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STATE OF NEW JERSEY

In the Matter of Dean Schwaner, Department of Corrections	:	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket No. 2014-2120 OAL Docket No. CSR 2835-14	:	

ISSUED: SEP 17 2014 (DASV)

The appeal of Dean Schwaner, a Correction Officer Recruit with the Mountainview Youth Correctional Facility, Department of Corrections, of his removal, effective February 10, 2014, on charges, was heard by Acting Director and Chief Administrative Law Judge Laura Sanders (ALJ), who rendered her initial decision on August 1, 2014. 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 3, 2014, accepted and adopted the Findings of Fact and Conclusions as contained in the attached initial decision and the recommendation that the removal be upheld.

DISCUSSION

The appellant was removed on charges of conduct unbecoming a public employee; other sufficient cause; the use, possession or sale of any controlled dangerous substance; and the violation of a rule, regulation, policy, procedure, order, or administrative decision. Specifically, the appointing authority asserted that the appellant tested positive for cocaine during a random drug test. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In her initial decision, the ALJ set forth the testimony of the appointing authority's witnesses. Salahuddin Rabb, a Senior Investigator, Parole and Secured Facilities, testified that on November 26, 2013, he received a list of employees to be randomly tested for drugs which included the appellant. The appellant was given instructions on the collection of a urine sample and signed a Notice of Acknowledgement, which indicated among other things that a positive test result would result in termination. It is noted that this notice did not inform the appellant that he could provide a second urine sample. The notice to employees subject to a reasonable suspicion test included such language. The appellant also signed for the receipt of the Drug Screening Program Monitor Booklet. Rabb further testified that each officer is routinely advised during the test that he or she has the option of providing two samples of urine. However, the ALJ found that Rabb did not have a "definitive recollection" that he advised the appellant of this option. The appellant provided only one sample. On November 27, 2013, Rabb transported the appellant's sample to the State Toxicology Lab in Newark. Dr. Robert Havier,[1] who is the acting director of the lab, testified that the appellant's urine was tested under two methods. The first test was performed with the immunoassay process and yielded a positive result of "392" for cocaine. A second portion of the urine sample was then tested utilizing the gas chromatography/mass spectrometry method. Two instruments had been used in the second test since the first instrument produced a "poor chromatography." The second instrument measured the appellant's urine sample as having 262 nanograms (ng) per milliliter (ml) of benzoylecgonine, well over the threshold of 100 ng/ml for the test. Benzoylecgonine is the main metabolite of cocaine. The laboratory medical officer compared the positive test results with the appellant's medical form, but the form did not reveal a medical reason for the results. Once the test results were received, Rabb informed the appellant, who submitted a report stating that he had "never experimented or used cocaine before . . . never did drugs, this must be a mistake." The appellant did not testify at OAL, nor did he present witnesses. The appointing authority presented a third witness who testified about the disciplinary policy and the distribution of the Drug Testing Policy, which includes procedures on providing a second urine sample.

Based on the foregoing, the ALJ determined that the appellant "was not provided with a clear statement of his rights" to provide a second sample. Nonetheless, there was no evidence that the appellant's urine sample was not tested properly, the chain of command was faulty, or the results of the test were inaccurate. The ALJ stated that the appellant's written statement did not overcome the unrefuted laboratory report, notwithstanding the appellant's argument that the test was fatally flawed since the appointing authority failed to provide him with an opportunity to test a second sample. The ALJ indicated that "at most" the appellant was deprived of "potentially exculpatory evidence, not actual exculpatory evidence." Under these circumstances, the ALJ concluded that the appellant's urine did in fact produce a positive test result for cocaine above the acceptable limit. Therefore, the

[1] The ALJ incorrectly identifies this individual as "Dr. Robert Xavier."

ALJ found the appellant to be guilty as charged. Furthermore, considering the positive test result, the appellant's position as a law enforcement officer, and his recent appointment on March 25, 2013,[2] the ALJ recommended upholding the appellant's removal.

