Philip D. Murphy
Governor
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Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
DIVISION OF APPEALS AND REGULATORY AFFAIRS
Written Record Appeals Unit
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Deirdré L. Webster Cobb
Chair/Chief Executive Officer

November 9, 2021

Brian M. Hak, Esq.
34 Mountain Blvd.
Building A
Warren, NJ 07059

David J. Altieri, Esq.
Court Plaza South – West Wing
21 Main Street, Suite 151
Hackensack, NJ 07601

Re: *In the Matter of Christopher Ferro, Bergen County Sheriff's Office* (CSC Docket No. 2020-518 and OAL Docket No. CSR 12498-19)

Dear Messrs. Hak and Altieri:

The appeal of Christopher Ferro, a County Correctional Police Officer with the Bergen County Sheriff's Office, of his removal, on charges, was before Administrative Law Judge John P. Scollo (ALJ), who rendered his initial decision on September 15, 2021, recommending reversal of the removal. Exceptions and reply exceptions were filed by the parties.

The matter came before the Civil Service Commission (Commission) at its October 27, 2021 meeting. Currently, only four members constitute the Commission. A motion was made to uphold the removal. Two Commission members voted for this motion while the remaining two members voted to adopt the ALJ's recommendation in full. Since there was a tie vote, the motion was defeated and no decision was rendered by the Commission. Henry M. Robert, Sarah Corbin Robert, Henry M. Robert III, William J. Evans, Daniel H. Honemann, and Thomas J. Balch, *Robert's Rules of Order, Newly Revised*, Tenth Edition, October 2000, Da Capo Press, Perseus Book Group, Chapter 2, Section 4, p. 51. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter. *N.J.S.A.* 52:14B-10(c). Any further review should be pursued in a judicial forum.

Since the appellant's removal has been reversed, the appellant is entitled to back pay, benefits and seniority for the period following the date of his removal until he is reinstated. The appellant is also entitled to reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned, an affidavit of

mitigation and a certification of services should be submitted to the appointing authority within 30 days of said reinstatement. Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2-2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

Sincerely,

Allison Chris Myers
Allison Chris Myers
Director

Attachment

c: The Honorable John P. Scollo, ALJ
Division of Agency Services
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO.: CSV 06206-21
CSC DKT. NO.: 2020-518

IN THE MATTER OF CHRISTOPHER FERRO, BERGEN COUNTY SHERIFF'S OFFICE.

ON REMAND
OAL DKT. NO. CSR 12498-19

David J. Altieri, Esq. for Appellant, Christopher Ferro (Galantucci & Patuto)

Brian Hak, Esq. for Respondent, Bergen County Sheriff's Office (Bernstein & Assocs.)

Record Closed: August 12, 2021 Decided: September 15, 2021

BEFORE: **JOHN P. SCOLLO**, ALJ

INTRODUCTION

I am in receipt of the Decision of the Civil Service Commission dated July 21, 2021. In the Decision, the Commission states that the members are not comfortable with my reliance on "mere 'memory' or 'notes'" in determining whether Christopher Ferro is "guilty" or not. By the same token, Dr. Jackson and Dr. Falzon are relying on their memories and, perhaps, their notes. I know that I took accurate notes and that my memory of the testimony is reliable and supports each and every statement written in

my May 21, 2021 Initial Decision. NOTE: Throughout this writing, I might interchange the terms "sample" and "specimen". They refer to the same thing: the urine sample given by Ferro in November, 2018 during a random drug test.

As noted on pages 4-5 of my May 21, 2021 Initial Decision, after discovering that the Zoom hearing had not been recorded, I offered to re-try the case, but neither attorney opted to proceed this way. Instead, they (and I) agreed to work-up a statement of facts in lieu of a recorded record. They would each submit a statement of facts; they would submit comments on each other's statement of facts; and I (working from my recollection and my notes) would ultimately resolve any differences (i.e., decide what a witness's testimony was). In accordance with this agreed-upon procedure, both sides submitted their statements of facts and commented upon each other's statement of facts. I found that the parties agreed to the most important facts and that their points of disagreement were minor in nature and would not substantially affect the outcome of the matter. In that way, the record was established.

STATEMENT OF FACTS

The Statement of Facts remains the same as stated in the Initial Decision dated May 21, 2021.

PROCEDURAL HISTORY

The Procedural History remains the same as stated in the Initial Decision dated May 21, 2021. It is supplemented as follows. On June 18, 2021 Counsel for the BCSO submitted his Exceptions Brief to the CSC, and on June 23, 2021 Counsel for the Appellant submitted his Responding Brief thereto. On July 21, 2021 the Civil Service Commission issued its Decision. The Tribunal was not aware that any exceptions had been filed until an internal OAL email arrived on August 5, 2021 informing me that the matter was being remanded. I held a telephone conference with both counsel on August 9, 2021 and asked them to submit copies of their submissions to the CSC and

letters setting forth their reasons why further testimony is or is not necessary. I received and reviewed same on August 12, 2021. This writing is my Initial Decision on the Remand.

DECISION ON WHETHER ADDITIONAL TESTIMONY IS NEEDED

The Civil Service Commission has remanded this matter to me and has directed me to re-review my notes regarding Dr. Jackson's testimony and Dr. Falzon's testimony. According to the CSC's instructions, I may decide to either review and rely on my notes or, I may rely on my notes and listen to additional testimony from Dr. Jackson explaining the contents of his June 6, 2021 Certification and from Dr. Falzon explaining the contents of his (undated) Certification.

In Dr. Jackson's Certification, he says that his testimony was that degradation of Ferro's urine sample would result in a lower or the same finding for THC (metabolite) when it was re-tested (on February 6, 2020) for CBD. He goes on to say that he did not testify that degradation would result in higher results. The statements in his Certification are straightforward and need no further explanation. No further testimony is needed from Dr. Jackson.

In Dr. Falzon's Certification, he says that his testimony was that the level of THC (metabolite) in stored samples would go down and that it would be highly unlikely to go up. The statements in his Certification are also straightforward and need no further explanation. No further testimony is needed from Dr. Falzon.

DISCUSSION

Distinguishing the term "degradation" from the term "concentration"

The BCSO admits that the test result of the December, 2018 testing of Ferro's urine showed a THC metabolite reading of 18.9 ng/dl and that the February 6, 2020

testing of the same sample showed a THC metabolite reading of 10.2 ng/dl. The BCSO's attorney has stated in its correspondence to me dated August 12, 2021 that the BCSO is not attempting to change these numbers. In its argument, the BCSO is not stating that the State Lab made mistakes in its testing procedures that resulted in incorrect numbers for either test. However, the BCSO argues that the February 6, 2020 test should be set aside or given less weight than the December, 2018 test because the sample degraded over time. The BCSO's argument assumes that the sample actually degraded. However, when they testified, neither Dr. Jackson nor Dr. Falzon stated with certainty that Ferro's sample actually degraded. Even if we assume that the sample actually degraded, no one would know the extent to which it degraded and whether the concentration of the sample had changed.

To arrive at a decision based on the evidence, it must be clearly understood by the reader that the real issue in the case is the concentration of THC in the sample (specimen). During his testimony, Dr. Jackson stated that the concentration of THC contained in the urine sample could (or would) become *less concentrated* over time; that it would *remain in the same concentration* over time; or that it possibly would *become more concentrated* over time. "Over time" means "as the sample aged". I know that Dr. Jackson stated during his testimony (although he now disputes that he said it) that the concentration could become greater over time. The reader must discern that the term "degradation" does not only mean that the concentration would become less concentrated over time. In his Certification, Dr. Jackson states that although a sample will degrade over time, it would result in a *lower* or the *same* finding for THC when it was re-tested. So, it is very important that the reader does not assume that "degradation" only refers to a lessening or "lowering" of concentration.

