibid. “Covered workers” includes “employees, both full- and part-time, contractors, and other individuals working in covered settings, including individuals providing operational or custodial services or administrative support.” Ibid. (emphasis added).

Unvaccinated covered workers were required to receive their first dose of a vaccine by February 16, 2022, and to “provide adequate proof that they [were] up to date with their COVID-19 vaccination by March 30, 2022.” Ibid. To be “up to date,” covered workers must have demonstrated by March 30, 2022, that they received any booster dose for which they were eligible, or that they were “within 3 weeks of becoming eligible for a booster dose, whichever [wa]s later.” Ibid. EO 283 also provides that “[t]he policies adopted by covered settings . . . must provide appropriate accommodations, to the extent required by federal and/or state law, for employees who request and receive an exemption from vaccination because of a . . . sincerely held religious belief, practice, or observance.” Ibid. Finally, EO 283 provides that “[t]he policies adopted by covered settings pursuant to this Order must include a disciplinary process for covered workers’ noncompliance, which may include termination of employment.” Ibid. (emphasis added).

On March 2, 2022, the Governor issued Executive Order 290 (EO 290), extending the time for covered employees to provide adequate proof of vaccination to May 11, 2022. Exec. Order No. 290 at 5-6 (Mar. 2, 2022), 54 N.J.R. 511(a); <https://nj.gov/infobank/eo/056murphy/pdf/EO-290.pdf>. (last visited Dec. 1, 2022).

On January 20, 2022, the JJC issued a vaccination policy (Policy) consistent with and implementing EO 283. (R-A1). The Policy explains the process for requesting exemptions, including for religious beliefs, practices, or observances. Ibid. As to discipline for noncompliance, the Policy provides that “[i]n accordance with EO 283, applicable New Jersey Administrative Code, and JJC policies and procedures regarding employee discipline, failure of a covered worker to comply with this policy shall result in disciplinary action, up to and including termination.” Ibid. (emphasis added). On March 9, 2022, the JJC revised that Policy to be consistent with the time extension for providing proof of vaccinations contained in EO 290. (R-A). In addition to the above language regarding employee discipline, the revised Policy states, “[i]n accordance with EO 290, the JJC shall initiate disciplinary proceedings for covered workers who are noncompliant with EOs 283 and 290 and this policy within two weeks of the date of noncompliance.” Ibid.

On February 13, 2022, Borrero requested a religious exemption from the COVID-19 vaccination requirements. (R-B). The JJC’s form for requesting religious exemptions states, in relevant part:

JJC will provide a reasonable accommodation to qualified applicants and employees whose sincerely held religious observance, practice, or belief (hereinafter “beliefs”) conflicts with the JJC COVID-19 vaccination requirement, unless providing such an accommodation would pose an undue hardship. Note that completion of this form constitutes a request for an accommodation and does not signify that the request constitutes a basis for an accommodation or that an accommodation will be granted.

....

In most circumstances, JJC/LPS will need to obtain additional follow up information about your sincerely held religious belief. JJC/LPS will reach out to you if additional information is needed to process this request.

[(R-B at 1) (emphasis added) (sic passim).]

Borrero's religious exemption request incorporates a letter drafted by his attorney, with Borrero's participation, which cites to and quotes from the Bible at length, and states, in relevant part, that Borrero

is an observant Pentecostal Christian with sincerely held religious beliefs concerning the sanctity of his person as created in the perfect image of God, and against the desecration, invasion and/or alteration thereof, which includes being compelled to undergo any unwanted medical procedure or receive a vaccine or injection against his will which would introduce substances or insert items to his body that he believes to be unholy, or otherwise would alter it or any part thereof from the state as created by God, and therefore the state to be returned to God upon death. He believes that life is sacred, begins at conception, that God did not make any mistakes when He created any life on earth, and that it is blasphemy for humanity to substitute its own judgment for God's on matters of God's Creation.

He has a faith-based objection to the use of aborted fetal cell lines, genetically modified and/or artificially preserved or "immortalized" human cell lines, viral vector technology, mRNA genetic modification technology, and spike protein technology as part of process of developing the various COVID-19 vaccines, or for any other purpose, as well as the use of animal and/or insect genetic material in influenza vaccines as anathema to his beliefs in the holiness and perfection of God's creation and divine providence, and considers being vaccinated for COVID-19 or using any other product produced with the above-identified methods and elements to be a sin. . . .

. . . .

Notwithstanding the foregoing, my client is amenable to reasonable, mutually acceptable accommodations, including,

but not limited to: COVID-19 testing at reasonable intervals, use of a face covering, social distancing, and following any other applicable safety protocols, which would accommodate his sincerely-held religious beliefs without creating an undue hardship to your operations as defined by the EEOC, or otherwise put others at risk. . . .

