



STATE OF NEW JERSEY

In the Matter of David Arguello
Hudson County, Department of
Corrections

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC DKT. NOS. 2020-1573 & 2020-
1574

OAL DKT. NOS. CSR 01069-20 &
01078-20

(Consolidated)

ISSUED: JANUARY 22, 2021 BW

The appeals of David Arguello, County Correctional Police Officer, Hudson County, Department of Corrections, two removals effective September 12, 2018, on charges, were heard by Administrative Law Judge Gail M. Cookson, who rendered her initial decision on December 4, 2020. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on January 20, 2021, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision to uphold the removal regarding the drug test and modify the removal regarding the municipal court conviction to a six-month suspension.

ORDER

The Civil Service Commission finds that the actions of the appointing authority regarding the removal pursuant to the drug test was justified. The Commission therefore affirms that action. Additionally, the Civil Service Commission finds that the removal regarding the municipal court conviction should be modified to a six-month suspension. No back pay is due as the appellant's removal regarding the drug test, effective the same day, has been upheld. Counsel fees are denied pursuant to *N.J.A.C. 4A:2-2.12*.

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 20TH DAY OF JANUARY, 2021



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION - CONSOLIDATED

**IN THE MATTER OF DAVID ARGUELLO,
HUDSON COUNTY DEPARTMENT
OF CORRECTIONS.**

OAL DKT. NO. CSR 01069-20
AGENCY DKT. NO. N/A *2020-1573*

**IN THE MATTER OF DAVID ARGUELLO,
HUDSON COUNTY DEPARTMENT
OF CORRECTIONS.**

OAL DKT. NO. CSR 01078-20
AGENCY DKT. NO. N/A *2020-1574*

Frank C. Cioffi, Esq., for appellant David Arguello (Sciarra & Catrambone, attorneys)

John C. Collins, Assistant County Counsel, for Hudson County Department of Corrections (Donato J. Battista, County Counsel, attorneys)

Record Closed: October 27, 2020

Decided: December 4, 2020

BEFORE GAIL M. COOKSON, ALJ:

STATEMENT OF THE CASE

These two matters were each filed as appeals by David Arguello (appellant) from disciplinary actions filed against him by Hudson County Department of Corrections (County) with respect to his position as a Corrections Officer. Both disciplinary actions sought removal of appellant from his position. The first disciplinary action imposed an immediate suspension on appellant on September 12, 2018, stemming from a random

drug test on August 16, 2018, in which he allegedly tested positive for Oxycodone, Oxymorphone, Benzoyllecgonine (Cocaine) and 11-Carboxy-THC (Cannabinoids THC). The second disciplinary action was issued approximately a year later based on allegations that appellant failed to notify the County of a municipal conviction and disposition based on several motor vehicle summonses, in violation of departmental policies and procedures. The Final Notices of Disciplinary Action were filed on October 4 and 8, 2019, respectfully.

PROCEDURAL HISTORY

Appellant filed his appeals under cover of December 9, 2019, simultaneously with the Civil Service Commission (CSC) and the Office of Administrative Law (OAL). Those appeals were deemed perfected on January 16, 2020. They were transmitted to and filed with the Office of Administrative Law on the same date. The matters were assigned to the undersigned. I convened a telephonic case management conference on February 11, 2020, and set plenary hearing dates for April 27, 28 and 30, 2020. As discussed in previous Orders, the OAL was shut down due to the Covid-19 pandemic and those hearing dates were initially adjourned without date.

These disciplinary actions qualify appellant for the protections afforded to law enforcement personnel under the Law Enforcement and Fire Fighter Pay Act, P.L. 2009, c. 16, which amended N.J.S.A. 40A:14-150 and 40A:14-22, and provides for payment of salary to a law enforcement officer or firefighter who has been suspended pending termination for more than 180 days. N.J.S.A. 40A:14-200 *et seq.* I concluded in a prior Order, incorporated herein, that the New Jersey State of Public Health Emergency due to the Covid-19 pandemic and the closure of the Office of Administrative Law to in-person hearings constituted good cause under the Act for tolling of the salary reinstatement of appellant from July 14, 2020, until December 6, 2020, subject to and without prejudice to any further authorized tolling extensions under the Act and the regulations.