ANALYSIS

In support of its position that only the December, 2018 test should be considered reliable, the BCSO argued on page 3 of its June 18, 2020 Brief that: (1) the December, 2018 test was "closer in time" to the taking of the urine sample; (2) that the THC level of the sample would have degraded between December, 2018 and February 6, 2020; (3) that the "were more controls in place" for the December, 2018 test than the February 6, 2020 test; and (4) that the February 6, 2020 test was "only a qualitative review". Lest there be any doubt about the manner of how the two tests of the specimen were conducted and their accuracy, I will address the BCSO's points now.

I now address point (1) and point (2): As to the December, 2018 test being "closer in time" to the urine sample date, Dr. Jackson and Dr. Falzon agreed that it would be preferable to work with a sample that had not degraded, but neither one testified that the February 6, 2020 test was inaccurate, or in an way invalid because of the age of the specimen. If this were so, they had the opportunity to say so. It would have been the perfect opportunity for the BCSO to attack the accuracy or trustworthiness of the February 6, 2020 test, but neither Dr. Jackson nor Dr. Falzon stated that the specimen had actually degraded to the point that it was untrustworthy or unusable.

I now address point (3): The BCSO states, without support, there were more controls in place for the initial (i.e., the December, 2018) test than for the February 6, 2020 test. My review of the notes and my memory of the testimony does not support the BCSO's assertion. My notes show that Dr. Jackson testified about his duty to oversee the Lab's operations and his goal of rendering high quality, reliable testing. He explained technical points about gas chromatography and mass spectrometry in laymen's terms. He explained that in December, 2018, the Lab had the technology to test for and quantify the amount of THC metabolite in a urine sample, but that it was not until later (2019) that the lab acquired the already-existing technology for testing a urine sample for CBD metabolite. If Dr. Jackson had testified that the December, 2018 test

had employed more controls than the February, 2020 test (or vice versa), I would have made a note of it. The Appellant's attorney, Mr. Altieri, would have cross-examined him about it. If the Appellants attorney had chosen not to cross-examine Dr. Jackson about it, I certainly would have inquired about the nature and extent of any such controls in place for the December, 2018 test versus the controls in place for the February 6, 2020 test. Thus, there is no support for the BCSO's assertion that there were "more controls" utilized during the December, 2018 testing and the CSC should disregard this specious argument.

I now address point (4): The BCSO states that the February 6, 2020 test "was only a qualitative review that was performed *solely* for the purpose of determining whether *CBD* existed in Ferro's system ... and was not performed to determine the precise level of CBD, or THC ...." I disagree with the BCSO's assertions in point (4). First, it is disingenuous to characterize the February 6, 2020 test as a "CBD test" because it not only tested for the presence of CBD, it also tested for the presence and quantity of THC metabolite. Second, it is disingenuous to characterize the February 6, 2020 testing as merely "qualitative" because when a test produces a <u>number</u> (derived by the State Lab's scientific analysis), that test is more than "qualitative". The word "number" denotes a "quantity". The quantity of 10.2 ng/dl is a numerical statement determined by the State Laboratory to be the amount of THC metabolite in the sample. It is not a mere statement of whether THC metabolite was present or not; it is a statement of *how much* THC metabolite was present in the sample on February 6, 2020. Therefore, the February 6, 2020 test was not a qualitative test; it was a quantitative test.

As part of its case against Ferro, the BCSO sought to refute Ferro's assertion that he did not use marijuana (which contains THC), but actually used legal CBD products, which might contain trace amounts of THC. The BCSO used the State Lab to re-test the urine sample hoping to prove that CBD was not present in the sample and that the THC previously detected in the December, 2018 test did not come from Ferro's use of CBD products. This is why the BCSO argues that it was only testing for the

presence of CBD metabolite and was not looking for precise amounts of CBD or THC. But as a matter of fact, on February 6, 2020 the State Lab was indeed looking for quantities of THC metabolite and of CBD metabolite. Dr. Jackson testified that if the Lab could not detect CBD at a 5mg/dl (a quantitative "cutoff" which the Lab itself established), it would mark the result as "ND" (not detected). However, it would make sense that if there had been a discernable quantity (something over the 5 mg/dl "cutoff"), the State Lab would have recorded that quantity, as it did with the quantity of THC metabolite. (See Exhibit R-16, Line 11, which I analyzed on pages 26-27 of my May 21, 2021 Initial Decision.) Therefore, the BCSO's argument that the test was merely qualitative is belied by the fact that the Lab recorded the quantity of THC metabolite and the Lab would have recorded the quantity of CBD metabolite, if indeed it was able to detect it.

In putting forth the argument that the February 6, 2020 test was merely qualitative, the BCSO seeks to convince the CSC that it should entirely disregard the accuracy of the February 6, 2020 test. However, since the February 6, 2020 test and the December, 2018 test were both performed in in the State Lab and in accordance with the State Lab's procedures, they should therefore be considered to be equally accurate. The problem for the BCSO is that it now has two tests with two different results. The question arises: Which of these two presumably accurate tests should be believed by the trier of fact? It is similar to the question that a Municipal Court judge faces when, in a quasi-criminal drunk driving case, he receives in evidence two or more scientifically-derived test results, one or more above the presumptive drunk driving limit and one or more below the limit.

It appears that the BCSO is now trying to refute its own evidence, the February 6, 2020 test, which was produced by the very Laboratory that was run by its own witness. I recall that during a case management conference a year before the hearing, I noted to Mr. Hak and to Mr. Altieri that for the two tests the State Lab rendered two different results: quantities of 18.9 ng/ml and 10.2 ng/ml, respectively. I asked Mr. Hak a question: "Aren't you 'stuck' with these numbers (one above the 15.0 ng/ml threshold

and one below the threshold)?" He agreed that he was stuck with these numbers. The BCSO's evidence presented in R-16, Line 11(a test result of 10.2 ng/dl) conflicts with the evidence presented in R-15, page 48 (a test result of 18.9 ng/dl). Dr. Jackson stated that samples degrade over time, but he also said that the concentration of THC *could become less concentrated or could remain the same.* It would be wise to heed my above-stated warning not to assume that "degradation" only means a lessening of concentration. When Dr Jackson admitted that the sample could become less concentrated or remain the same, he himself accounted for why there could be two different test results. Moreover, when we add to this the "disputed" testimony about whether or not Dr. Jackson testified that the sample could become more concentrated over time, it further demonstrates why the test results could differ. [Note: I am certain that Dr. Jackson testified that a sample could become more concentrated over time.] Simultaneously, Dr. Jackson introduced the element of doubt into this case. This is so because if the concentration of the sample had "remained the same", then the result of the February 6, 2020 test rendered an accurate test result of 10.2 ng/dl, which contrasts with the December, 2018 test results and necessarily casts doubt upon the earlier results. Again, as noted above, (and now as verified by Dr. Jackson's own testimony and his Certification), it is wrong to assume that the "degradation" only results in a lessening of concentration over time. When the two test results stand side-by-side, it becomes impossible to know which of the two tests rendered the correct result because we do not know if the sample became less concentrated over time or remained the same over time or even became more concentrated over time. The inevitable conclusion is that the evidence in this matter is equivocal.

