The appeal of Steven J. Winters, a Fire Fighter with North Hudson Regional Fire and Rescue, of his removal effective November 30, 2006, on charges, was heard by Administrative Law Judge James A. Geraghty (ALJ), who rendered his initial decision on February 5, 2008. Exceptions were filed on behalf of the appellant and cross exceptions were filed on behalf of the appointing authority.

Having considered the record and the ALJ’s initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on September 10, 2008, accepted and adopted the Findings of Fact and Conclusions as contained in the attached ALJ’s initial decision and his recommendation to grant the appointing authority’s motion for partial summary decision and uphold the removal. However, the Commission did not adopt the appellant’s motion for partial summary decision and found that the issue was moot.

DISCUSSION

The appellant was removed effective November 30, 2006, on charges of, \textit{inter alia}, incompetency, inefficiency or failure to perform duties, insubordination, chronic or excessive absenteeism, conduct unbecoming a public employee, neglect of duty, resignation not in good standing and other sufficient cause. Specifically, the appellant was charged with ten discrete acts of misconduct, all of which related to abuse of sick time. Upon the appellant’s appeal, this matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

At the OAL, the appointing authority moved for a partial summary decision as to the charge that the appellant engaged in outside employment while on sick leave, contrary to a work rule in the collective bargaining agreement (Count Four), stating that this conduct constituted incompetency, inefficiency or failure to perform duties, insubordination, conduct unbecoming a public employee, neglect of duty and other sufficient cause. The appellant countered that he was entitled to summary decision with respect to Count 4 since the sick leave outside work provision is found solely in the union contract and the only remedy for this is through the contract grievance procedures. He also contended that there were unestablished facts critical to the disposition of this matter in that testimony from his psychiatrist would
show that his outside work while on sick leave was not illicit, but rather, therapeutic. The appellant cross-moved for a partial summary decision regarding the charge that he violated the home confinement rule (Count One) which requires him to remain in his residence while on medical or injury leave. The appellant argued that the home confinement rule was facially unconstitutional. He also asserted that the portion of the November 30, 2006 charge (Count 1(d)), alleging he was not home on October 4, 2006, violated the “45-day rule” which requires that charges against Fire Fighters be filed within 45 days after the misconduct is known by the appointing authority. See N.J.S.A. 40A:14-28.1.

Initially, the ALJ noted that the record established as uncontested fact that the appellant had a history of minor discipline for insubordination relating to his complaints about superior officers and a 60-day suspension and demotion to Fire Fighter in September 2005. The ALJ also indicated that the appellant was granted sick leave from June 13, 2006 to October 24, 2006 for a panic disorder for which he received regular treatment from a psychiatrist who had certified he was unable to work in the Fire Department. From June 12, 2006 to November 9, 2006, the appellant worked on a per diem basis as an Electrical Inspector/Code Enforcement Officer with the Township of Old Bridge. From September 5, 2006 through November 24, 2006, the appellant worked as a Construction Official with the City of Long Branch. The ALJ accepted as fact that on the days the appellant worked for either Old Bridge or Long Branch while on sick leave, he failed to comply with the home confinement rule. On October 12, 2006, a psychologist for the appointing authority evaluated the appellant and indicated that he was capable of returning to work with no psychological restrictions. However, on October 23, 2006, the appellant’s personal psychiatrist advised the Fire Chief against the appellant’s returning to work. On October 24, 2006, the appellant was ordered off sick leave and to report for modified duty and the appellant refused. Thereafter, the appellant failed to attend a November 15, 2006 appointment with a psychiatrist arranged by the Fire Chief.

The ALJ determined that specification (d) of Count 1 should be dismissed as untimely since the appellant’s failure to be available on October 4, 2006 while on sick leave occurred more than 45 days before the filing of the charge on November 30, 2006. However, the ALJ found the appointing authority’s sick leave home confinement rule constitutionally valid.