[(R-B at 4-5) (sic passim).]

Without any further input from Borrero (A-1 at 1), on February 23, 2022, Sara Pascale, the deciding official on Borrero's religious exemption application wrote:

Your request for an accommodation in the form of an exemption from the requirement that you provide adequate proof that you are up to date with COVID-19 vaccinations is denied because it is an undue hardship. In your position as a Senior Correctional Police Officer, you are an essential employee and are required to interact with JJC residents in an indoor congregate care setting. You not being vaccinated risks the introduction to or spread of COVID-19 into the facility where you are assigned. Covid-19 has burdened the JJC with significant operational and financial costs, including requiring the temporary closure and consolidation of housing units, the denial of vacation leave time, and the requirement that healthy staff work more overtime. Notably, unvaccinated staff, which comprises 32% of the workforce, were responsible for nearly half the positive cases.

If you believe you have been discriminated against because of your religion, you may contact the Office of Equal Employment Opportunity at 609-633-2345.

[(R-C) (sic passim).]

On February 23, 2022, the JJC ordered Borrero to produce proof of his vaccination status by February 27, 2022. When Borrero failed to do so, the JJC issued a Preliminary Notice of Disciplinary Action (PNDA) on March 1, 2022, recommending his removal from office for N.J.A.C. 4A:2-2.3a(6), conduct unbecoming a public employee, and N.J.A.C. 4A:2-2.3a(12), other sufficient cause: Executive Order 283 and JJC Policy Regarding the Implementation of EO 283. (R-D). The PNDA states that "[y]our presence in a

congregate setting is a serious health and safety risk which could adversely affect the health and safety of others.” Ibid. A departmental hearing was held on May 26, 2022, and the charges were sustained. (R-F; R-E). Borrero was removed from office effective March 2, 2022, ibid., the date of his suspension.

The parties agree that at some point, Borrero filed a discrimination complaint with the New Jersey Office of Equal Employment Opportunity (EEO) against the JJC, alleging that it failed to accommodate Borrero, on the basis of his religion, both by denying his vaccination exemption request and by failing to provide him with alternative accommodations. After interviewing witnesses and reviewing documents, the EEO found Borrero's discrimination claims to be unsubstantiated. There is no evidence that Borrero appealed from that determination.

LEGAL ANALYSIS AND CONCLUSIONS

I.

A summary decision “may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” N.J.A.C. 1:1-12.5(b). That rule is substantially similar to the summary judgment rule embodied in the New Jersey Court Rules. See R. 4:46-2; Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954).

In Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in determining the motion:

[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 fact finder to resolve the alleged disputed issue in favor of the non-

moving party. The “judge’s function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”

[Id. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)).]

In evaluating the merits of the motion, “[a]ll inferences of doubt are drawn against the movant and in favor of the opponent of the motion.” Judson, 17 N.J. at 75. However, “[w]hen a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.” N.J.A.C. 1:1-12.5(b).

The JJC maintains that this matter is ripe for summary decision because the only issues before me are whether Borrero violated EO 283 and the JJC’s implementing Policy, and the appropriate penalty to be imposed. I agree.

Borrero asserts that there are genuine issues of material fact requiring a plenary hearing. Specifically, Borrero maintains that a plenary hearing is required to determine whether the JJC violated Borrero’s State and Federal Constitutional rights by not engaging in a “flexible, interactive process” with him to find an appropriate accommodation. I disagree.

In his application for the exemption, Borrero described his job duties, which involve close personal contact with juveniles and their quarters in an indoor congregate care setting, and in transportation vehicles, and he attached a single-spaced comprehensive three-page letter detailing his religious beliefs and his proposed accommodations, including masking, testing, and social distancing. (R-B). After reviewing Borrero’s employment duties and reviewing his letter requesting the exemption, the JJC determined that it could not accommodate Borrero’s request because it would impose an undue hardship on the JJC by risking the introduction and spread of COVID-19 in the facility where Borrero was assigned, which would further the significant operational and financial

burdens COVID-19 had already imposed upon the JJC, including temporary closings and consolidations of housing units, denials of vacation leave time, and forcing healthy staff to work overtime. (R-C). I **CONCLUDE** that the JJC did not require any further information from Borrero to determine whether he had sincerely held religious beliefs, and whether it could accommodate his exemption request in light of his duties and proposed accommodations.

Having reviewed the parties' submissions and heard their oral arguments, I **CONCLUDE** that no genuine issues of material fact exist which require a plenary hearing to determine whether Borrero is guilty of the FNDA charges, and, if so, the appropriate penalty to be imposed. This matter is therefore ripe for summary decision.

II.