AN IMPORTANT POINT: It would be incorrect to casually assume that the lower concentration of THC found by the February 6, 2020 test is attributable to degradation of the sample (specimen). This is because while both Dr. Jackson and Dr. Falzon assumed that the samples (specimens) degraded over time, they did not say that the concentration of THC in the sample could *only* go down. They both testified that the concentration of THC in the sample could also *remain the same.* Their statements that the concentration of a substance like THC could become less concentrated, could

remain the same, or even possibly become more concentrated greatly affects the trier of fact's (the Tribunal's) ability to rely on one test result rather than the other. Ultimately, that is why I concluded that the evidence in this matter is equivocal.

The Issue of Accuracy

The set of the BCSO's exceptions to my May 21, 2021 Initial Decision contains three points of contention: (1) that the ALJ found the drug test results to be equivocal evidence; (2) that the ALJ "mischaracterized" (i.e., did not accurately write down in his notes and / or did not accurately remember) the witness's testimony; and (3) that the ALJ's conclusion that the BCSO did not carry its burden of proof is against the weight of the evidence. Ultimately, points 1 and 3 are part and parcel (involved in and included in) point 2. Point 2 comes down to a disagreement about whether I accurately set forth the testimony of Dr. Jackson and the testimony of Dr. Falzon.

As always, I took good notes during the hearing. I remember the testimony well. On the second day of the trial, January 14, 2021, Dr. George F. Jackson testified and was thoroughly cross-examined by the Appellant's attorney. I noted that Dr. Jackson stated in response to a question about the degradation of samples, that specimens and compounds therein may degrade over time.

Later, I questioned Dr. Jackson about degradation of specimens. Using as an example a pot of chicken vegetable soup left for a year in the back of my refrigerator, I asked about whether the concentration of various chemicals in a liquid sample could over time become more concentrated, remain the same in concentration, or become less concentrated (those chemicals being the chicken, the broth, the other ingredients). I recall clearly and therefore *know* that Dr. Jackson responded by saying that the various chemicals "could be more (concentrated), the same, or less (concentrated), but probably less."

I remarked to myself at the time that if Dr. Jackson had testified that the concentration of the chemicals in the urine sample could *only* have gone down (i.e., become *less concentrated*) during the approximately fourteen months that followed the collection of the urine, then the lower reading of 10.2 ng/ml would likely be attributable to "downwards" degradation of the sample (i.e., the sample becoming less concentrated) and there would be no basis to conclude that the two test results were equivocal.

However, Dr. Jackson stated that the concentration *could remain the same* even after the passage of fourteen months. I was surprised by this testimony because the concentration of the sample is important to the outcome of the testing (i.e. the numbers). I note that Dr. Jackson re-iterated in his June 6, 2021 Certification that the concentration "would result *in a lower or the same finding* for THC". If the concentration could (or would) remain the same, then, the 10.2 ng/dl result can be considered just as accurate as the December, 2018 test. I know that I accurately recorded Dr. Jackson's testimony when he said that the concentration can become less or it can remain the same. His Certification verifies this.

Since the same Lab and the same testing procedures were employed, there is little doubt that both tests were performed accurately. But the question remains: Which quantity (18.9 ng/ml or 10.2 ng/dl) is the correct one? The upshot of Dr. Jackson's testimony (whether the concentration becomes less or remains the same over time), is that the test results will be different, thus leaving the trier of fact in Limbo (i.e., unable to logically determine for certain) whether to accept the one test result or the other test result as the accurate result.

The problem is that no one knows whether or not the sample degraded, and the result you get depends on the concentration of the sample. And again, no one knows whether the concentration became less, stayed the same, or even became greater. Either way, because the two tests produced two different numbers, the results of the tests are equivocal.

In addition to what has been demonstrated above, we must recall that Dr. Jackson also stated at the hearing [and I am certain of this] that the concentration of the chemicals could be "more" (i.e., higher concentration). This statement would lead to further equivocal results. However, the dispute about whether or not Dr. Jackson testified that the concentration could or would become more concentrated is now academic, since he already admits that over time the concentration could become less or could stay the same, yielding equally valid, yet contrasting test results.

In regard to Dr. Falzon, I disagree with his recollection of his testimony as set forth in his Certification. I know and am fully confident that at the hearing he, like Dr. Jackson, testified that the concentration of a sample could become less or could remain the same after (approximately fourteen) months. So, the analysis I made of Dr. Jackson's testimony applies equally to Dr. Falzon's testimony. My conclusion remains the same: the evidence (the two different test results) is equivocal.

At this point, it is only academic to explore the ramifications of Dr. Falzon's Certification, but I will do so anyway. Dr. Falzon stated in his Certification that his testimony at the hearing was that the level of THC (metabolite) would be expected to go down over time and that it would be "highly unlikely" to go up. Although I clearly remember that Dr. Falzon testified at the hearing that the concentration could remain the same over time, Dr. Falzon's Certification mentions nothing about whether a sample's concentration can remain the same over a given period of time. Had he not testified that the concentration of the sample could have remained the same over time, Mr. Altieri would certainly have cross-examined him on this point or I would have done so.

Moreover, Dr. Falzon's Certification states that it would be "highly unlikely" that the concentration of a chemical would go up over time. Saying that something is "highly unlikely" is not the same as saying it is impossible. Therefore, as phrased, his Certification clearly leaves open the possibility that the concentration of a chemical in a

sample can indeed go up over time (i.e., become more concentrated). By inference, this also implies that the concentration can also remain the same over time.

On the issue of accuracy, I am confident that I took accurate notes and that my memory is accurate. I have recalled my thoughts about my reactions to the testimony as it was spoken. Of course, I have no interest in the outcome of the matter before me.

CONCLUSION

As noted earlier, if the experts had testified that over time the concentration of the chemicals in a sample could *only* go down (i.e., become less concentrated) there would be no basis on which to challenge the result of the December, 2018 test. However, the fact remains that the testimony of both BCSO witnesses was that over time the concentration *could* (Jackson's Certification says *"would") become less concentrated or remain the same.*

For the reasons stated above, it has been demonstrated that the December, 2018 test and the February 6, 2020 test are equally valid, but at the same time their results (the numbers) contrast with each other. The quantity 18.9 ng/dl and the quantity 10.2 ng/dl are not the same. Since both tests were conducted properly, the existence of the February 6, 2020 test result (10.2 ng/dl) necessarily raises a doubt about the December, 2018 test result (18.9 ng/dl).

In the context of this case, it is crucial that one quantity is above the 15.0 ng/dl threshold and one is below the threshold. Faced with this implacable dilemma, I reiterate that the BCSO's evidence is equivocal and, as such, the BCSO has not borne its burden of proof.

ORDER

As such, the CSC should affirm and adopt my Initial Decision dated May 21, 2021 and lift the stay on the ORDER I set forth therein.

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.

John P. Scollo

September 15, 2021
DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

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STATE OF NEW JERSEY

In the Matter of Christopher Ferro,
Bergen County, Sheriff's Office

CSC DKT. NO. 2020-518
OAL DKT. NO. CSR 12498-19

DECISION OF THE
CIVIL SERVICE COMMISSION

ISSUED: JULY 21, 2021 (NFA)

The appeal of Christopher Ferro, County Correctional Police Officer, Bergen County Sheriff's Office, removal effective January 11, 2019, on charges, was before Administrative Law Judge John P. Scollo (ALJ), who rendered his initial decision on May 21, 2021. Exceptions were filed on behalf of the appointing authority and a reply was filed on behalf of the appellant.