The hearings were held by way of Zoom technology on September 29 and October 1, 2020. Post-hearing summations were permitted to be filed, after receipt of which the record closed.

FACTUAL DISCUSSION

Detective Gabriel Diaz (Diaz) testified on behalf of the respondent. He has been employed with the Hudson County Prosecutor's Office for four years. During the relevant period, Diaz was on loan to the Internal Affairs Office of Hudson County Corrections. On August 16, 2018, Diaz was part of the team conducting random drug screening urine collections for the Corrections Department. He testified that he was in charge of providing to each test subject the paperwork, two sealed specimen cups, and a pencil. Diaz stated that he explained the paperwork and protocol to each individual due to give a urine sample, including appellant. Diaz also explained what appellant would have to do to challenge the results of his test, that a second sample was the only way appellant could challenge any results, in the event he wished to do so.

Once he completed the instructions, Diaz stated that appellant signed the Hudson County Department of Corrections and Rehabilitation Random Drug Screening Advisory (J-4). Diaz further testified that he went through each section of Urine Sample Chain of Custody Log (HC-9) with appellant, explaining each part to him and completing them in his presence to maintain appellant's anonymity. Diaz testified that appellant understood each part of the process and chose not to give a second sample. By contrast, Diaz remarked that other employees who went through the same step-by-step procedure chose to give second samples, as evidenced by their paperwork. [HC-7.]

Diaz also explained the sampling process with each officer being accompanied by either himself or a female Lieutenant, who observed the urine stream going into the container, split if so opted, and then sealed. The containers were escorted to a box being monitored and locked until they could be delivered to the respondent's secure refrigerator in a secure office. Diaz described the manner of recording these events for all the test subjects on the Law Enforcement Drug Testing (LEDT) Chain of Custody

form. [HC-5.] He took the readied containers to the secure office freezer at lunchtime and also happened to have been the individual who also delivered all the samples to the NJSTL on Monday, August 20, 2018, where laboratory personnel accepted them. Diaz understood that Lt. Erika Patterson took the containers remaining at the end of the day to that same secure location.

On cross-examination, Diaz admitted that the initials "EP" on the first page of the LEDT Chain of Custody log, indicating Lieutenant Erika Patterson, might have been incorrect for some of the entries but that he monitored appellant on that day and so properly initialed the sheet. He was also questioned as to the decision to use a hand-drawing of names rather than the specified computer program for the random selection of officers to be tested. He reiterated that such a program was not yet available. On further questioning, Diaz described appellant as being very quiet during the entire screening process.

Lieutenant Erika Patterson also testified on behalf of the respondent. She is presently employed by respondent as the Administrator in Charge of Internal Affairs. Previously, she served in several divisions within the Hudson County Prosecutor's Office, achieving the rank of Lieutenant. On August 16, 2018, Patterson was also on loan to the Corrections Department for random drug screenings that had been arranged for that date with the input of a union representative for the line officers. She testified that the selection of names was done by Investigator Keith McMillan and herself by randomly pulling names from a bag, while being monitored by representatives of the employees – the presidents of both applicable unions. Patterson testified that no one disputed this method or questioned the process. This method was chosen because at the time of the test, respondent did not have a computer program to select the names, although the latter method was so specified in the Hudson County Department of Corrections and Rehabilitation Drug-Free Workplace: Alcohol and Drug Testing. [J-3.] Patterson stated that this method was deemed acceptable according to the Attorney General's Law Enforcement Drug Testing Policy, which states that the method for selecting names "...can be as simple and inexpensive as placing names in a hat, or as complex and expensive as a custom computer program." [J-2 at 4.]

The random drug testing process was set up in the Juneau Center, Kearny, New Jersey, with chairs and tables arranged in that building's cafeteria, with bathrooms nearby. A packet was placed at each location which included the medication sheet each subject officer was required to complete, an envelope for that sheet, two specimen bottles, a pencil, the Random Drug Screening Advisory, also required to be signed by the subject officer and witnessed by a monitoring officer, the internal LEDT log, and the NJSTL chain of custody form. Detective Diaz, Investigator Keith McMillan, and Sergeant Shantanee Candelaria were assigned to be acquisition monitors.

