STATE OF NEW JERSEY

In the Matter of Alberto Aponte
Essex County, Department of
Corrections

CSC DKT. NO. 2019-1614
OAL DKT. NO. CSR 02049-19

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 24, 2019 BW

The appeal of Alberto Aponte, County Correction Sergeant, Essex County, Department of Corrections, removal effective October 23, 2017, on charges, was heard by Administrative Law Judge Irene Jones, who rendered her initial decision on September 24, 2019. Exceptions and a reply to exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on October 23, 2019, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

As the removal has been modified, the appellant is entitled to mitigated back pay as set forth in *N.J.A.C.* 4A:2-2.10. However, the appellant is not entitled to counsel fees. In this regard, *N.J.A.C.* 4A:2-2.12(a) provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in the disciplinary appeal is the merits of the charges. See *Johnny Walcott v. City of Plainfield,* 282 N.J. *Super.* 121,128 (App. Div. 1995): *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, the charges were sustained. Consequently, as appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12, counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections,* unpublished, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issue concerning back pay is resolved. Regardless, under no circumstances should the appellant's reinstatement be delayed by any dispute as to the amount of back pay.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore modifies the removal to a six-month suspension, a demotion to County Correction Officer and bi-monthly random drug testing for one year. Accordingly, the appellant is entitled to mitigated back pay from the date after his six-month suspension until the date of his actual reinstatement. The amount of back pay awarded is to be reduced and mitigated as outlined in *N.J.A.C.* 4A:2-2.10. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

Counsel fees are denied pursuant to *N.J.A.C.* 4A2-2.12.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
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attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 02049-19

AGENCY DKT. NO. N/A

IN THE MATTER OF ALBERTO APONTE, ESSEX COUNTY, DEPARTMENT OF CORRECTIONS.

Wolodymr Tyschenko, Esq., for appellant (Caruso, Smith, Picini, attorneys)

Jill Caffrey, Assistant County Counsel, for respondent (Courtney Gaccione, Essex County Counsel, attorneys)

Record Closed: July 22, 2019 Decided: September 24, 2019

BEFORE **IRENE JONES**, ALJ (Ret. on recall):

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Alberto Aponte, appeals his removal from the Essex County Department of Corrections (department or respondent) because he failed a random drug test. The drug screening tested positive for benzoylecgonine , a metabolite of cocaine

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A Preliminary Notice of Disciplinary Action[1] (PNDA) was issued on October 23, 2017, charging the appellant with violating N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause; violation of Essex County Department Policies and Procedures PS Adm. 017 drug testing; violation of rules and regulations 3:1.1, standard of conduct and 3:1.23, knowledge of law and regulations. (J-2.)

A departmental hearing was held on October 15, 2018, wherein the removal was sustained effective October 23, 2017. The FNDA was issued on December 6, 2018.

The initial decision was due on September 9, 2019. At the request of the undersigned, that date was extended by Order of Extension, Nunc Pro Tunc to October 24, 2019.

FACTS

Based on the record, I **FIND** the following **FACTS**:

Appellant commenced his employment with the respondent as a correction officer in 2009. He was promoted to sergeant on March 5, 2016. He was terminated on October 23, 2017. Pursuant to department drug testing policy, the County routinely conducts mandatory random drug testing in accordance with the Attorney General Guidelines and N.J.A.C. 10A:31-1 et seq. On September 1, 2017, the department randomly selected the appellant and other officers for a drug test on September 13, 2017. The random list is computer generated and administered by Sgt. Carlos Zapata of the department's Internal Affairs Division. The list is confirmed and signed by Sergeant Zapata and union representatives.

Thereafter, Sergeant Zapata notified appellant that he had to submit to the drug test and gave him paperwork to complete along with the instructions for the test. The

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[1] The PDNA provide that the departmental hearing was to be held on November 21, 2017. However, the Final Notice of Disciplinary Action (FDNA) provides that the departmental hearing was held on October 23, 2017.

paperwork included a medical form where the appellant was allowed to list prescription and non-prescription medication he was taking. A chain of custody form was also included in the paperwork. The appellant did not disclose any medications. After completion of the paperwork, the appellant was told to void in a specimen bottle. After doing so, appellant returned with the uncapped bottle. He capped the bottle in front of Sergeant Zapata who placed it in locked evidence refrigerator to which only he had the key. Subsequently, Sergeant Zapata learned that appellant tested positive for benzoylecgonine, a cocaine metabolite. (C-5.) Sergeant Zapata then prepared an investigative report and a copy was given to the appellant.