With respect to Count 4, the appellant’s violation of the proscription against outside employment while on sick leave, the ALJ found no merit in

---

1 The appellant’s appeal of this matter is pending at OAL.
2 The appellant’s County and Municipal Personnel System (CAMPS) record indicates that he was appointed as an Electrical Inspector on September 5, 2006 and that he resigned from his position in good standing on June 22, 2007.
the appellant’s argument that the only remedy available to the appointing authority for this violation was in the grievance procedures contained in the collective bargaining agreement. In this regard, the ALJ noted that the contract did not permit the appointing authority to grieve a violation by an employee of the prohibition against outside employment while on sick leave. However, the ALJ emphasized that the contract did specify that major disciplinary actions are under the jurisdiction of the Department of Personnel (DOP)\textsuperscript{3} and are not arbitrable. Thus, since the appointing authority removed the appellant for violation of a work rule whose purpose was to prevent malingering and misuse of sick time, the ALJ determined that the appointing authority exercised its prerogative under Civil Service law to sanction it.

In considering the appellant’s argument that summary decision would be premature because the ALJ had not yet received testimony from his treating psychiatrist concerning the therapeutic value of his outside employment, the ALJ did not agree that his illicit outside employment could be the only or preferred therapy. The ALJ found unpersuasive the appellant’s argument that his psychological problems, brought on by discipline for prior misconduct and conflicts in the workplace, could only be remedied by the commission of more misconduct. Therefore, the ALJ did not consider the anticipated medical testimony necessary to the resolution of the appointing authority’s motion for summary decision. Finally, the ALJ rejected the appellant’s argument that the appointing authority did not provide evidence that he worked his outside employment on days that would have been his work days during his sick leave because the contract categorically forbade outside employment while on sick leave.

The ALJ concluded that the appellant engaged in outside employment while on sick leave and that this conduct constituted insubordination, neglect of duty, conduct unbecoming, and other sufficient cause. He also determined that the appointing authority’s home confinement rule did not infringe on the appellant’s constitutional liberty rights, but that the charge in Count 1(d) was filed beyond the statutory 45 days and was untimely. Accordingly, the ALJ granted the appointing authority’s motion for partial summary decision on Count 4, dismissed the appellant’s motion to dismiss Count 4, and upheld the appellant’s removal. The ALJ also granted the appellant’s cross-motion in part regarding Count 1(d).

\textsuperscript{3} On June 30, 2008, Public Law 2008, Chapter 29 was signed into law and took effect, changing the Merit System Board to the Civil Service Commission, abolishing the Department of Personnel and transferring its functions, powers and duties primarily to the Civil Service Commission. In this decision, the former names will be used to refer to actions which took place prior to June 30, 2008.
In his exceptions to the ALJ’s decision, the appellant argues that the ALJ incorrectly utilized the “shock the conscience” standard set forth in In re Herrmann, 192 N.J. 19 (2007), in sustaining his removal instead of the correct de novo standard. The appellant emphasizes that New Jersey courts have consistently recognized that appeals before the Commission are plenary hearings conducted de novo and this was not done in this case as the ALJ accepted the decision of the appointing authority. He also states that the decision frustrates the purpose of the OAL, which is to create a record via an evidentiary hearing so that an agency head can make an intelligent and informed decision. In this case, the appellant argues that the ALJ made his decision on a motion without permitting critical medical evidence to be presented. The appellant also asserts that the ALJ failed to engage in a predominant interest analysis since this matter implicated jurisdictional issues concerning the collective bargaining agreement under the purview of the Public Employment Relations Commission (PERC) and a settlement agreement. Thus, any disagreement as to the meaning of the contract was one for arbitration, not the OAL. More importantly, the appellant argues that the meaning and intent of the outside employment provision has already been interpreted and decided in the proper forum – PERC. As such, he maintains that PERC has the predominant interest in this matter and the ALJ did not have jurisdiction to rule on Count 4, a contractually based charge.