Officers whose names were selected were informed without explanation to report to the Juneau Center. There were different shifts represented in the random list of officers. Patterson testified that Candelaria monitored the sample acquisition from the female officers while she logged the chain of custody form and boxed the containers. She recalled that Diaz transported some containers to the secured refrigerator midday, while she or McMillan took the remainder. She did not conduct the individualized instructions to each officer as Diaz and Candelaria undertook those. Patterson explained that one urine stream would be split into the two sample containers if the officer chose to do so. She seemed to recall that she might have served as an acquisition monitor for a female officer who had to be rescheduled after August 16, 2018.

On cross-examination, Patterson had difficulty explaining why her initials were on form HC-5 when she was not the acquisition monitor that day. She believed that the team thought she was going to be monitoring the containers while also accompanying female officers to the bathroom but then Candelaria was told to report for that duty. On further questioning, Patterson repeated that there were union representatives present throughout the process who raised no objections. She also testified that the use of a secure freezer rather than refrigeration was inconsequential and the NJSTL accepted all the samples.

Dr. Robert Havier also testified on behalf of the respondent. Dr. Havier was the Acting Director of the New Jersey State Toxicology Laboratory (NJSTL) in Newark, New Jersey, during the relevant period. He has been employed by the State for forty-one years as a Forensic Toxicologist. As the Acting Director, he set the goals for the laboratory and specified the methods for analysis, certified the data, and finalized reports for law enforcement drug testing. Dr. Havier is familiar with the State's drug testing policy. The NJSTL is the only lab authorized to conduct drug testing for the New Jersey law enforcement community. When he finalizes a report for a case, he reviews all the data submitted from the screening and confirmation testing, as well as the certification from the medical review officer.

Dr. Havier explained that the NJSTL LEDT Chain of Custody form is presented with all the specimens that are being submitted for testing, listed by the Social Security numbers of all personnel who provided urine samples. A receptionist in the laboratory receives all drug testing specimens. In this case, Jean Smith received the specimens and accepted each specimen for testing from Diaz, as indicated by her initials after each specimen and her name at the bottom of the submission form. The standard criteria she follows for accepting the sample is to check that the container has not been opened once it was sealed, or tampered with in any way. She also checks the volume and appearance of the sample. The social security on the label inside of the container is checked and compared to the submission form and put into the computer which generates a toxicology number. The case is then referred to solely by the LEDT toxicology number for the duration of the screening. The toxicology number assigned to appellant (xxx-xx-6382) was 18L010818.

Dr. Havier stated that each sample is subjected to a first screening procedure, which is an immunoassay procedure using antibodies to identify drugs or classes of drugs that may be present in the sample. If the sample is screened positive, that is, it contains one or more of the drugs they are screening for, the original specimen will be tested by a confirmation method completely different from the initial screening method. The equipment used for the screening procedure is itself tested to ensure proper functioning prior to the testing of the LEDT urine samples. If a flag appears during the

equipment calibration, it is corrected and retested to ensure that the equipment is properly functioning before it is used on the submitted samples. The proper quality control and assurance of the NJSTL's equipment is tested against blind samples that are known, that is, purposely maintained, to contain the target drug, as well as also ran with blank clean samples.

The drugs tested for are amphetamines, barbiturates, benzodiazepines, cocaine, creatinine for validity (to make sure the urine is human), methadone, opiates, oxycodone, phencyclidine (PCP), and tetrahydrocannabinol (THC), the active ingredient in marijuana. Dr. Havier then went through the written results that indicated that specimen 18L010818 tested positive for the metabolites for cocaine, oxycodone and marijuana.