The urine specimen was sent to the State's Toxicology Laboratory. The urinalysis was conducted by Joanne Shaunnesy, (Shuannesy) one of the two lab technicians at the Laboratory. Shaunnesy's work is overseen by the Acting Director of the Lab, Dr. Robert Havier. Dr. Havier has held his current position for eight years and prior thereto he was the Lab's forensic toxicologist, a position he held for forty years. Over the objection of the appellant, Dr Havier was recognized as an expert witness. Dr. Havier has testified as an expert witness in numerous cases before this tribunal. Neither counsel chose to voir dire Dr. Havier, thus his credentials stood untested.

Dr. Havier testified that the drug specimen was subjected to two procedures: Immunoassay and Gas Chromatography Mass Spectrometry (GCMS). Over the objection of the appellant, Dr. Havier identified exhibit C-1 as the litigation package. He admits that he did not prepare the package. The litigation package contains all the information and all the data that was analyzed during the urine analysis. C-1 confirms that the drug screen tested positive for metabolite of cocaine. The confirmation analysis found 622 nanograms of benzoylecgonine, the major metabolite of cocaine. He then finalizes the test results by reviewing all the data checking the medication sheet for any medications that the officer is taking and issues a final report.

Under cross-examination, Dr. Havier conceded that he was not present when the urinalysis was received by the receptionist at the State's Toxicology Lab on September 14, 2017, thus he has no first-hand knowledge of its delivery or receipt. Nor was he present when the Immunoassay testing was conducted and he did not personally

oversee Shaughnessy conduct the actual drug test. This is consistent with his normal practice. He noted that Shaughnessy has worked for the lab for more than twenty years and she is the supervisor of law enforcement and detection testing.

Under cross-examination, he further admitted that he did not have an answer as to why Shaughnessy ran the test twice when it initially passed. However, there was an error with the instrument detecting concentration for tetrahydrocannabinol and oxy on an unrelated test. This was a quality control issue. The instrument, Architect, was re-calibrated and was able to identify both positive and negative specimens for all drugs. The quality control test precedes an actual drug screening. The Architect does fail and it must be recalibrated. The instrument is used for 17,000 cases annually. Although the quality control test on the cocaine passed twice, he doesn't know why she reran it. In any event, his review of all the data showed that the functionality of the Architect and it performed properly. Architect is routinely subject to maintenance pursuant to its service requirements manual.

Dr. Havier agreed that positive cocaine specimens normally test higher than 622 nanograms. A typical positive result for cocaine metabolite is normally 1,000 nanograms per milliliter. However, he refused to concede that the specimen result in this matter was consistent with someone using a coco-leaf product because that cannot be determined. A positive result from urine can only tell whether the individual ingested cocaine. How much and when they ingested cannot be determined from the analysis. The same applies to the coco-leaf product.

Officer Herbert Hamlin was called by the respondent. Officer Hamlin is training officer and primary classroom instructor for the department's Training Bureau. He testified that the department provides training for correction officers that includes training on the County's drug testing policy. The department's records reveal that appellant attended drug-training classes on June 19, 2017, July 25, 2016, and June 4, 2016. (C-7.) The department distributed handouts during the training classes. One such handout (C-12) pertained to coco leaves and noted that it was an illegal, Schedule II drug under 21 C.F.R. § 1308.12 and N.J.S.A. 2C:35-10. Another handout (C-13) was given in a training class and it also pertained to coco-leaf tea. This handout was given

in the July 25, 2016, training class. Attendance at the classes is mandatory and absent officers are issued a "no show" and subject to disciplinary action.