Having considered the record and the exceptions, as well as the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on July 21, 2021, did not adopt the recommendation to reverse the removal. Rather, the Commission remanded the matter to the Office of Administrative Law (OAL).

DISCUSSION

The appellant, a County Correctional Police Officer, was charged with various violations of Title 4A of the New Jersey Administrative Code as well as the Bergen County Sheriff's Office's rules and regulations. Specifically, it was alleged that the appellant failed a random drug test by testing positive for marijuana (THC).

In his initial decision, the ALJ recommended reversing the appellant's removal. The crux of this determination was based on the ALJ's conclusion that as there were two tests on the appellant's urine specimen, one resulting in a positive

result and the other, tested over a year later, producing a negative result, that the evidence was "equivocal" and thus, the appointing authority had not sustained its burden of proof. In arriving at this determination, the ALJ made numerous findings, with those in dispute being reconciled based on the ALJ's "memory" and "notes."[1] Pertinent to this matter are the following findings. The ALJ found that Dr. George Jackson testified that "a year-old sample, when tested for the quantitative level of a given substance 'could' show results that are more, the same, or less than the original results." The ALJ also found that Dr. Anthony Falzon testified that "samples would deteriorate over time" and "that over the period of time between the two tests, the urine specimen's concentration could have gone up, or down, or stayed the same." As these witnesses could not testify with certainty as to how and if the sample's degradation may have caused the negative result, the ALJ concluded that he could not reliably find that the first test's positive result was dispositive.

In its exceptions, the appointing authority argues that the ALJ improperly found that the second test on the appellant's sample produced a negative result regarding THC as it contends that the sample was not tested for that purpose, but only to determine whether the appellant's sample contained the CBD metabolite. Accordingly, it argues the ALJ erred when he utilized the second test's purported "negative" result for THC to undermine the first test's positive result. It also contends that the ALJ completely mischaracterized Dr. Jackson's and Dr. Falzon's testimony regarding the potential degradation of samples over time. In support, it submits certifications from both witnesses indicating their disagreement with the ALJ's recitation and characterization of their testimony regarding the issue of degradation. It also argues that the ALJ's recitation of these witnesses' testimony was not based on any court transcripts but rather just the ALJ's notes and recollections.

In reply, the appellant argues that the certifications should be discounted as the two witnesses are "now revising their testimony absent the conditions of a hearing that protect the reliability of what can be considered as evidence." He further argues that if the certifications are considered, Dr. Jackson's certification indicating that the second sample should have resulted in the same or a lower level of THC supports that the test results are equivocal. Finally, he argues that even using the results of the first test, when applying the accepted margin for error, the result of the first test could have produced a negative result for THC.

Initially, the Commission rejects the appellant's argument that the two witnesses are revising their testimony. That question has not been definitively determined. Rather, the appointing authority is specifically arguing that the ALJ made errors in summarizing the testimony of these witnesses. As evidence, it

[1] In this regard, the hearing took place over Zoom due to the Covid-19 pandemic. In his initial decision, the ALJ notes that the hearing was inadvertently not recorded.

provides the above certifications.[2] The Commission does not take those certifications as new testimony, but only argument that the ALJ's recitation of the testimony is inaccurate. The Commission's function at this juncture is to determine whether those arguments are persuasive in showing that the ALJ made errors. For the reasons set forth below, while the Commission does not find that argument wholly persuasive, it finds it persuasive enough to provide a basis to seek further clarification as to the actual testimony.

Additionally, the Commission rejects the appellant's argument that if the certifications are considered, Dr. Jackson's certification indicating that the second sample should have resulted in the same or a lower level of THC supports that the test results are equivocal. If the second test was expected to result in a same or lower THC level based on degradation, and, as here, it did result in a lower THC level, that does not invalidate the positive finding from the first test in any way.

Finally, the Commission rejects the argument that the results of the first test, when applying the accepted margin for error, could have produced a negative result for THC. In that regard, the ALJ has found that even utilizing the margin for error would not result in a level below the cutoff for a positive test. The Commission finds no reason to question or reject that finding.

Upon its *de novo* review, the Commission finds that it cannot make a reasoned determination at this time. In this regard, the Commission has significant concerns regarding the ALJ's recitation of the testimony of the witnesses, especially that of Dr. Jackson and Dr. Falzon regarding the degradation of the second test. It is these portions of their testimony that the ALJ relies upon to find that the appellant's test results are "equivocal." However, those witnesses have provided certifications indicating that the ALJ inaccurately characterized or summarized their testimony. In this regard, the ALJ's findings were based on his "memory" and "notes" of the witnesses' testimony. While the Commission is sure that the ALJ, to the best to his ability, summarized the subject testimony based on his recollections and notes, more definitive would be a transcript or recording of the proceedings, which in such circumstances the Commission could review. However, none exists as noted by the ALJ in the initial decision. Given that the matter turns on the actual specifics of that testimony, and the charges against the appellant in this matter are of such a serious nature, the Commission is not comfortable allowing mere "memory" or "notes" to be relied upon to determine whether the appellant is guilty. Rather, the Commission directs that the ALJ re-review his notes of the proceedings regarding the challenged testimony of Dr. Jackson and Dr. Falzon and/or allow those witnesses to re-testify on the issue in order to reconcile their testimony with the certifications provided in the appointing authority's exceptions. Thereafter, if the ALJ finds that the credible testimony is as certified to by the witnesses, he

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[2] The Commission would have preferred citations to the hearing transcripts in this regard. However, as noted in footnote 1, the hearing was not recorded.

should find that the charges against the appellant are sustained, since there would then be a preponderance of the evidence showing that the positive first test was valid. This is true since, if the credited testimony is that the second sample would be expected to produce the same or lower amount of THC based on degradation, and the facts show that it indeed did so, then the lower level of THC found in that test was expected and in no way invalidates the first positive test. In other words, the evidence regarding the two tests would no longer be "equivocal." On the other hand, if the ALJ finds his original findings are appropriate, the evidence regarding the two tests would, indeed, be "equivocal."

Accordingly, this matter is remanded to the OAL for further proceedings as detailed above.

ORDER

The Civil Service Commission remands the appeal of Christopher Ferro to the Office of Administrative Law for further proceedings.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 21ST DAY OF JULY, 2021

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Allison Chris Myers.
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 12498-19
CSC DKT. NO. 2020-518

IN THE MATTER OF CHRISTOPHER FERRO, BERGEN COUNTY SHERIFF'S OFFICE.