As stated by Dr. Havier, once a sample screens positive for a specific chemical makeup, it must be subjected to a procedure called gas chromatography/mass spectrometry (GC/MS), which is the industry benchmark for confirming the identity and the amount of any particular drug. An aliquot is a small portion of the original urine collected for testing. An aliquot of the original sample is taken and is subjected to the GC/MS confirmation test for each drug that initially was flagged as positive, such that the specific drug is identified as well as the amount of the drug in the urine. This information is then sent to the medical review officer to discern whether anything listed on the officer's sealed medication sheet could account for this positive result. In this case, there was nothing on appellant's medication list that would account for the positive results of cocaine, oxycodone or marijuana.

Specifically, Dr. Havier stated that the GC/MS of specimen 18L010818 tested positive for the major metabolite of cocaine – benzoylecgonine -- at a measurement of 3,842 nanograms per milliliter (ng/ml), whereas the detection limit is only 100 ng/ml, below which would be considered a negative test result. The result of appellant's undiluted urine sample was 2,800 ng/ml but it was a qualified result because it was so high that the value was deemed inaccurate. Appellant's sample was so high that it was above the GS/MS retention time calibration curve. Accordingly, as explained by Dr.

Havier, the instrument was used on both undiluted and diluted (1:10 with negative urine) samples in order to get responses wherein the relevant ions are within the acceptable range of the analysis. The diluted sample was then run, resulting in the 3,842 ng/ml benzoylecgonine reading.

Utilizing the same protocols for calibration, verification, dilution, and confirmation as detailed by Dr. Havier, the GC/MS drug confirmation report for 18L010818 also identified THC in the appellant's diluted specimen in the amount of 36 ng/ml, whereas the detection limit for that drug is 15 ng/ml. The GC/MS drug confirmation report for 18L010818 also identified the opiates oxycodone and oxymorphone in the diluted specimens in the amount of 1022 ng/ml and 621 ng/ml, respectfully, whereas the detection limits for both are 100 ng/ml. There were no positive results for other tested substances in appellant's sample 18L010818.

Dr. Havier also acknowledged that the remaining urine sample provided by appellant remains frozen at the NJSTL and could be tested by a certified laboratory. He further detailed how the NJSP guidelines for LEDT changed just after this instant case (September 2018) requiring officers to submit two urine samples, rather than giving them the option to do so herein. In general, the best way to have two identical urine samples is for the officer to void urine into only one cup, have the monitor check the temperature of that sample, and then the subject splits the sample into two collection cups, both properly identified. Dr. Havier stated that the NJSTL will only test the "A" sample, storing the "B" sample if and when the subject officer seeks to have an independent certified laboratory analyze and verify the split sample. Prior to the mandatory second sampling, an officer was given the option and there might or might not have been visual verification of the splitting of the sample; but here, appellant did not opt for the second or split sample. The urine sample provided by appellant which remains at the NJSTL could be subject to a claim of contamination because it was opened for use by NJSTL. Preferably, a sealed "B" sample would remain intact for an independent laboratory. Even with the singular sample provided, Dr. Havier explained that it remains frozen in its original undiluted state and would likely result in similar results if tested even now.

On cross-examination, Dr. Havier was questioned about the AG Drug Testing Guidelines in effect at the time of appellant's random urinalysis that stated that the first specimen should not be retested. He understood that provision to mean that the NJSTL should not conduct a retest on the frozen sample. He concurred that according to that AG policy, an officer wanting to have an independent laboratory test his sample would have had to have provided a second sample. Nevertheless, forensically speaking, the remaining undiluted sample could still be independently tested. Dr. Havier explained that the frozen sample(s) is typically maintained for a year or until any related litigation has concluded, whichever is later. The AG policy on independent testing of the second sample having to occur within sixty (60) days is not a laboratory requirement. He affirmed, without being asked for more specifics, that there had been an instance(s) of an independent laboratory result successfully contradicting those of the NJSTL.