At the initial hearing, Officer Hamlin was not familiar with "Inka Leaf" but his subsequent Google search of product quickly revealed that it was supplement that should not be taken by a correction officers as it is coca leaf, a Schedule II drug that contains erythroxylon. Inka Leaf contains erythroxylon-C, which is derivative of cocoa leaf. The training materials specifically identify coca leaves as a Schedule II drug. Officer Hamlin also testified that he has been the only training instructor for the department since 2015. He believes that the appellant received all the training materials in 2015 and 2016 as he cannot recall having to issue him a "no show" report and related disciplinary action.

The appellant testified that he weight trains and runs as part of his health regimen. He also takes nutritional supplements. He was aware of the department's random drug testing and had passed all tests until September 13, 2017. After his promotion to sergeant and the birth of his child, he desired to take an all-natural nutritional supplement, one without additives. He came upon the Inka Leaf supplement on the internet. He believed from nutritional information that it was a vitamin-based safe natural product that it would help him with his workouts. He started taking the supplement in August 2017. His due diligence found that Inka Leaf contained vitamins, iron, calcium, and protein.

He acknowledged that on the face of the bottle, erythroxylon-C is listed below the caption Inka Leaf; however, he did not notice this ingredient before taking the supplement. (P-2.) He admits that had he known that the supplements contained coco leaf, he would not have consumed it. He took Inka Leaf two to three times weekly with his workouts. When failed the drug test he was in disbelief as he has never used drugs. He decided to purchase an over-the-counter drug test and when he tested positive it was only then that he made the connection to the Inka Leaf supplement.

DISCUSSION, FINDINGS AND CONCLUSIONS

Under the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, the appointing authority has the burden of proof in major disciplinary actions. N.J.A.C. 4A:2-1.4. That burden is to establish by a preponderance of the competent, relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); In re Polk, 90 N.J. 550, 560-61 (1982). Precisely what is needed to satisfy this standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 274-75 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily depending on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47, 49 (1975).

Major discipline includes removal or suspension of more than five working days. N.J.A.C. 4A:2-2.2. Appeals before the Commission are conducted as hearings de novo. Borough of Park Ridge v. Salimone, 36 N.J. Super. 485, 498 (App. Div. 1955), aff'd, 21 N.J. 28 (1956); Sullivan v. Roe, 18 N.J. 156, 161 (1955). The de novo review of a penalty requires the development of a new evidentiary record and allows the Commission to substitute their opinion for that of the appointing authority as if no decision had been previously rendered. Henry v. Rahway State Prison, 81 N.J. 571, 576 (1980); Housing Auth. of Newark v. Norfolk Realty Co., 71 N.J. 314, 326 (1976).

In the present matter, due to the positive drug test result that respondent received from the State Toxicology Lab on September 13, 2017, appellant is charged with violating N.J.A.C. 4A:2-2.3(a)(6), which states that an employee is subject to discipline for "[c]onduct unbecoming a public employee." The imposed discipline of removal constitutes a major disciplinary action granting jurisdiction before the Commission.

The appellant denies knowledge of ingesting an illegal substance. He asserts that he was not trained on the coco leaf/Inka Leaf as being a prohibited substance. Further, he objects to the testimony of the respondent's witness, Dr. Havier, and to the

admission of C-1, the litigation package. The appellant questions certain discrepancies in the urine analysis and states that since Dr. Havier did not personally perform or supervise the test it was inadmissible hearsay.

The respondent contends that the reports contained in the litigation package were properly admitted because they were prepared in the ordinary course of business by the Lab, and that Dr. Havier, as Director of the person who performed the tests, was competent to testify about what the documents reflect. Further, hearsay is admissible in an administrative proceeding and C-1 is a business record. Accordingly, whether the respondent has met its burden to prove its case by a preponderance of the evidence is dependent on the weight given to Dr. Havier's testimony and the admission of the litigation package.

I **FIND** no merit to the appellant's contention that Dr. Havier's testimony should have been excluded because he was not qualified as an expert witness. Dr. Havier's qualifications as the Acting Director of the State's Toxicology Laboratory and forty years of employment as Director and a forensic toxicologist stand unrefuted. He has testified in this forum on scores of occasions and has been recognized as an expert in too many dockets to enumerate. See In re Picariello, A-3270-10T2 (App. Div. July 9, 2012), http://njlaw.rutger.edu/collections/courts/, cert. denied, 212 N.J. 462 (2012).