David J. Altieri, Esq. for Appellant, Christopher Ferro (Galantucci & Patuto, attorneys)

Brian Hak, Esq., for Respondent, Bergen County Sheriff's Office (Eric M. Berstein & Associates, LLC, attorneys)

Record Closed: March 3, 2021 Decided: May 21, 2021

BEFORE: **JOHN P. SCOLLO**, ALJ:

STATEMENT OF THE CASE

The respondent, Bergen County Sheriff's Office, maintains that Corrections Officer Christopher Ferro (hereinafter "Ferro") failed a random drug screening test. Appellant-Ferro, appeals the decision of the BCSO, to terminate his employment, as set forth in the Preliminary Notice of Disciplinary Action (PNDA) (Exhibit R-8) dated January 11, 2019, effective on that date; and as set forth in the Final Notice of Disciplinary Action (FNDA) dated August 12, 2019 (which the Tribunal has marked as Tribunal-1).

following a departmental hearing held on July 11, 2019, wherein all charges that had been filed against Ferro were sustained. Those charges are as follows:

3:1.1 Obedience to Laws and Rules and Regulations;
3:1.2 Standards of Conduct;
3:1.9 Neglect of Duty;
3:1.10 Performance of Duty;
3:1.29 Unbecoming Conduct;
3:2.2 Alcoholic Beverages and Drugs;
GO-06-1.30 Drug-Free Workplace – Law Enforcement Employees;
4A:2-2.3(a)-1 Incompetency, Inefficiency or Failure to Perform Duties;
4A:2-2.3(a)-3 Inability to Perform Duties;
4A:2-2.3(a)-6 Conduct Unbecoming a Public Employee;
4A:2-2.3(a)-7 Neglect of Duty; and
4A:2-2.3(a)-11 Other Sufficient Cause.

PROCEDURAL HISTORY

Appellant ("Ferro") appeals the BCBO's determination, as set forth in the August 12, 2019 Final Notice of Disciplinary Action (hereinafter, the "FNDA") that he should be removed (effective January 11, 2019) from his position for failing a drug screening test. The appeal was filed with the Office of Administrative Law (OAL) on August 30, 2019 as a contested case pursuant to N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52-14F-1 to -13. On October 1, 2019 the matter was assigned to John P. Scollo, ALJ, who conducted an Initial Telephone conference with counsel on that date and thereafter issued a Pre-Hearing Order dated October 2, 2019, which was amended several times to accommodate the discovery process and to accommodate the parties. The Tribunal held several settlement conferences. The BCSO's position was that it was constrained to seek termination under the Attorney General's Law Enforcement Drug Testing Policy. Several compromise solutions were floated whereby Ferro would remain employed with the BCSO, but would accept a demotion, would waive back pay and / or back benefits,

and / or would undergo counselling and education. The key stumbling block was whether or not the BCSO, in consultation with the BCPO and the Attorney General's Office, could obtain consent from the BCPO or from the Attorney General's Office to waive the mandatory termination provision set forth in the Attorney General's Law Enforcement Drug Testing Policy to reach a compromise resolution. Ultimately, the BCSO was not able to obtain consent. Thereupon, the parties prepared for trial.

On February 17, 2020, Appellant's counsel, David J. Altieri, Esq. ("Altieri") submitted to the Tribunal a Motion in Limine seeking to bar the Respondent's (BCSO's) expert's report and his testimony on the basis that it had not been submitted in a timely manner. The expert report was due on February 17, 2020 and there was no request by the Respondent's counsel ("Hak") to extend the time for its submission. The Tribunal refused to bar the report on that basis and issued an Order dated February 21, 2020 denying the relief sought and extending the due date for Respondent's expert report to February 27, 2020. The Respondent's expert's report, authored by Andrew L. Falzon, M.D., Chief State Medical Examiner / Medical Review Officer ("Falzon") is dated February 24, 2020 and was received by the Tribunal by email on February 25, 2020.

On February 27, 2020, Appellant's counsel filed a Motion for seeking to bar the Respondent's expert's report and his testimony on the basis that Dr. Falzon's February 24, 2020 two-paragraph report did not comply with the requirements of an expert report and was merely a "net opinion". On March 3, 2020, Respondent's counsel (Brian M. Hak, Esq.) filed papers in Opposition to Altieri's Motion to Bar claiming that Falzon's report was not a net opinion. Also, on March 3, 2020 the Respondent filed a cross-motion seeking to bar the report of Dr. Lage, the expert for Appellant, as a net opinion. The Tribunal put the Motion to Bar and Cross-Motion to Bar on hold in order to explore settlement options.

At this time, I must note that for most of 2020 the OAL operated remotely due to the raging Covid-19 Pandemic. During the Summer and Autumn of 2020 certain renovations (rug replacement and painting) took place at the OAL offices in Newark.

Despite the fact that the case file was carefully packed and securely boxed, I, Judge Scollo found that the box was moved, opened and its contents spilled. In order to be certain that no materials were lost, I conducted a telephone conference with the parties. As a result, the parties submitted duplicates of their papers connected to the Motions. The Tribunal conducted several telephone conferences inquiring about settlement possibilities. However, the case was not ripe for settlement. It became clear that it was necessary to decide the Motions. The Tribunal permitted the parties to clarify the positions taken in their Motions and responses thereto. The last of these submissions were received by November 13, 2020.

Both parties claimed that other's expert's report was a net opinion. On December 11, 2020, I decided the Appellant's Motion to Bar Respondent's expert (Dr. Falzon) and the Respondent's Cross-Motion to bar the Appellant's expert (Dr. Lage). I issued an Order ruling that Dr. Lage's report was not a net opinion (thus allowing Lage to testify as an expert) and ruling that Dr. Falzon's report was a net opinion (thus not allowing him to use it as the basis of an expert opinion), but allowing him to testify as a fact witness. Thereupon, Respondent's counsel (Mr. Hak) moved before the Civil Service Commission for leave to file an Interlocutory appeal. The Civil Service Commission granted leave to Respondent, and after considering the parties' arguments, ultimately issued an Order on February 21, 2021 overruling that part of my December 11, 2020 Order barring Respondent's expert's report (and thus allowing him to testify as an expert).

The case went to trial and was heard by Zoom on January 13, 14, 20, and 22, 2021. At the end of the hearing, it was discovered that the entire hearing was not recorded on Zoom. I took responsibility for this technical error and discussed the lack of a recorded record with counsel for the parties. Neither counsel opted to re-try the case, but they agreed to work from their notes (with me working from my notes) to come up with a statement of facts in lieu of a recorded record, from which I would decide the case. The parties agreed that in the event that they could not agree upon a critical issue of fact, my recollection and notes would decide what a witness's testimony was. The

parties submitted their recollections of testimony and statements of fact by March 3, 2021. I found that the parties agreed to the most important facts and their points of disagreement are minor in nature and do not substantially affect factual issues that would be critical to the outcome of the matter. My comments on T-2 and T-3 are set forth below in my Findings of Fact.

FACTUAL DISCUSSION

Review of the Witnesses' Testimony and of the Exhibits

Testimony of Detective Steve Ruiz

When the events of this matter took place, Detective Steve Ruiz (hereinafter "Ruiz") was in charge of BCSO's Internal Affairs ("I.A.") Unit. He testified that the random drugs tests were conducted by I.A. and he was familiar with the Attorney General's guidelines for conducting the tests. He testified that all procedures were followed. (The Tribunal notes that there is no disagreement between the parties in this matter about whether the proper procedures were followed.) Ruiz identified various documents (R-1 through R-12) which were utilized during the course of drug testing the randomly-picked officers. He testified that Ferro was immediately suspended for testing positive (R-6) and was apprised of his Loudermill rights. He identified the PNDA, which set forth the charges against Ferro, all of which were ultimately sustained. The only point made on cross-examination was that in R-3, Ferro acknowledged that if he used illegal drugs (as opposed to legal drugs like CBD), he would be subject to punishment, including termination.

The Tribunal's comments on the testimony of Detective Ruiz's testimony will be set forth below.