Dr. Havier confirmed that he oversaw but did not personally observe or complete the paperwork with respect to the NJSTL receipt, chain of custody, testing or other steps in the analysis of appellant's urine sample. Further, he stated that the NJSTL's dilution methods are not established by the American College of Pathologists accreditation process but that the laboratory does follow the federal government standards. With respect to the impact of any deviation during the sample collection process by the local personnel not under the control of the NJSTL, Dr. Havier testified that such would depend on the form of the deviation; there was not an automatic impact. However, the acceptance of the samples by the NJSTL at the time of their conveyance means that no obvious disqualifying deviation had occurred. Further information would be needed. During an inquiry about why other positive lab results unrelated to appellant's and from outside Hudson County were tested at the same time, Dr. Havier explained that only samples that screened positive would need to be confirmed through the GS/MS process so those would be batched together by the specific drug implicated.

On continued examination by respondent, Dr. Javier confirmed that the NJSTL will not retest the first specimen, in accordance with the AG guidelines. Again, at the time of appellant's random test, there was no requirement that he provide a second sample. In theory, an independent test could be conducted on the retained, undiluted, first specimen. He also reiterated that the NJSTL reviews each received sample for seal, leaks, identifier, and other physical indications that the sample is acceptable. Finally, Dr. Javier opined within a reasonable degree of scientific certainty that appellant's urine sample tested positive for the metabolites of cocaine, oxycodone, oxymorphone, and THC.

Captain John Geoghegan has been employed by respondent since 1996 and promoted several times before he became a Captain in 2017. He has supervised appellant in several of his prior positions. Geoghegan testified as to the undisputed fact of appellant's five motor vehicle violations in the fall of 2018 and their disposition with a ten-day bracelet monitoring sentence in May 2019. He also stated that being suspended pending appeal of the positive drug test and its concomitant termination did not give appellant or any officer a pass to go out and violate other laws. On cross-examination, Geoghegan reiterated his understanding that appellant was suspended but not yet terminated, albeit without pay or benefits.

Chonda Rosario is now retired from the Hudson County Prosecutor's Office. Her rank when she left was Detective-Sergeant. In August 2019, Rosario was on loan to the Hudson County Department of Corrections, Internal Affairs Office. In that capacity, she received information from Secaucus Police Department that appellant had been arrested on several motor vehicle violations and had been sentenced earlier that year. Insofar as appellant had never reported the conviction on those violations to respondent, Rosario wrote up her report on that failing by appellant and also drafted the PNDA. [P-1 (CSR 1078-20).]

On cross-examination, Rosario explained that it was her understanding that appellant was still employed at the time of the summonses and sentencing even though

he was suspended without pay pending appeal. She agreed that appellant would have no obligation to report the Secaucus violations if he had been terminated.

Appellant presented no witnesses on either contested matter.

FINDINGS OF FACT

Based upon due consideration of the testimonial and documentary evidence presented at this hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following as **FACTS**:

1. Appellant was a Correctional Officer for Hudson County Department of Corrections as of August 16, 2018.

2. Appellant was randomly selected to provide a urine sample on August 16, 2018, using a simple and random manual method that was acceptable under the AG Guidelines.

3. Appellant was advised that he had the option of requesting that a second sample be maintained and he declined to do so.

4. Detective Diaz maintained appellant's confidentiality and consistently indicated for appellant and others whether they were opting to provide a second sample.

5. Appellant did not produce a second sample for the second container. He also never sought to have the remaining urine sample at the NJSTL tested.

6. Lt. Patterson's initials on other lines was harmless error in terms of the chain of custody for appellant's urine sample, which was properly monitored and documented by Detective Diaz.

7. There were no errors in the handling of appellant's urine sample.

8. The samples were accepted by the NJSTL and the fact that they were frozen by respondent following collection rather than refrigerated was immaterial and harmless error, if an error at all.

9. The NJSTL irrefutably determined that appellant tested positive for Oxycodone, Oxymorphone, Benzoylcegonine (Cocaine) and 11-Carboxy-THC (Cannabinoids THC).

10. Appellant was issued five summonses on October 25, 2018, for motor vehicle violations of driving without a license, driving while vehicle registration was suspended, driving while driver's license was suspended, failure to possess insurance card, and failure to have liability coverage on the vehicle.

11. Appellant was fined and placed on a diversionary sentence on May 15, 2019, for the above-referenced motor vehicle violations, of ten (10) days through a bracelet monitor.

ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). Governmental employers also have delineated rights and obligations. The Act sets forth that it is State policy to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his 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. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against her and, if so, the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). In this matter, Hudson County bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) (citation omitted). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Therefore, the tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933).

It is well-recognized that the Hudson County Correction Department operates through a rigidly hierarchical, almost "paramilitary" structure. Lockley v. Dep't of Corr., 177 N.J. 413, 425 (2003). In the instant matter, the respondent emphasizes that the appellant is employed in a paramilitary setting and is charged with maintaining discipline and order in a correctional facility. The precise requirements of such a position are not mere technicalities but are established and must be adhered to in order to ensure the utmost safety and security of the facility. The charges set forth in the respondent's disciplinary action are insubordination, inability to perform one's duties, conduct unbecoming a public employee, and other sufficient cause due to the positive drug results of his random urine screening. "Conduct unbecoming a public employee" has been described as any conduct which adversely affects the morale or efficiency of a department; conduct which has a tendency to destroy respect for public employees and their departments; or conduct which destroys confidence in public service. See In re Emmons, 63 N.J. Super. 136, 140-42 (App. Div. 1960); cf. Moorestown v. Armstrong,

89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966).

As found from the competent evidence produced at the hearing, I **CONCLUDE** that the preponderance of the competent and credible evidence has proven that appellant engaged in conduct unbecoming a corrections officer because he tested not only positive for drugs in his system but very high above the non-detect limits. This also means that he was unable to properly and adequately perform his job as a corrections officer while under the influence of these illicit drugs.

Based upon the findings of fact set forth above, I **CONCLUDE** that the process for randomly selecting the names for the employees to be tested deviated in only an immaterial way from the stated method under Hudson County's policy. The fact that it was done manually, an accepted method under the AG Guidelines, did not undermine its randomness. I also disagree with appellant's position that the respondent blatantly ignored the AG Guidelines and that its random selection process was "akin to having the randomly selected employees provide their samples in plastic cups instead of the sample containers provided by the State Laboratory." [Appellant Brief at 6.] The random drawing clearly did not impact the accuracy of the testing of appellant's urine sample, which significantly exceeded the threshold limits, whereas non-sterile containers is an order of magnitude different.

Further, while there was not a waiver of a second sample form executed separately by the employees, Diaz testified credibly that he asked every subject officer whether they wanted to provide a second sample, appellant expressly declined, and then Diaz so indicated on the internal chain of custody forms for appellant, in contrast to that entry for others. I so **CONCLUDE** that appellant expressly waived his option to provide a second sample. He also never made a later request to have an independent laboratory test the remaining undiluted urine sample held at the NJSTL.

Insofar as Hudson County has supported its case of establishing grounds for the disciplinary action against appellant, the next question is the appropriate level of that discipline. A system of progressive discipline has evolved in New Jersey to serve the

goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is usually considered to be an appropriate analysis for determining the reasonableness of the penalty. See Bock, supra, 38 N.J. at 523-24. Nevertheless, in certain circumstances, progressive discipline may be bypassed if the charges against the officer are egregious and serious. "The concept of progressive discipline was not intended to be a straightjacket to prevent an appointing authority from removing an employee guilty of egregious conduct." Selph v. Newark Housing Authority, 94 N.J.A.R.2d (CSV) 420-21.

Major discipline may include removal, disciplinary demotion, a suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4. There can be no genuine dispute that testing positive for the derivative compounds of cocaine, oxycodone and THC is grounds for termination of a corrections officer without any consideration of the policy of progressive discipline.

[In re Herrmann, 192 N.J. 19, 33-4 (2007).]

I **CONCLUDE**, as have others before me, that drug use by someone in a safety-sensitive position is a serious offense and the penalty should reflect the same. I/M/O Michael McGee, 2011 N.J. CSC LEXIS 110, 6-7 (February 16, 2011). In sum, I **CONCLUDE** that Hudson County correctly terminated appellant for the significant positive drug results found to have been in his system on August 16, 2018.