The appellant also argues that the ALJ incorrectly applied the standard to determine if there is any issue of genuine material fact as set forth in Brill v. Guardian Life Ins. Co. of America, 42 N.J. 520 (1995). The appellant details what the ALJ determined to be uncontested facts and alleges that they are not material or that there was no evidence in the record indicating that an issue was uncontroverted. He also contends that the ALJ erred in his ruling as to the facts in dispute. Additionally, the appellant claims that the ALJ’s ruling is contrary to the well settled law as to the interpretation of contracts in that he did not engage in an analysis of the intention of the parties to the terms of the contract. Rather, he argues that the ALJ simply ascribed the meaning he thought the contract should have. Further, the appellant states that the ALJ’s ruling violated the intent of the “45-day rule” as the appointing authority did not receive any records pertaining to his employment with Long Branch until days before the OAL trial commenced in 2007. He also contends that the ALJ failed to support his ruling that the prohibition against outside employment rule in the contract also constituted a rule for which an employee may be administratively charged.

The appellant asserts that the ALJ erred because he ruled on evidence not in the record. Specifically, he presents that the ALJ made a medical
finding without the benefit of any medical testimony. Moreover, he states that the ruling is based on an incomplete record and claims that the ALJ “improperly coached respondent’s witnesses” resulting in bias against him. Finally, the appellant argues that the appointing authority violated the ALJ’s discovery order as it failed to provide him certain information. Therefore, the appellant requests that the appointing authority’s motion for summary judgment be reversed, and his cross-motion for summary judgment based on a lack of jurisdiction be granted, thereby dismissing Count 4 in its entirety. The appellant also requests that Counts 1, 2, 3, 8, 9, and 10 be dismissed as per the collective bargaining agreement which mandates that all disputes be resolved through grievance procedures.

In response, the appointing authority argues that it is undisputed that the appellant worked a second and a third job while on extended paid sick leave contrary to a policy expressed in the plain terms of the union contract. In so doing, he engaged in egregious misconduct that warranted his termination. It emphasizes that the appellant continued to collect his full time pay as a Fire Fighter when he worked at his second and third jobs while on sick leave and when he was ordered to return to modified duty, he refused. The appointing authority states that it is clear that the appellant violated its prohibition against working a second job while out on paid sick leave and that this constitutes conduct unbecoming a public employee.

Regarding the appellant’s argument that the ALJ utilized the wrong standard of review, the appointing authority notes that the Commission is required to perform a *de novo* review to determine guilt as well as the penalty and *Herrmann, supra*, only concerned an appellate court’s standard of review of an agency determination, which is not applicable. Rather, the appointing authority presents that the controlling cases in this matter are *Henry v. Rahway State Prison*, 81 N.J. 571 (1980) and *West New York v. Bock*, 38 N.J. 500 (1962). In this case, the appellant engaged in egregious misconduct by working two separate jobs while on paid sick leave. Thus, it maintains that removal is the appropriate penalty. With respect to the appellant’s asserted medical evidence that working two other jobs while out on sick leave would be therapeutic, the appointing authority states that this evidence is irrelevant and immaterial in that the appellant’s personal physician does not have the authority to modify a work rule. As such, given that the ALJ determined that the rule was valid, a personal physician’s contrary opinion does not override a valid work rule. It also states that the appellant has not provided any evidence to support his assertion that summary decision was not appropriate because other employees worked outside employment while on medical leave.
The appointing authority asserts that the appellant’s argument that the ALJ erred because he failed to conduct a “predominant interest” analysis is absurd. Specifically, it notes that such an analysis is only required when the jurisdiction of more than one agency is invoked and here, the appellant did not file a PERC claim. Thus, the ALJ was not obligated to perform a predominant interest analysis. Moreover, even if he did, it states that the Commission would clearly have possessed the predominant interest to adjudicate this dispute. With respect to the ALJ’s grant of summary decision, the appointing authority emphasizes that the appellant does not deny that he worked two jobs on sick leave in contravention to a work rule. Thus, in accordance with Brill, supra, these are the only facts that were material and summary decision was appropriate. Additionally, the appointing authority presents that this matter has nothing to do with the interpretation of a contract nor does the ruling violate the 45-day rule. Further, it states that as a Civil Service jurisdiction, it has the authority to discipline the appellant under the provisions of Title 11A. Regarding the proposed testimony of the appellant’s psychiatrist, the appointing authority states that its policy does not have an exception for when a doctor thinks one should be permitted to engage in outside employment. Finally, it states that the appellant provided no evidence that other employees engaged in similar conduct and the ALJ’s comments could not be construed as biased because the matter was decided on a motion.