Testimony of Detective Raymond Paradiso

Detective "Ray" Paradiso (hereinafter "Paradiso") testified that he was acting in the role of a monitor during the course of the random drug testing that took place at the BCSO on November 7, 2018, when Ferro was called-upon to give two urine samples. He described the process by which "donors" like Ferro selected two vials into which they deposited their urine for later testing by the N.J. State Toxicology Laboratory (hereinafter, the "State Lab"). He was with each officer when they gave their urine samples, but he was not "standing over anyone's shoulder". Paradiso testified that Ferro, like the other officers, filled out paperwork (R-15, p.6) on which they set forth the drugs they used within the fourteen days before giving their urine samples. Paradiso stated that part of his duties as a monitor was to secure the urine samples taken from the officers in a locked refrigerator, until they were removed and taken directly to the NJ State Toxicology Laboratory. Paradiso testified that he was the custodian of the urine samples and that he was the only person who had the key to the secure refrigerator and that he personally delivered the urine samples to the State Lab on November 8, 2018. On cross-examination, Paradiso stated that all proper procedures were followed in obtaining the urine samples from Ferro; all paperwork was duly processed; there were no breaks in the chain of custody of the samples; and he recalled that Ferro personally sealed his vials of urine.

The Tribunal's comments on the testimony of Detective Paradiso will be set forth below.

NOTE: Here, the Tribunal, for the sake of clarity, believes it bears mention that Ferro gave two simultaneous urine samples (two vials) on November 7, 2018. The reason why the testing procedure calls for two vials of urine is to afford an officer the opportunity to perform a re-test using the second vial, in the event of a positive finding for prohibited substances in the first vial. The second vial of Ferro's urine has never been tested. The first vial of Ferro's urine was tested twice. The first test on vial number one's urine was done by the State Lab November-December, 2018. The second test on vial number one's urine was done by the New Jersey State Toxicology on February 6,

2020, about fifteen months later. Various dates appear in R-15 and it is not clear what the precise date is that the sample was tested. The Tribunal is satisfied that the sample of Ferro's urine was kept in a secure chain of custody and was tested by the State Lab shortly after Ferro gave the sample. Throughout this Initial Decision, this test will be referred-to as the "December, 2018" test.

Testimony of Detective-Sergeant Christopher Howe

Detective-Sergeant Christopher Howe (hereinafter "Howe") is assigned to the Criminal Investigations Unit, but he testified that on 11/7/2018 he was assigned to the Internal Affairs Unit and was assigned on that date by the Chief, Kevin Pell, to assist in the conducting of the random drug tests of officers. He testified that he ran a computer device called a "randomizer" the purpose of which was to randomly select the officers from whom urine samples would be requested. Utilizing R-13, he testified about the nature of the computerized program by which names of officers would be randomly picked and he testified that he complied with all the instructions by which the randomizer device was used. He testified that Ferro was one of the officers randomly chosen to give urine for drug testing. Howe testified that he was involved in notifying officers on duty to report to a conference room for the drug testing and that he assisted the monitors. On cross-examination, Howe was asked about how the randomizer randomly selects names. He explained that the randomizer is a computer software program that is designed to randomly pick the names. He was also asked if he went into the lavatory where the selected officers donated their urine. He responded that he did not actually accompany each officer into the bathroom, but he made sure that the officer was alone when he voided into the vials.

The Tribunal's comments on Detective-Sergeant Howe's testimony will be set forth below.

Testimony of George F. Jackson, Ph.D.

The parties stipulated that Dr. Jackson is an expert in Toxicology. Dr. Jackson was and still is the Executive Director of the N.J. State Toxicology Laboratory. He testified that his duties include overall oversight of the State Lab, which chiefly includes his responsibility for overseeing the Law Enforcement Drug Testing Program, Post-Mortem Toxicology in cooperation with various Medical Examiners, and that part of the lab that deals with Histology (tissue study). He oversees people who make reports; he deals with toxicological issues involved in legal cases; and he handles all aspects of the State Lab's functions and business.

Dr. Jackson testified that he and Sorin Diaconescu authored the "Memorandum for Record" dated February 10, 2010, which is one of two documents contained in R-17. He testified that the Memorandum for Record was a qualitative screen for the presence of CBD or the metabolite of CBD called carboxy-CBD (a/k/a 7-Nor 7-carboxycannabidiol). Dr. Jackson explained that a qualitative screen is not a screen which seeks to establish the actual amount of a chemical in a given sample, but rather it seeks to only establish whether or not a chemical is present in the sample. He explained that a cut-off sets a limit or degree of precision on how far a test will go to seek whether a chemical is present or not present in the sample. In the test done on February 6, 2020, the Lab sought the presence of CBD and CBD-metabolite down to the level of 5 ng/ml. (The meaning of "ng/ml" is nanograms per milliliter.) Dr. Jackson explained that the State Lab had to establish a "cut-off" at 5 ng/ml because it was not capable of testing for the sought-after chemicals below that concentration. Dr. Jackson testified that the Memorandum for Record states that the February 6, 2020 gas chromatography test on the sample of urine donated by Ferro on November 7, 2018 did not detect the presence of CBD or CBD's metabolite at the 5ng/ml cutoff level. He explained how the gas chromatography test works as "like solving a "jigsaw puzzle".

On cross-examination and re-direct by the attorneys, Dr. Jackson re-iterated his previous testimony and when asked if the Lab's testing was checked by an outside agency, he replied that the College of American Pathology (CAP) was an independent,

objective agency which performed proficiency examinations and that the State Lab was CAP-certified.

My questioning of Dr. Jackson went into the issue of urine sample degradation over the course of fifteen months. Dr. Jackson testified that the sample "could have" degraded but could not say that it actually did degrade. Moreover, even assuming that some degrading of the sample took place (i.e., some change in the composition of the urine sample or in the chemicals contained therein), Dr. Jackson stated under questioning that he could not say whether degradation would result in a higher, or in a lower, or in the same finding for THC in the February 6, 2020 testing of the subject sample when compared with the December, 2018 testing.

The Tribunal's comments on Dr. Jackson's testimony will be set forth below.

Testimony of Andrew L. Felson, M.D.

The parties stipulated that Dr. Falzon is an expert in medicine, toxicology and three types of pathology. Dr. Falzon is a licensed physician and is board certified in Anatomic Pathology, Clinical Pathology and Forensic Pathology. He is the Chief State Medical Examiner for the State of New Jersey. He serves as the Medical Director of the N.J. State Toxicology Laboratory.