With respect to the second disciplinary matter relating to the failure of appellant to report the subsequent motor vehicle violations to his department in violation of respondent's Rule 2:2-1 (P-2 (CSR 1078-20)), I **CONCLUDE** that the preponderance of the credible evidence supports respondent's discipline of appellant. Driving without proper insurance and while both the registration and driver's license were suspended are not minor traffic offenses, as supported by the ten-day sentence he received, and were required to be reported, so long as he was appealing his prior disciplinary action.

Nevertheless, there was presented at this hearing ambiguous evidence even by respondent's witnesses of appellant's legal status at the time of these motor vehicle

summons. Because there was reason for appellant to believe that he has been terminated from the Department, albeit pending appeal, I would not uphold the penalty of removal based solely on this FNDA. Accordingly, if the removal from the drug test is not upheld on further review for any reason, I would reduce the penalty on this second matter to six (6) months of unpaid suspension.

For all the reasons set forth above and on the basis of the competent proofs, I **CONCLUDE** that respondent has met its burden on these major disciplinary charges and that the disciplinary charges against appellant must be upheld.

ORDER

Accordingly, it is **ORDERED** that the disciplinary action (OAL Dkt. CSR 01069-20) entered in the Final Notice of Disciplinary Action of the Hudson County, Department of Corrections, against appellant David Arguello on the allegations of positive test results on a random urine test is hereby **UPHELD** and the penalty of removal is also **AFFIRMED**.

Further, it is **ORDERED** that the disciplinary action (OAL Dkt. CSR 01078-20) entered in the Final Notice of Disciplinary Action of the Hudson County, Department of Corrections, against appellant David Arguello on the allegations of failure to report his municipal conviction on motor vehicle offenses is hereby **UPHELD** but the penalty of removal is **MODIFIED** to a six-month suspension.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this

recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



December 4, 2020

DATE

GAIL M. COOKSON, ALJ

Date Received at Agency:

12/4/20

Mailed to Parties:

id

APPENDIX

Witnesses

For Appellant:

None.

For Respondent:

Dr. Robert Havier

Detective Gabriel Diaz

Lieutenant Erika Patterson

Captain John Geoghegan

Chonda Rosario

Exhibits

Joint Exhibits:

- J-1 Preliminary Notice of Disciplinary Action (31-A), dated September 14, 2018
- J-2 Attorney General's Law Enforcement Drug Testing Policy, revised April 2018
- J-3 Hudson County Department of Corrections and Rehabilitation Drug-Free Workplace Alcohol and Drug Testing, revised April 11, 2018
- J-4 Hudson County Department of Corrections and Rehabilitation Random Drug Screening Advisory, dated August 16, 2018

For Appellant:

- P-1 CSR 1069-20; Transcript from Hearing conducted on October 12, 2018
- P-2 CSR 1069-20; Memorandum from Detective Gabriel Diaz to file dated September 26, 2018
- P-1 CSR 1078-20; Preliminary Notice of Disciplinary Action
- P-2 CSR 1078-20; Portions of Hudson County Department of Corrections, Custody Staff Rules and Regulations Manual, dated September 2017

For Respondent:

OAL DKT. NOS. CSR 01069-20 & CSR 01078-20 (CONSOLIDATED)

- HC-1 Toxicology Report – New Jersey State Toxicology Laboratory, dated 8/31/18
- HC-2 Memorandum from Lt. E. Patterson to Director R. Edwards, dated 9/12/18
- HC-3 Memorandum from Lt. E. Patterson to Internal Affairs File 1809-0001, dated 9/12/18
- HC-4 Memorandum from Lt. E. Patterson to Director R. Edwards, dated 8/20/18
- HC-5 New Jersey State Toxicology Laboratory, Law Enforcement Drug Testing (LEDT) – Chain of Custody form, dated 8/20/18
- HC-6 Memorandum from Det. G. Diaz to Internal Affairs File 1809-0004, dated 9/26/18
- HC-7 Urine Sample Chain of Custody Logs for specimen number xxx-xx-7834 & xxx-xx-1671
- HC-8 Subpoena Duces Tecum, dated 6/1/20, and accompanying report from New Jersey State Toxicology Laboratory
- HC-9 Urine Sample Chain of Custody Logs for specimen number xxx-xx-6382