In Picariello, the appellant therein contested the testimony of the respondent's witness, who was unable to verity the temperature of the sample in the lab. The Court found the objection irrelevant since Dr. Havier testified to the procedures for handling samples at the lab, as well as the lab's records. The Court makes clear the burden is satisfied if the appointing authority presents a witness who has general knowledge of the laboratory and its procedures. Here, Dr. Havier is responsible for the final report and has reviewed the underlying data of his lab technician. The case law is clear that an appointing authority is not required to produce the technician who completed the drug test at issue or who directly supervised those technicians. Instead, it is sufficient, as a matter of law, to produce a supervisor from the lab who can testify, generally, as to the procedure at the lab and has sufficient expertise to analyze the documentation and correlate it to the procedures that were followed to ascertain that documents were made

in the regular course of business. Accordingly, I **FIND** the expert testimony of Dr. Havier to be credible and properly admissible. Again, it must be emphasized that at no time did the appellant attempt to void dire Dr. Havier.

The next issue is the admission of C-1, which was admitted over the appellant's objection. It is well-established that hearsay such as unsubstantiated documentation related to a drug test is presumed inadmissible unless it meets one of the exceptions to the hearsay rule. N.J.R.E. 802. However, the general rules of evidence promulgated by the OAL do not require strict compliance with the New Jersey Rules of Evidence. N.J.A.C. 1:1-15.1 to -15.12. Hearsay[2] evidence is admissible in an administrative proceeding, "shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability." N.J.A.C. 1:1-15.5(a). However, pursuant to N.J.A.C. 1:1-15.5(b), the "residuum rule", hearsay evidence cannot be used as the sole basis for the ultimate findings of fact or making a legal determination. See In re Analysis of Walsh Trucking Occupancy and Sprinkler Sys., 215 N.J. Super. 222, 231 (App. Div. 1987) (residuum rule violated where an agency's decision was based on an engineering report, but neither the author of the report nor anyone else was called as a witness to be subject to cross-examination or to defend the conclusions of the report).

In determining whether evidence is hearsay, and thus any applicability of the residuum rule, an ALJ may consider the business records exception, which excludes as hearsay:

> A statement contained in a writing or other record of acts, events, conditions, and, subject to [N.J.R.E.] Rule 808, opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.

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[2] Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.J.R.E. 801(c).

[N.J.R.E. 803(c)(6).]

"The reliability of . . . hearsay statements [contained in business records] is based on the regularity with which business is done, the routine quality of each transaction, the lack of motive to single out any transaction for the purpose of making an untrustworthy statement and the responsibility of each employee to make accurate and reliable statements." State v. Moore, 158 N.J. Super. 68, 77-78 n.1 (quoting 1963 Report of New Jersey Supreme Court Committee on Evidence). The 1967 N.J. Evid. R. 63(13)[3] posited three preliminary conditions to the admissibility of evidence pursuant to this hearsay exception:

> First, the writing must be made in the regular course of business. Second, it must be prepared within a short time of the act, event or condition being described. Finally, the source of the information and the method and circumstances of the preparation of the writing must justify allowing it into evidence.
>
> [State v. Matulewicz, 101 N.J. 27, 29 (1985).]

The current rule, N.J.R.E. 803(c)(6), adds a fourth prerequisite, that it must be the regular practice of the business to make such a record.

The business records exception relieves the offering party from producing the witnesses who participated in the routine activity involved. State v. Martorelli, 136 N.J. Super. 449, 455 (App. Div. 1975), certif. denied, 69 N.J. 445 (1976); Webber v. McCormick, 63 N.J. Super. 409, 416 (App. Div. 1960). The proponent of the evidence must simply demonstrate that the elements of the business records rule have been satisfied. New Jersey Div. of Youth and Family Serv. v. E.D., 233 N.J. Super. 401, 413-14 (App. Div.) (home evaluation report prepared by South Carolina Department of Social Services was improperly admitted because "no information was available concerning the preparation of the report" and, therefore, there was an insufficient foundation for its admission as a business record), certif. denied, 118 N.J. 232 (1989);

[3] The rule is now codified as N.J.R.E. 803(c)(6). The current rules, N.J.R.E. 101 to 1103, were adopted by the New Jersey Supreme Court on September 15, 1992, and became effective July 1, 1993. They replaced the 1967 rules, N.J. Evid. R. 1 to 71.