In his exceptions, the appellant maintains that he was not advised of his option to provide a second urine sample. As such, he argues that his procedural due process rights were violated. Additionally, the appellant contends that the ALJ erred in not considering the applicable cases that he cited, such as *Mattielli v. Bayonne Department of Public Safety*, 2001 N.J. AGEN LEXIS 615. In that case, the appellant contends that the ALJ reinstated the employee despite having a positive drug test because the employee was never advised orally or in writing of his option to provide a second urine sample. Therefore, the appellant states that since the ALJ in his case found that he was not adequately advised of his right to provide a second urine sample, the drug test results should be suppressed. Moreover, he indicates that the failure to be properly advised undermines the credibility of the drug test, since he claims that there are no means to challenge the accuracy of the results without a second urine sample. The appellant emphasizes that the Notice of Acknowledgement that he received did not contain the option to provide a second sample. The appellant also submits his post-hearing arguments where he reiterates the above argument as well as contends that no adverse inference should be drawn against him for not testifying at OAL, as the burden of proof in this case rests on the appointing authority.

In its cross exceptions, the appointing authority submits that it was arbitrary and capricious for the ALJ to find that the appellant was not provided with notice of his right to provide a second urine sample. It contends that Rabb did in fact testify that he informed the appellant of this right since Rabb "as a matter of habit" always provides this information to the individual being tested. Moreover, the appointing authority indicates that Rabb noted on the test summary sheet that the appellant did not provide a second sample. As such, Rabb's testimony established that the appellant was provided with the applicable notice. Further, the appointing authority emphasizes that the appellant did not testify nor submit any evidence that he was not given this information. In addition, the appellant was on notice of his entitlement to provide a second urine sample since he received the Drug Testing Policy as a trainee. Consequently, the appointing authority asserts that the ALJ's finding in this regard should be rejected.

Nonetheless, despite the ALJ's finding, the appointing authority maintains that the appellant's removal should be upheld. It states that the decision in *Matttieli, supra*, was an initial decision and the employee was ultimately removed.

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[2] The appellant previously served in a temporary capacity as a Correction Officer Apprentice with the Department of Corrections from December 3, 2012 through March 24, 2013. Additionally, the ALJ indicated that the appellant's removal was his only disciplinary action.

The appointing authority also notes that the Commission has denied appeals which relied on *Mattieli's* initial decision. For instance, it cites *In the Matter of Gregory Pettey* (CSC, decided March 10, 2010) where, despite the employee's assertion that he did not use marijuana and his second urine sample was lost, the Commission stated that "[i]n the absence of any evidence, or even a suggestion, that the initial test produced an inaccurate result, the value of the split sample is significantly decreased." Moreover, the appointing authority contends that there is absolutely no evidence to undermine the validity of the appellant's drug test. It reiterates that the appellant did not testify, nor did he present witnesses to challenge the chain of custody or the testing procedures of his urine sample. In support of its position, the appointing authority cites *In the Matter of Michael Larino* (CSC, decided May 4, 2011 (failure to collect a split sample found not to be fatal, as no evidence was presented that the results of the appellant's drug test were inaccurate) and *In the Matter of John W. Kelly* (MSB, decided May 24, 2006) (procedural errors, including the failure to offer the appellant the opportunity to provide a second urine sample, were not fatal where there was absolutely no evidence that the results of the drug test were inaccurate). Therefore, the appointing authority maintains that "any minor procedural violations did not deprive [the] appellant of his due process rights" and his removal should be upheld.

Upon its *de novo* review, the Commission agrees with the ALJ's assessment of the record and her recommendation to uphold the appellant's removal. The Commission is not persuaded by the appellant's exceptions. Initially, it is noted that the appellant erroneously relies on the initial decision of *Matttieli.* That decision had been remanded back to the OAL by the Police Training Commission in a consolidated case. Upon return to the OAL, the ALJ recommended upholding the employee's removal, which was adopted by the Merit System Board[3] in *In the Matter of Dominick Mattieli* (MSB, decided April 7, 2004). Moreover, the appointing authority raises a valid argument that the appellant was advised of his right to provide a second urine sample, given Rabb's testimony that individuals are routinely so informed, the test summary sheet noted that the appellant did not provide a second sample, and the appellant received the Drug Test Policy which set forth this option. Nonetheless, even assuming that the appellant was not given notification about providing a second sample, the record does not demonstrate an irregularity or breach in the chain of custody of the appellant's urine sample, an error in the testing process, or discrepancy in the results of the drug test. Although the appellant offers his written statement that he does not use cocaine and the result of the test was "a mistake," the appellant did not testify or present witnesses to refute the results of the urinalysis which confirmed the presence of the metabolite of cocaine. There is also nothing in the record which shows a medical

[3] On June 30, 2008, Public Law 2008, Chapter 29 was signed into law and took effect, changing the Merit System Board to the Commission, abolishing the Department of Personnel and transferring its functions, powers and duties primarily to the Commission.

reason for the positive result. It is noted that no adverse inference[4] is being drawn as a result of the appellant not testifying, nor is the burden of proof shifting to the appellant. However, it is the lack of contrary evidence, including testimonial evidence, that causes the appellant's defense to fail.