In Dr. Falzon's report dated February 24, 2020, he specifically refers to and attaches the February 10, 2020 "Memorandum for Record" written by Jackson and Diaconescu. The Memorandum for Record, in turn, refers to a qualitative screen for CBD and CBD metabolite 7-Nor-7-Carboxycannabidiol (Carboxy-CBD) performed by GC-MS (on February 20, 2020). Jackson and Diaconescu state "CBD and Carboxy-CBD were not detected at the 5 ng/ml cutoff level." Jackson and Diaconescu use the words "not detected". The facts underlying this statement are shown on Page one of R-16 on Line 11 of that document. On Page 1 it states that CBD ad Carboxy-CBD were "ND", which according to Jackson and Diaconescu means "not detected." Dr. Jackson

testified in court that "ND" meant "not detected" at 5ng/ml. Utilizing the statement of Jackson and Diaconescu, Dr. Falzon stated as a matter of fact (i.e., not as a matter of opinion) that this result would not be consistent with the use of CBD-containing products. He then renders his opinion that the use of CBD-containing products would not explain the presence of 11-carboxy-THC in Ferro's urine sample. Dr. Falzon refers to no other information or data in his report. Except as stated above, Dr. Falzon's report gives no analysis of any of the information, including the many graphs and readings, contained in R-15 or R-16, even though those exhibits are the State's evidence. Referring back to Page 1, Line 11, where the CBD and Carboxy-CBD results are listed as "ND", (i.e., "not detected"), we see on the very same line where the CBD and Carboxy-CBD results show that they were not detected, there is a THC result of 10.2 ng/ml. The number 10.2 ng/ml is a quantitative statement, not a mere qualitative statement. Moreover, on Page 38 of R-16, there is a Quantitation Report showing the laboratory technician's calculation of 10.2 ng/ml. These pages show that in the sample tested on February 6, 2020 the THC level of 10.2 ng/ml is under the 15.0 ng/ml level. In his report of February 24, 2020, Dr. Falzon does not mention this critical reading of THC, which could be dispositive of the entire case. Despite the availability of this relevant information, which is found in the State's own documents, Dr. Falzon ignored it and merely says that the use of CBD oil is not the reason why THC is present in Ferro's urine.

During his direct testimony, Dr. Falzon identified R-17 as his Report and the Memorandum of Record and he stated that he was familiar with the Attorney General's Law Enforcement Drug Testing Policy (R-12). He testified about the normal procedures for the testing of law enforcement officers and stated that in Ferro's case all procedures had been properly followed. He testified that when an officer tests positive, as in the case of Ferro, the testing and the paperwork is forwarded to him for review. He explained that he reviewed Ferro's test result showing a positive test for THC metabolite in Ferro's November 7, 2018 urine sample and reviewed the information provided by Ferro on his "Drug Testing Medication Information" form (R-15, page 6) dated November 17, 2018. In that document Ferro stated that on November 6, 2018, the day

before the urine sample was given, he used Advil and CBD oil. Dr. Falzon testified that CBD could possibly contain up to 0.3%THC. He testified that casual use of CBD oil would not produce a test result of 18.9 ng/ml, but that prolonged, frequent use of CBD could accumulate in the body fat of an individual and then be gradually released into the bloodstream. He also testified that if a person uses CBD products and there was a showing of an appreciable amount of THC in that person's body, there would necessarily be an appreciable amount of CBD in that person's body. He added that the amount of CBD would be about 100 times higher than the amount of THC in the body. However, in Ferro's case, although Ferro claimed that he used CBD oil, no detectible amount of CBD was found. This led Dr. Falzon to believe that the THC found in Ferro's urine sample could not be from his use of CBD oil. During his testimony, Dr. Falzon re-iterated the opinion that he previously set forth in his February 24, 2020 Report. His opinion was that the use of CBD-containing products would not explain the presence of THC metabolite in Ferro's urine sample.

On cross-examination, Dr. Falzon admitted, upon Attorney Altieri's cross-examination, that he suspected that the THC metabolite found in Ferro's urine sample was because of his use of marijuana, but he admitted that he did not actually know that marijuana was the source of the THC metabolite found. When cross-examined about the possibility of human error in the Lab's processing of the urine sample and the testing, Dr. Falzon admitted that this was a possibility, but that the State Lab incorporated features in its procedures to eliminate such risks. Dr. Falzon also admitted that since the sale of CBD products was an unregulated market, the amount of THC in a given CBD product could be substantially higher than .03%. Dr. Falzon also admitted that hemp oil also can produce a positive THC result. (However, the Tribunal must note that that the use of Hemp oil has not been alleged in this matter.)

Mr. Altieri's further cross-examination of Dr. Falzon went into the figures noted on various laboratory documents. In regard to R-15 (which pertains to the December, 2018 testing), page 31, Dr. Falzon was unable to explain what the assay (i.e., the substance or chemical) THC20Q meant, even though it was listed on a list of drugs. He also could

not explain the finding of the number 64.8285 for this assay, which appeared to be a quantitative figure obtained through a drug test that was termed "positive". In regard to R-16 (which pertains to the February 6, 2020 testing), page 38, he agreed that the figure 10.25 ng/ml was the concentration found for THC for the urine sample number 18L014773, which corresponds to Ferro. Dr. Falzon stated that the words "plus or minus 20%" appearing in R-16, page 41 was a statement of the margin of error for the tests.

In regard to the THC concentration of 18.9 ng/ml shown by the December, 2018 test, Dr. Falzon believed that it was an accurate figure arrived at by proper testing. In regard to the re-testing of the same urine sample on February 6, 2020 showing a concentration of 10.2 ng/ml (shown on R-16, page 1), Dr. Falzon stated that the sample could have degraded over the fifteen months since the sample was given. Upon further questioning, Dr. Falzon admitted that if degradation had taken place, he could not say if the numbers for the concentration of the chemicals would go up, would go down, or would stay the same.

When I asked Dr. Falzon what a judge should do when faced with inconsistent results (18.9 ng/ml versus 10.2 ng/m), Dr. Falzon recommended that the "fresh" result be chosen, but he did not explain why the "fresh" test result would be preferable, in light of his admission about the uncertainty of the concentration going "up", "down" or "remaining the same".

The Tribunal's comments on Dr. Falzon's testimony will be set forth below.

Testimony of Gary L. Lage, Ph.D.

The parties stipulated that Dr. Lage was an expert in pharmacology and toxicology.

In Dr. Lage's report dated December 10, 2020, Dr. Lage utilizes the information contained in R-15 and R-16 and, in formulating his opinions applies recognized

scientific knowledge and published literature. He explains how and why specific gravity and creatine levels are important to the analysis of the subject urine sample. Dr. Lage questions the scientific reliability of the State's analysis and renders the opinion that the State's analysis does not provide a reasonable basis for finding that the THC level that is attributable to marijuana use. Moreover, using the facts that that CBD oil contains THC and that Ferro used CBD oil, Dr. Lage attributes the presence of THC in Ferro's urine, which he characterizes as a "low level", to Ferro's use of CBD oil. In the final analysis of Dr. Lage's report, he cannot deny that THC or its metabolite was actually detected in Ferro's urine sample in both the first test and the second test. Dr. Lage can only offer his opinion that the presence of THC or its metabolite came from the small amounts of THC that can be found in CBD products.

During his direct testimony, Dr. Lage focused on the fact that Ferro's creatinine level at the time of the urine sample was 89.3 mg/dl (89.3 milligrams per deciliter), slightly lower than normal concentration, but still in the normal range for men of his age, ethnicity, body mass, etc. He explained that the level of creatinine was important to consider because it reflected the concentration of the urine sample in question. He explained that if the urine is dilute, then the concentration of drugs in the urine would be dilute. If the level of creatinine was concentrated, then the concentration of drugs in the urine would be concentrated. (Note: As will be seen below, this statement was re-visited and examined closely during cross-examination.) Dr. Lage testified that the 18.9 ng/ml of THC metabolite finding in the December, 2018 test had to be viewed against the margin of error of about plus or minus 20 percent. He testified that since the urine was dilute (i.e., less concentrated), then the 18.9 ng/ml result could really be as low as 15.12 ng/ml. Dr. Lage testified that because Ferro's body mass indicated that he had more fat than the average man and because CBD metabolite was stored in the body's fat, then Ferro's use of CBD could result in higher amounts of CBD being stored over time in his body. Since the body continuously releases CBD metabolite, this could account for the presence of THC metabolite in the urine because CBD products contain up to .03 percent THC.