A civil service employee's rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1 to 4A:10-3.2. The Act is an inducement to attract qualified individuals to public service positions and is to be liberally construed toward attainment of merit appointments and broad tenure protections. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576, 581 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583, 586 (App. Div. 1972). However, "[t]here is no constitutional or statutory right to a government job," State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998), and constitutional principles do not provide Borrero with a constitutional right to refuse a vaccination, New Jersey State Policemen's Benev. Ass'n v. Murphy, 470 N.J. Super. 568, 591 (App. Div. 2022).

Indeed, a civil service employee who commits a wrongful act related to their employment may be subject to discipline, which may be a reprimand, suspension, or removal from employment, depending upon the incident. N.J.S.A. 11A:1-2c; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2(a). Public entities should not be burdened with an employee who fails to perform their duties satisfactorily or engages in misconduct related to their

duties. N.J.S.A. 11A:1-2c. Thus, a public entity may impose major discipline upon a civil service employee, including termination/removal from their position. N.J.S.A. 11A:1-2c; N.J.A.C. 4A:2-2.2(a).

In appeals concerning major disciplinary action such as termination, the appointing authority bears the burden to prove the FNDA charges by a preponderance of the competent credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v Parsekian, 37 N.J. 143, 149 (1962). 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) (internal quotation marks omitted). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro Bottling Co., 26 N.J. 263, 275 (1958). OAL hearings on civil service removal appeals are de novo, both as to guilt and the penalty to be imposed. Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980); W. New York v. Bock, 38 N.J. 500, 522, n.1, n.3 (1962).

In New Jersey, all correctional police officers are endowed with full police powers, and are, in fact, police officers. N.J.S.A. 2A:154-4. Police officers are held to a higher standard of conduct than ordinary citizens. In re Phillips, 117 N.J. 567, 576-77 (1990); In re Emmons, 63 N.J. Super. 136, 141-42 (App. Div. 1960). "An officer cannot complain that he is being held up as a model of proper conduct; it is one of the obligations he undertakes upon voluntary entry into the public service. His obligations are greater if he desires to maintain his position as police officer." Emmons, 63 N.J. Super. at 141-42. Law enforcement employees represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Twp. of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965).

In military-like settings such as police departments, prisons, and correctional facilities, it is of paramount importance to maintain strict discipline of employees. See Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div. 1971); Newark v Massey, 93 N.J. Super. 317, 323 (App. Div. 1967). Indeed, "a finding of misconduct by a police official need not be predicated on the violation of any particular department rule or

regulation,” as “an ‘implicit standard of good behavior . . . devolves upon one who stands in the public eye as the upholder of that which is morally and legally correct.’” Phillips, 117 N.J. at 576 (quoting Emmons, 63 N.J.Super. at 140).

In this case, the FNDA sustained each of the following charges against Borrero, terminating his employment effective March 2, 2022. (R-2).

1. N.J.A.C. 4A:2-2.3(a)6: Conduct unbecoming a public employee

“Conduct unbecoming a public employee” is an elastic phrase which has been broadly defined as conduct that adversely affects the morale or efficiency of the governmental unit, or has the tendency to destroy the public’s respect for public employees and the public’s confidence in the operation of government services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); Emmons, 63 N.J. Super. at 140. Borrero does not dispute that he was denied a religious exemption to the vaccination requirements imposed by EO 283 and the JJC’s Policy, and that he refused to get vaccinated and produce adequate proof of being fully vaccinated against COVID-19. His conduct surely adversely affected the morale and efficiency of the JJC and the staff members who had to “fill his shoes,” and it had the tendency to destroy the public’s respect for public employees and the public’s confidence in the operation of the JJC, by potentially exposing the juvenile wards in his care and his colleagues to the ravages of COVID-19.

I therefore **CONCLUDE** that the JJC has met its burden to prove by a preponderance of credible evidence that Borrero’s conduct was conduct unbecoming a public employee which warrants discipline, pursuant to N.J.A.C. 4A:2-2.3(a)6.

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

Other sufficient cause has been described as other conduct not specifically delineated in N.J.A.C. 4A:2-2.3(a) which would “violate[] the implicit standard of good

behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.” In re Boyd, Cumberland County Dep’t of Corrs., 2019 N.J. CSC LEXIS 621, 121 (July 3, 2019), adopted Comm’r, id. at 1-2 (Aug. 14, 2019). N.J.A.C. 4A:2-2.3(a)12 is essentially a catchall provision for why an employee may be subject to major discipline. In this matter, Borrero violated EO 283 and the JJC’s Policy requiring COVID-19 vaccinations and proofs by dates certain, which demonstrates “other sufficient cause.”

I therefore **CONCLUDE** that the JJC has met its burden to prove by a preponderance of credible evidence that Borrero’s conduct constituted other sufficient cause which warrants discipline, pursuant to N.J.A.C. 4A:2-2.3(a)12.