In its exceptions to the ALJ’s decision, the appointing authority presents that Count 1(d) should not have been dismissed under N.J.S.A. 40A:14-28.1 since the statute provides that the charge shall be filed no later than 45 days after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based. Thus, to require the filing of charges when the entire investigation was not concluded would have prejudiced its investigation concerning the appellant’s misconduct, which was not limited to his failure to be at home on sick leave. As such, given the need to analyze the totality of the circumstances to determine the appropriate disciplinary charges, the appointing authority asserts that it is appropriate to apply the equitable doctrine of “continuous violation” to determine if any of the disciplinary charges violated the 45-day rule. Therefore, since there is no evidence that it delayed commencing a disciplinary investigation, the appointing authority should be afforded sufficient time to investigate an offense that could be part of a continuing disciplinary violation, as opposed to a single incident which may or may not be found to support the disciplinary measure sought.

In a supplemental submission dated September 5, 2008, the appellant requested an extension of time until September 30, 2008 to reply to the appointing authority’s exceptions and cross-exceptions. However, the
Commission determined that this matter did not necessitate further submissions.

Upon its de novo review of the record, the Commission adopts the recommendation of the ALJ to grant the appointing authority’s motion for partial summary decision and uphold the removal. It also denies the appellant’s motion for partial summary decision.

N.J.A.C. 1:1-12.5(a) provides that a party may move for summary decision upon all or any of the substantive issues in a contested matter at any time. N.J.A.C. 1:1-12.5(b) provides that summary decision may be rendered in whole or in part if the supporting documents show that there is no genuine issue of material fact so that the moving party is entitled to prevail as a matter of law. In Brill, supra, the Court stated that if there are no material factual issues in dispute, the court must render judgment as a matter of law. Further, summary judgment is appropriate if a reasonable fact finder could not find in favor of the party opposing the motion although the evidence is viewed in a light most favorable to the non-moving party. Moreover, summary judgment cannot be avoided simply because there is a disputed immaterial fact.

In this case, it is undisputed by the appellant that he worked for Old Bridge and Long Branch while he was out on paid sick leave. The Commission agrees with the ALJ that the home confinement rule is constitutionally valid in New Jersey and that it has a preventive effect against malingering and abuse of sick leave. Although the appellant argues that the Commission does not have standing to review this matter, that ALJ determined that the no outside employment while on sick leave rule was a work rule. Accordingly, the appellant’s violation of the rule is cognizable under Civil Service law and rules as it constitutes conduct unbecoming a public employee. With respect to the argument that the ALJ failed to initiate an analysis to determine predominant interest, the record does not evidence that the appellant filed an unfair labor practice charge with PERC on this matter or that he presented a motion to consolidate these matters with a pending unfair labor practice charge, in compliance with N.J.A.C. 1:1-17.1, Motion to consolidate, and N.J.A.C. 1:1-17.3, Standards for consolidation. Thus, there was no reason for the ALJ to determine if these matters should be consolidated and make a determination as to which agency should have the predominant interest.