It is recognized that not every technical deviation from a drug testing process warrants the nullification of the results of a drug test. *See In the Matter of Bruce Norman,* Docket No. A-5633-03T1 (App. Div. January 26, 2006), *cert. denied,* 186 *N.J.* 603 (2006); *In the Matter of Mario Lalama*, 343 *N.J. Super.* 560 (App. Div. 2001) (Despite flaws in the chain of custody, a drug test is still valid where the record shows a "reasonable probability" that the integrity of the sample has been maintained). For instance, it is well established that the failure to offer the opportunity to provide a second urine sample is not fatal where, as in the case here, there is absolutely no evidence that the results of the appellant's drug test were inaccurate. *See Pettey* and *Kelly*, *supra.* Therefore, the Commission concludes that there were no fatal flaws in the appointing authority's drug testing procedures, and the record contains ample evidence to support that the integrity of the appellant's urine sample was maintained. Accordingly, the Commission upholds the charges against the appellant.

The Commission notes that to avoid a similar issue in the future, it would be prudent for the appointing authority to amend the Notice of Acknowledgement given to individuals subject to a random drug test. Consistent with the notice given during a reasonable suspicion testing, individuals should be advised of their option to provide a second urine sample.

With regard to the penalty, it is clear that drug usage cannot be tolerated in a law enforcement officer. In imposing a penalty, the Commission, in addition to considering the seriousness of the underlying incident, utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). In this case, a review of the appellant's past disciplinary history is unnecessary since it is clear that removal is the proper penalty based on the egregious nature of the offense and the fact that the appellant, as a law enforcement officer, is held to a higher standard than other public employees. *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied,* 47 *N.J.*

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[4] An adverse inference for an appellant's failure to testify may be drawn during an administrative hearing in this State, but the inference may be drawn only if there is other evidence supporting the adverse finding. *See Duratron Corporation v. Republic Stuyvesant Corp., et al.*, 95 *N.J. Super.* 527 (App. Div. 1967), *cert. denied,* 50 *N.J.* 404 (1967), and *State Department of Law and Public Safety v. Merlino*, 216 *N.J. Super.* 579 (App. Div. 1987), *aff'd*, 109 *N.J.* 134 (1988).

80 (1966). *See also In re Phillips,* 117 *N.J.* 567 (1990). Further, the Commission notes that an unrefuted positive test result for drug use has uniformly been held to warrant removal from employment for law enforcement employees. *See e.g., Norman, supra*; *In the Matter of Alfred Keaton* (MSB, decided November 8, 2007). Accordingly, the Commission concludes that the penalty imposed by the appointing authority is neither unduly harsh nor disproportionate to the offense and should be upheld.

ORDER

The Civil Service Commission finds that the action of the appointing authority in imposing a removal was justified. Therefore, the Commission affirms that action and dismisses the appeal of Dean Schwaner.

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 3RD DAY OF SEPTEMBER, 2014

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals
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Civil Service Commission
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 02835-14
AGENCY DKT. NO. N/A
2014-2120

IN THE MATTER OF DEAN SCHWANER,
MOUNTAINVIEW YOUTH CORRECTIONAL FACILITY.

Kevin G. Roe, Esq., for appellant (Kevin G. Roe, Attorney at Law)

Nicole M. DeMuro, Deputy Attorney General, for respondent (John J. Hoffman, Attorney General of New Jersey, attorney)

Record Closed: July 25, 2014 Decided: August 1, 2014

BEFORE **LAURA SANDERS**, Acting Director and Chief ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Correction officer recruit (COR) Dean Schwaner appeals the action by the Mountainview Youth Correctional Facility within the New Jersey Department of Corrections (Mountainview or the appointing authority) terminating his employment on grounds of conduct unbecoming and other sufficient cause, specifically, testing positive for a cocaine metabolite in a random drug test.