Monarch Fed. Sav. and Loan Ass'n v. Genser, 156 N.J. Super. 107, 128 (Ch. Div. 1977). ("No specific person must be called to supply the foundation . . . . However, whoever testifies must be in a position to supply the foundation specified in [N.J.R.E. 803(c)(6)], i.e., the regular course of business, the time of the making of the record and the event recorded, the sources of information recorded, and finally, the methods and circumstances of the . . . record's preparation.").

In the instant matter, I **FIND** that the litigation package, C-1 is admissible as it meets the four-part test: it was made by an employee in performing her regular duties; it was prepared near the time of the observations; the source and method of information would justify admittance as evidence because it is the employee's observations; and it is within the regular practice of the employee to document her activities in the submitted reports. In the present matter, Dr. Havier, by virtue of his tenure at the State Toxicology Lab and as its current Acting Director, has a clear and detailed understanding of the procedures that the Lab follows for drug testing of law enforcement drug samples. His knowledge of the procedures to be followed and the routine documentation produced by the Lab when conducting drug tests established a reliable foundation that the documents contained in C-1 were made at or near the time of the observation by an employee with actual knowledge, and that the documents were made in the regular course of business of the Lab and it was the regular practice of the Lab to make these documents. Therefore, I **FIND** and **CONCLUDE** that C-1 was properly admitted as non-hearsay evidence pursuant to the business records exception as defined by N.J.R.E. 803(c)(6).

Appellant does not dispute that he ingested Inka Leaf, which resulted in positive urine tests. He asserts that it was not knowingly done. He does, however, cast doubt on his training, more specifically, any training with respect to nutritional supplements. I have reviewed training material as contained in C-11 to C-15. The exhibits expressly discuss coca, coca leaf tea, and coca leaves as a prohibited illegal substance. I **FIND** credible the testimony of Officer Hamlin that officers who miss drug policy training are issued a "no show" and thereafter subject to disciplinary action. He specifically referenced the sign-in sheet for the July 25, 2016, training where appellant's name appears on line 2. Likewise, appellant signed in for the training session on June 4,

2015, which also addressed a drug free workplace (C-9). Appellant does not effectively refute that he was given a copy of the department's drug testing policy. (C-10.) Thus, I **FIND** and **CONCLUDE** that the appellant was sufficiently trained and he nonetheless violated the department drug policy where he ingested Inka Leaf.

Having determined that appellant has violated respondent's drug testing policy, the only remaining issue concerns the penalty that should be imposed. In determining the reasonableness of a sanction, the employee's past record and any mitigating circumstances should be reviewed for guidance. W. New York v. Bock, 38 N.J. 500, 523 (1962). Although the Civil Service Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980); Bowden v. Bayside State Prison, 268 N.J. Super. 301, 306 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994). The concept of progressive discipline is recognized in this jurisdiction, but

> that is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property.
>
> [In re Herman, 192 N.J. 19, 33-34 (2007), (citing Henry, 81 N.J. at 580).]

Although, the focus is generally on the seriousness of the current charge as well as the prior disciplinary history of the appellant, consideration must also be given to the purpose of the civil service laws. Civil service laws "are designed to promote efficient public service, not to benefit errant employees. The welfare of the people, and not exclusively the welfare of the civil servant, is the basic policy underlining [the] statutory

scheme." State-Operated School Dist. of City of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). "The overriding concern in assessing the propriety of the penalty is the public good. Of the various considerations which bear upon that issue, several factors may be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record." George v. N. Princeton Developmental Ctr., 96 N.J.A.R. 2d (CSV) 463, 465.