III.

Once a determination has been made that an employee violated a statute, rule, or regulation concerning their employment, the concept of progressive discipline requires consideration. In re Stallworth, 208 N.J. 182, 195-96 (2011); Bock, 38 N.J. at 523. When deciding what disciplinary action is an appropriate penalty, the fact finder shall consider the nature of the sustained charges and the appellant’s past record. Bock, 38 N.J. at 523-24. The employee’s past record is said to encompass their reasonably recent history of promotions or commendations on the one hand, and on the other hand, any “formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated . . . by having been previously called to the attention of and admitted by the employee.” Ibid. Consideration as to the timing of the most recently adjudicated disciplinary history should also be given. Id. at 524.

The theory of progressive discipline is not a fixed rule to be followed without question. In re Carter, 191 N.J. 474, 484 (2007). “[S]ome disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record.” Ibid. The question for the fact finder is whether the disciplinary action is so disproportionate to the offense, considering all of the circumstances, to shock one’s sense

of fairness. Ibid. The threshold of “shocking” [one’s] sense of fairness is a difficult one, not met whenever the fact finder would have reached a different result. In re Herrmann, 192 N.J. 19, 29 (2007). Removal has been upheld where the acts charged, with or without a prior disciplinary history, have warranted imposition of the sanction. Carter, 191 N.J. at 484. Hence an employee may be removed, without regard to progressive discipline, if their conduct was egregious. Ibid.; Herrmann, 192 N.J. at 33-34.

Borrero has no prior disciplinary history, and urges that he should have been placed on a furlough or other inactive status until the JJC determines that it is safe for him to return to his job. However, “an indefinite unpaid leave is not a reasonable accommodation, especially where the employee fails to present evidence of the expected duration of [their] impairment.” Svarnas v. AT&T Commc’ns, 326 N.J. Super. 59, 79 (App. Div. 1999). There is no way of knowing when, if ever, EO 283 and the JJC’s Policy will be lifted, particularly when new variants and variants of interest continue to surface worldwide. It may well be that COVID-19 is here to stay. When Borrero was denied a religious exemption from the vaccination requirement, he was faced with the dilemma of offending his religious beliefs by getting vaccinated, or potentially losing his job, pursuant to EO 283 and the Policy. He cannot deny that he was on fair notice that termination was a distinct possibility, and he cannot predict what the future may hold, which would not negate his refusal to be vaccinated at the time he refused to do so in any event.

Under these facts and circumstances, I **CONCLUDE** that no progressive discipline could have been imposed, and that termination was the only appropriate penalty to preserve the health and safety of the JJC’s wards and staff, and maintain the efficiency and duties of the JJC’s operations. See New Jersey State Policemen’s Benev. Ass’n, 470 N.J. Super. at 585-86, 591 (detailing severe impact COVID-19 has had on JJC’s wards, staff, and operations, and noting that covered “employees have the right to get vaccinated and keep their jobs or decide that they do not want to work for the common good”) (internal quotation marks omitted).

ORDER

It is therefore **ORDERED** that JJC's motion for summary decision is hereby **GRANTED**; and it is further

ORDERED that the June 10, 2022, FNDA charges are hereby **SUSTAINED**; and it is further

ORDERED that Borrero be removed from his position as a JJC SPCO effective March 2, 2022; and it is further

ORDERED that Borrero's petition of appeal is hereby **DISMISSED**.

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. 40A:14-204.

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 29, 2022

DATE

Sarah H. Surgent

SARAH H. SURGENT, ALJ

Date Received at Agency:

Date Mailed to Parties:

SHS/kl

APPENDIX

EXHIBITS

For appellant

- A-1 Certification of Borrero, dated October 14, 2022; Borrero's religious exemption request, dated February 13, 2022; denial of Borrero's religious exemption request, dated February 23, 2022
- A-2 Letter from Daryl J. Kipnis, Esq., confirming a thirty-seven (37) day tolling of 180-day return to pay rule, dated December 6, 2022

For respondent

- R-A JJC's revised Policy implementing EOs 283 and 290, dated March 9, 2022
- R-A1 JJC's Policy implementing EO 283, dated January 20, 2022
- R-B Borrero's religious exemption request, dated February 13, 2022, with accompanying letter dated January 31, 2022
- R-C Denial of Borrero's religious exemption request, dated February 23, 2022
- R-D Preliminary Notice of Disciplinary Action (31-A), dated March 1, 2022
- R-E Departmental Hearing Officer Decision, dated June 10, 2022 (page 8 only)
- R-F Final Notice of Disciplinary Action (31-B), dated June 10, 2022
- R-G Not in evidence
- R-H Certification of Kathryn B. Moynihan in support of the motion for summary decision, dated August 16, 2022