COR Schwaner was served with a Preliminary Notice of Disciplinary Action (PNDA) on January 14, 2014. Following a departmental hearing on January 28, 2014,

COR Schwaner was advised by a Notice of Final Disciplinary Action dated February 10, 2014, that he had been terminated effective February 10, 2014. By letter dated February 28, 2014, COR Schwaner appealed the termination to the Civil Service Commission (CSC) and the Office of Administrative Law (OAL), as required under N.J.S.A. 40A:14-202(d). The letter was received at the OAL on March 5, 2014, such that the appeal was filed on that date. The hearing was held on July 16, 2014, and the record was left open to July 25, 2014, for receipt of closing summations.

FACTUAL DISCUSSION AND FINDINGS

There is no dispute over most of the facts. On November 26, 2013, senior investigator Salahuddin Rabb received a list of employees to be called in relation to Mountainview's random-drug-testing policy. The list is generated by the Office of Information Technology for the Department of Corrections Central Office, which then forwards it to the various facilities. The list for November 1 through 30, 2013, included Schwaner's name among eight other names. COR Schwaner appeared timely. Consistent with the usual practice, he was offered a box filled with urine cups encased in wrappers, and given instructions about filling out the label, placing it in the cup, sealing the cup, filling the cup, and hand-washing. He signed a Notice and Acknowledgement, which, among other things, incorporates his understanding that either refusing to participate or receiving a negative result will result in termination. (R-8.) He also signed for receipt of the Drug Screening Program Monitor booklet. (R-7.) Senior Investigator Rabb testified that he had never been formally trained in the area of monitoring drug tests. However, he had been told to read the procedure. He said the protocol is to explain to each officer being randomly tested that he or she has the option to provide two samples. However, he also testified that at the time of the hearing, as well as back in January at the departmental hearing, he had no definitive recollection of whether he did or did not advise COR Schwaner about his right to provide two samples. He said that imparting such information is his habit, and that the routine for doing these tests is "almost like clockwork," but he also acknowledged that even with important habits there is an occasional miss, for instance, failing to lock the house when one leaves and having to return to the house to lock it.

COR Schwaner provided one sample, which he personally sealed and placed in a refrigerator, which was then locked by Senior Investigator Rabb, who also filled out the requisite internal paperwork. (R-9.) The following day, November 27, 2013, Senior Investigator Rabb transported COR Schwaner's sample to the State of New Jersey Toxicology Lab in Newark. It was accepted there, along with two other samples, and a chain-of-custody document was completed. (R-11.)

Dr. Robert Xavier, acting director of the NJ Toxicology Laboratory, who was admitted as an expert in forensic toxicology, testified regarding the testing process. At the laboratory, a portion of the specimen was tested with an immunoassay process for the presence of any of eight classes of drugs. The test yielded a result of 392 for cocaine, which was above the limit of 100. This indicated the presence of cocaine. (R-12 at DOC 117.) Therefore, a second portion of the specimen was taken for testing through gas chromatography/mass spectrometry (GC/MS). The first testing, on December 3, 2013, produced "poor chromatography" on instrument number five, and, consequently, another round of testing was conducted on instrument number one. (R-12 at DOC 123–24, 179.) Testing of that specimen produced a result of 262 nanograms per milliliter (ng/ml) of benzoylecgonine, which is the major metabolite of cocaine. (R-12 at DOC 178.) The reporting limit concentration is 100 ng/ml. (Ibid.) The medical reporting form that accompanied the specimen was then opened and compared by the laboratory medical officer to the results to determine whether they were explained by the medical reporting form. The laboratory reported they were not. These are the laboratory results upon which Mountainview took disciplinary action.

Dr. Xavier acknowledged that while he reviewed the results and signed off on them, he was not the person who actually ran the tests. A laboratory employee, Joann Wolwowicz, ran the immunoassay, while a second employee, JoAnn Shaughnessy, performed the GC/MS testing. Dr. Xavier also said that the two tests do not use up all of the original sample, and his laboratory retains the remaining portion for a year. To his knowledge, officers are not generally advised that a portion of the sample is supposed to be retained for a year.

Following the appointing authority's receipt of the laboratory positive test result, Senior Investigator Rabb testified, he called in COR Schwaner on January 14, 2014, to provide an opportunity to respond. The appellant filled out and signed a report, stating, "I D. Schwaner have never experimented or used cocaine before. I never did drugs, this must be a mistake." (A-3.)