Although, appellant's past disciplinary record was not presented in this matter, even accepting this as his first disciplinary matter, drug use by someone in a safety-sensitive position is a serious offense and the penalty should reflect the same. Indeed, refusal to even take a single drug test has resulted in an employee's termination from employment. See In re McGee, 2011 N.J. CSC LEXIS 110, 6-7 (February 16, 2011) (upholding termination where policy did not provide for a lesser penalty when employee refused to comply with an order to submit to a drug test.)

The appellant was employed by the respondent for eight years at the time of his termination. He has no prior disciplinary history. He was promoted to sergeant in 2016. I **FIND** credible the appellant's testimony that he is not a drug abuser. While it cannot absolutely be determined whether his positive drug test was due to his ingestion of a supplement, the amount of drugs in his system—622 nanograms—is consistent with the taking of a supplement. Indeed, appellant drug tested himself after ingesting the Inka Leaf supplement and tested positive.

The department has invested in the appellant's employment by way, attendance at the academy, and other trainings. He was promoted to a sergeant thus evidencing good employment. Based on these factors, I **CONCLUDE** that appellant should be given a second chance, subject to the following conditions. The appellant is to be suspended for six months and thus forfeits his back pay and other emoluments for that period. The appellant shall lose his rank as sergeant as he displayed poor judgement in buying and taking a nutritional supplement that contained a prohibited substance without doing due diligence. The Inka leaf supplement contained erythroxylon-C and that is noted on the face of the bottle, albeit in small print. If the appellant had carefully and thoroughly examined the bottle for its ingredients, he would not be here. Appellant

exercised poor judgement and ignored his training. He must demonstrate, once again, that he is entitled to be a sergeant. Further, while I am persuaded that the positive drug test was due to the supplement, I **FIND** that the appellant should be subject to random drug testing twice per month for a period of one year from his reinstatement.

While this may be considered punitive, it balances the cost to the department that ensued from the positive drug test, e.g., litigation, loss of trained personnel, etc. against a loss of career.

Consequently, I **FIND** and **CONCLUDE** that appellant's dismissal, effective October 23, 2018, should be reversed.

ORDER

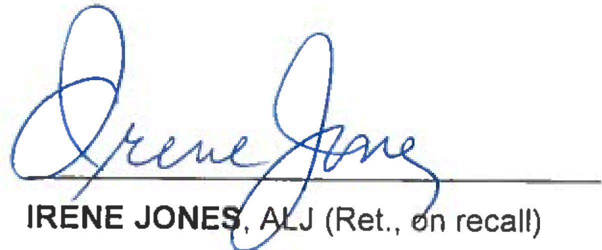
It is hereby ordered that the FNDA removing appellant from his position effective October 23, 2018, be and hereby is **REVERSED**. It is further **ORDERED** that appellant be **REINSTATED** subject to a six-month suspension without pay and emoluments, a demotion in rank, and being subject to random drug testing twice a month for a period of one year from the date of his reinstatement.

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, P.O. 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.

9/24/19
DATE



IRENE JONES, ALJ (Ret., on recall)

Date Received at Agency: 9/24/19

Date Mailed to Parties: 9/24/19

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APPENDIX

WITNESSES

For Appellant:

Alberto Aponte

For Respondent:

Robert Havier

Carlos Zapata

Herbert Hamlin

EXHIBITS

Joint:

J-1 FNDA, dated December 6, 2018

J-2 PNDA, dated October 23, 2017

For Appellant:

P-1 Bank Statement of Alberto Aponte

P-2 Inka Leaf Bottle

For Respondent:

C-1 Litigation Package

C-2 Letter Special Investigations

C-3 Random Selection List, dated September 7, 2017

C-4 Drug Screening Program Monitor

C-5 Evidence and Urine Specimen

C-6 Investigation Report, dated October 23, 2017

C-7 Attendance Sheet, dated June 19, 2017

C-8 Attendance Sheet, dated July 25, 2016

C-9 In- Service Training 2015

C-10 Drug Policy P.S. ADM. 017

C-11 Drug Free Workplace Training

C-12 WEB MD Coca

C-13 Coca Leaf Article

C-14 Coca-Leave - Legal Status

C-15 Drug Testing Advisory