The appellant contends that summary decision was inappropriate because he did not have the opportunity to have his psychiatrist testify on the therapeutic value of his working in another position while he was out on sick leave. The Commission disagrees. It is irrelevant if his working in another
capacity for another employer while out on paid sick leave had a therapeutic value to his medical condition. The rule clearly prohibits this activity. Moreover, there is no evidence in the record that the appellant sought an exception to this rule from the appointing authority where he could have documented the medical necessity of obtaining other employment while out on paid sick leave for therapeutic reasons. Therefore, the Commission agrees with the ALJ's reasoning in rejecting the appellant's arguments on this point. As such, any medical testimony would have been immaterial because the no work rule while on sick leave policy did not provide an exception for when a personal physician thinks it should be permitted. Similarly, the appellant's exceptions concerning contract interpretation, the statutory intent of the 45-day rule concerning the documentation received via the OPRA request to Long Branch, the fact that the ALJ made medical findings without the benefit of medical testimony, the appointing authority's violations of discovery orders, and the fact that the ALJ improperly coached witnesses are frivolous and without merit. Consequently, in accordance with N.J.A.C. 1:1-12.5(b), summary decision on Count 4 was appropriate because there was no genuine issue of material fact.

It is not necessary to address the appointing authority's exceptions concerning the ALJ's granting of the appellant's summary decision concerning Count 1(d) since the ALJ did not make any factual determinations for the Commission to review. Additionally, for the reasons further explained below, since the Commission is upholding the appellant's removal, this issue is moot.

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, supra. In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. George v. North Princeton Developmental Center, 96 N.J.A.R. 2d (CSV) 463. 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, supra. 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 case, a review of the appellant's past disciplinary history is unnecessary since it is clear that removal is the proper penalty. In *In the Matter of James Bergen* (MSB, decided February 10, 1998), a Police Officer was found to be working as a bartender when he was out on extended sick leave in violation of the appointing authority's sick leave policy. Although the appellant in that matter claimed that he did not actually work there, but was just “helping out,” the Board determined that his working while on sick leave constituted conduct unbecoming a public employee. Even more germane to this matter is the situation addressed by the Board in *In the Matter of Glenn Kline* (MSB, decided April 21, 1992). In *Kline*, the appellant was charged with conduct unbecoming a public employee on charges that while he was on approved sick leave injury, he sought and accepted outside employment with two different private employers. In upholding the charge and imposing the penalty of removal, the Board adopted the conclusion of the ALJ who emphasized that:

> Even if [the] appellant did not have a prior disciplinary record, the conduct in which he was found to have engaged, particularly with respect to outside employment while on an approved leave of absence, is very disturbing. In fact, such conduct comes close to being a fraud committed upon the State by the appellant … for he was granted the benefit of sick leave injury because he caused to be filed documents saying he could not work. Yet, appellant turned around, collects full pay and then becomes employed while he is supposed to be home recuperating.

With respect to the instant charge of conduct unbecoming a public employee, the ALJ determined that summary judgment on the appointing authority's motion to remove the appellant was appropriate. The Commission agrees. As detailed above, working in other positions while being out on paid sick leave from a public employer is egregious conduct in that it is a serious misuse of paid sick time and public resources. Clearly, this conduct “has a tendency to destroy public respect for [public] employees and confidence in the operation of [public] services.” *In re Emmons*, 63 N.J. Super. 136, 140 (App. Div. 1960). See also, *Karins v. Atlantic City*, 152 N.J. 532 (1998) (Off duty Fire Fighter’s use of racial epithet constituted conduct unbecoming a public employee). Moreover, working in another paid position while out on paid sick leave from a public employer violates “the implicit standard of good behavior which devolves upon one who stands in the public eye.” *In re Tuch*, 159 N.J. Super. 219, 224 (App. Div. 1978). In these trying fiscal times, such conduct is clearly inappropriate and egregious and warrants the appellant’s removal. Additionally, the Commission is cognizant of the fact that the appellant’s disciplinary history also includes a 60-day suspension and demotion to Fire Fighter in 2005 for incompetency,
inefficiency or failure to perform duties, insubordination, conduct unbecoming a public employee, neglect of duty, and other sufficient cause. This disciplinary history provides further reason to remove the appellant from his position.

One additional comment is warranted in this matter. Given that the Commission is upholding the appellant’s removal, the remaining nine charges against the appellant may be ripe for dismissal if the instant decision is not challenged further. However, should this decision be challenged further, it may be advisable to place the remaining charges on the inactive list at the OAL pending the outcome of that challenge.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. Therefore, the Commission dismisses the appeal of Steven J. Winters.

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