With regard to the policies, the Special Investigations Division (SID) Internal Management Procedures for drug testing, in section IV, "Procedures," first addresses random drug testing. (R-4.) It requires the SID officer ("the monitor") to provide a Drug Screening Program Monitor booklet to the employee, and have the employee sign for it. The monitor then must direct the employee to read and sign Attachment A-1, the Drug Testing Employee Notice and Acknowledgement, which the monitor also signs. The employee must then complete Attachment D, the Drug Testing Medication Information form. The employee is to keep one copy, and put the other in a sealed envelope, which eventually accompanies the urine sample to the State toxicology lab. Additional procedures, not relevant here, apply if the employee cannot immediately produce a urine sample. Once the employee indicates he or she is ready, the monitor provides "a packaged specimen container (two specimen containers if they choose to provide a second sample for freezing)." (Id. at DOC 99.)

The SID Procedure for Drug Testing also states, "The monitor shall advise the [employee] that if he/she chooses to provide a second sample, it must be done at the same time the first specimen is produced. In addition, the second specimen shall be collected in the same fashion as the first specimen." (Id. at DOC 100.) The NJ Department of Corrections Monitor Instructions similarly do not state explicitly when officers must be advised of their right to provide a second sample, they say only that, "In the event the employee has voided a second specimen for freezing, the official monitor will complete a second 'Continuity of Evidence' form . . . , place the second specimen in the designated freezer, and make the appropriate entry into the log book." (R-6 at DOC 6.)

The acknowledgment forms for random and reasonable-suspicion testing are different. The notice and acknowledgment presented to COR Schwaner for reading and

signature includes nothing about the submission of a second specimen. (R-8.) In contrast, the acknowledgment provided for employees being tested as a result of a reasonable suspicion states at item 4, "I may request two urine samples to be taken. One sample will be kept frozen for a period of sixty . . . days. In the event I wish to challenge the results of the test, I or my legal representative must immediately notify the Department of Corrections of my intention to challenge the results, or frozen samples may be destroyed." (R-4 at DOC 111.) At hearing, no one testified as to why the two are different. The appointing authority offered only a single sheet, "Drug Screening Program Monitor," with COR Schwaner's signature. This appears to be the cover to the document required by the policy. What else is in that booklet is unknown, because it was not offered into evidence.

Lt. Donald Nywening, the administrative lieutenant at Mountainview, testified both as to the applicability of the Department of Corrections' disciplinary policy, which requires termination for a positive drug test (R-13), and to the distribution of the Drug Testing Policy to all persons trained at the corrections academy. That policy (R-14) spells out at some length the procedures for providing a second sample. (See R-14 at DOC 90–91.)

It is clear that DOC policy requires that officers be offered the opportunity to provide a second sample. This right is spelled out definitively in the reasonable-suspicion acknowledgement, and is ignored in the random-testing acknowledgment. Senior Investigator Rabb testified that he has a routine that includes advising officers of the right to offer a second sample, but even two months after the event, he could not recall whether he did or did not advise COR Schwaner. However, it is clear that COR Schwaner only provided one. Based on the lack of written notice, the senior investigator's inability to recall, the absence of the sample, and the fact that it is against the officer's interest not to provide a second sample, I **FIND** as **FACT** that COR Schwaner was not provided with a clear statement of his rights.

Appellant did not testify, but his written statement denying the use of cocaine or other drugs is in evidence. While appellant challenges the admissibility of the toxicology-lab evidence on procedural grounds (see legal analysis and conclusions

below), the written statement is the only evidentiary challenge to the accuracy of the test result. Lacking evidence that the samples were not tested properly, that something was wrong in the chain of custody, or that the result was rendered acceptable by some medical reason, the written statement is overborne by the otherwise unrefuted laboratory report. Therefore, I **FIND** as **FACT** that COR Schwaner's test produced a result of 262 ng/ml of benzoylecgonine, the major metabolite of cocaine, which is above the acceptable limit of 100 ng/ml.

LEGAL ANALYSIS AND CONCLUSIONS

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant and 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 (1962); In re Polk, 90 N.J. 550 (1982). Here, COR Schwaner is charged with conduct unbecoming and other sufficient cause, namely, violation of the appointing authority's drug policy, because a specimen he provided tested above the limit for a metabolite of cocaine.

The appellant contends that the process of administering the test was fatally flawed by the failure to give him the opportunity to test a second sample.

In George v. City of Newark, 384 N.J. Super. 232 (App. Div. 2006), the court considered the significance of due process in relation to a second sample that was tested by an independent laboratory for the wrong level, because the city did not send a letter explaining the correct testing regimen along with the frozen sample. The court analogized the situation to "the plight faced by criminal defendants when the State loses or otherwise damages or suppresses favorable evidence." George, supra, 384 N.J. Super. at 242.

> Without bad faith on the part of the State, "failure to preserve potentially useful evidence does not constitute a denial of

> due process of law." Arizona v. Youngblood, 488 U.S. 51, 57, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281, 289 (1988). It is only the suppression of exculpatory evidence that violates due process "irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97, 10 L. Ed. 2d 215, 218 (1963).
>
> [Id. at 243.]

The court then went on to say that even a correct independent test result would not be considered exculpatory at the time the split specimen was sent to the independent laboratory. "At best it was potentially exculpatory. Even a negative result . . . or [a result] well below the correct threshold . . . would still only be evidence of a mistake in the two positive State Lab results and not clearly exculpatory." Ibid.

Here, the appellant did not testify, so the record includes no statement from him as to whether he did or did not violate the drug policy. At hearing, it became apparent that a sample of the original specimen still exists, and presumably could be re-tested if there were anything to indicate that the State lab's results were inaccurate. The decision to perform GC/MS testing twice, along with Dr. Xavier's testimony, suggests that quality controls were in place. Thus, I **CONCLUDE** that the failure to advise COR Schwaner that he could provide a second urine sample at most deprived him of potentially exculpatory evidence, not actual exculpatory evidence.

Conduct unbecoming is a term that encompasses actions adversely affecting the morale or efficiency of a governmental unit or having a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally

correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Here, COR Schwaner violated the Department's policies by testing above the limit for a metabolite of cocaine. Since correction officers are held to a standard that includes not violating the laws against use of controlled dangerous substances, I also **CONCLUDE** that testing positive for use of a controlled dangerous substance constituted conduct unbecoming. Some disciplinary infractions are so serious that removal is appropriate, even in the face of a largely unblemished prior record. In re Herrmann, 192 N.J. 19, 33 (2007). This is COR Schwaner's only disciplinary action, but he was appointed on March 25, 2013, and this is an extremely serious violation within a very short time. Moreover, no matter how long the officer's service, the only discipline listed in the Department of Corrections' Disciplinary Action Policy for the offense of use of any controlled dangerous substance is termination. Therefore, I **CONCLUDE** that the appointing authority has met its burden, and termination is appropriate.

ORDER

The removal is hereby **AFFIRMED**, and the appeal is **DISMISSED** with **PREJUDICE**.

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.

August 1, 2014
DATE

Laura Sanders
LAURA SANDERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency: August 1, 2014

Date Mailed to Parties: August 1, 2014

/caa

WITNESSES

For appellant, Dean Schwaner

No witnesses

For respondent, Mountainview Youth Correctional Facility

Salahuddin Rabb

Robert Xavier

Donald Nywening

EXHIBITS

For appellant, Dean Schwaner

A-1 Department of Corrections Attachment C, acknowledgment

A-2 No exhibit

A-3 DOC Mountainview Youth Correctional Facility Special Investigations Division statement by Schwaner

A-4 New Jersey Law Enforcement Drug Testing Manual

For respondent, Mountainview Youth Correctional Facility

R-1 Preliminary Notice of Disciplinary Action served January 14, 2014

R-2 Final Notice of Disciplinary Action dated February 10, 2014

R-3 Disciplinary history

R-4 Special Investigations Division Internal Management Procedure #016, "Drug Testing Policy," effective May 15, 2001, revised October 2013

R-5 Donors list for November 1, 2013, through November 30, 2013

R-6 NJ Department of Corrections "Monitor Instructions"

R-7 Drug Screening Program Monitor booklet page

R-8 Attachment A-1, Drug Testing Employee Notice and Acknowledgement, signed November 26, 2013

R-9 Attachment F, Summary, dated November 26, 2013

R-10 NJ Department of Corrections Continuity of Evidence—Urine Specimen Form signed November 27, 2013

R-11 Law Enforcement Drug Testing—Chain of Custody

R-12 Litigation packet

R-13 Department of Corrections Human Resources Bulletin 84-17 as Amended

R-14 Department of Corrections Human Resources Bulletin 99-01, amended November 6, 2009, "Drug Testing Policy"