Dr. Lage took issue with Dr. Jackson's testimony regarding the "ND" ('Not Detected") finding for CBD or CBD's metabolite in R-16, p.1. When Dr. Lage read R-16, and the graphs contained therein, he argued that, contrary to Dr. Jackson's testimony, the State Lab actually did detect CBD metabolite and that the first page of R-16 incorrectly reported that CBD and CBD metabolite were "not detected". Counsel for BCSO, Attorney Hak, objected that this testimony was well beyond the content of Dr. Lage's Report. I allowed Dr. Lage to use R-16 to explain his Report, but I warned him not to stray too far from the contents of his Report.

Dr. Lage testified that in R-16, p.39 there was an entry, 40.79 ng/ml, which he claimed was a reading of CBD metabolite. He accused the BCSO's witnesses of ignoring this number (and other numbers that he pointed-out). Dr. Lage testified that the testimony of Dr. Jackson was incorrect and perhaps misleading because he ignored the 40.79 ng/ml finding. Dr. Lage testified that Dr. Jackson's statement that CBD and CBD's metabolite were "not detected" is false.

On cross-examination, Dr. Lage was unable to explain the meanings of certain terms contained in R-16. On cross-examination, Dr. Lage admitted that he did not test Ferro's urine; that he did not know the name of the CBD product that Ferro claimed to have used; that he did not know the percentage of THC contained in the CBD product that Ferro used; that he did not know how much (i.e., the dosage) CBD product Ferro used or consumed at any given time; and that he did not know how long or how often Ferro had been using CBD products, except to say that Ferro told him that he used a CBD product the day before the urine test.

On cross-examination, Mr. Hak, counsel for the BCSO asked Dr. Lage about his testimony pertaining to the levels of creatinine correlating with the concentration of drugs in the donor's urine. As reported above, Dr. Lage testified during his direct testimony that since Ferro's urine was dilute, then the concentration of a drug in his urine was going to test low. On cross-examination, Dr. Lage testified that the sample was dilute and tested at the 18.9 number for THC metabolite. However, during cross-

examination, Dr. Lage conceded that the number would be different if the sample was not dilute. His testimony on cross-examination means that if a sample was not dilute, but rather was a sample that was approaching a level of being neither dilute nor concentrated (i.e., approaching a more concentrated level), then the test result number would be *higher* than 18.9, *not lower* than 18.9. (See the Tribunal's comment about this in the Factual Analysis section.) Toward the end of cross-examination, Dr. Lage also conceded that the 15.12 ng/ml figure he arrived at in his report was above the 15.0 ng/ml cutoff.

The Tribunal's comments on Dr. Lage's testimony will be set forth below.

Testimony of Christopher Ferro

Christopher Ferro testified that he has been a corrections officer for over thirteen years. He testified that he knew that law enforcement personnel like himself were subject to random drug testing and that the penalty for a positive drug test included penalties up to and including termination. He testified that he believed that he could only be terminated for using illegal drugs. He testified that on the date of the drug test, November 7, 2018, he was not intoxicated. He testified that when he filled-out the Drug Testing Medical Information form (R-15, p.6) he wrote that he had used Advil and CBD oil the day before the drug test, i.e., on November 6, 2018.

Ferro testified that he first heard about CBD-containing products from radio and television advertisements. He made his first of several purchases of CBD products in September, 2018 and stated that he discontinued using them in December, 2018. He purchased several different brands of CBD products. He testified that he kept them at home and in his car. He used them several times each day, depending on his work schedule. He used the CBD products in several different ways. He used a liquid form of CBD product that he sprayed under his tongue. He ate gummie (chewable) candies containing CBD. He poured CBD oil into a vaporizer and said he "smoked" it by inhaling it. He applied a CBD-containing crème to his body. During his testimony he recalled

only two brand names of CBD products: Hawaiian Choice and Purekana, the label of which is set forth in R-14, a/k/a A-5.

Ferro testified that he attended a concert at the Beacon Theatre on November 3, 2018 and that he smelled marijuana smoke at the concert. He testified that he did not smoke marijuana.

On cross-examination, Attorney Hak asked Ferro if he ever sought medical advice before using CBD products. Ferro stated that he did not seek medical advice. Ferro also was aware that CBD products were unregulated and that they did contain varying amounts of THC. Ferro acknowledged that he was aware that pursuant to BCSO General Order GO-06-1.30 (R-10) all law enforcement personnel were subject to random drug testing. Ferro also acknowledged that he was aware that if he tested positive for illegal drugs he would be subject to termination. Further cross-examination revealed that Ferro relied in part upon the representations of the salesman at the store where he purchased the CBD products that use of CBD should not make him fail a drug test.

When questioned about his testimony about smelling marijuana at the concert, Ferro stated that he was not saying that his smelling of marijuana smoke at the concert accounted for his positive test result, but he was only stating that he was exposed to the smoke a short time before the drug test.

Upon questioning by the Tribunal, Ferro stated that to the best of his recollection he consumed a full bottle of gummie candies (around 100 chewable candies); that he used about one and a half bottles of drops under his tongue, each bottle containing about two to three ounces of CBD product; that he used a bottle of CBD spray (about two ounces); that he used (smoked) half of a one-to-two-ounce bottle of CBD oil in an e-cigarette; and that he had used CBD crème several times.

The Tribunal's Comments on the testimony of the various witnesses and its examination of the factual information and opinion testimony adduced at the hearing follows.

FACTUAL ANALYSIS

General Comments

The Tribunal notes that both sides agree that the reason why the February 6, 2020 test was conducted was because Ferro claimed that he did not use marijuana before his urine was donated on November 7, 2018, but he did use CBD, which his expert, Dr. Lage, concluded was the likely reason why the metabolite for marijuana (11-Carboxy-THC) was detected in Ferro's urine.

During his testimony, Dr. Jackson explained that, although the technology for detecting CBD or CBD's metabolite was available to the scientific community at the time when Ferro's urine sample was first tested (December, 2018), the State Lab did not yet possess it. However, when the State Lab came into possession of the technology for testing for CBD or CBD's metabolite, it began testing urine samples for CBD and CBD's metabolite, including Ferro's sample donated on November 7, 2018.

Comments on the testimonies of Detective Ruiz, Detective Paradiso and Detective-Sergeant Howe

The Tribunal notes that the testimony of each of the three officers was straightforward and remained unchanged by cross-examination. The Tribunal is satisfied that the officers' testimony demonstrated that the drug testing was random, that all procedures were followed appropriately, and that the urine samples were obtained, secured, and delivered intact to the State Lab.

Comments on the testimony of Dr. Gary L. Lage

The Tribunal notes that whether the CBD metabolite was or was not detected in the February 6, 2020 testing, we must keep in mind that CBD is a legal drug. The real issue is whether an illegal drug (THC or its metabolite) was found in Ferro's urine; and if found, whether it was above the 15.0 ng/ml cutoff or below the 15 ng/ml cutoff.

I listened to Dr. Lage's explanations that the graphs and numbers set forth in R-16 indicated that CBD metabolite was detected at 40.79 ng/ml. I also listened for an explanation from Dr. Lage about the significance of a 40.79 ng/ml finding, if it were indeed established that such a finding was made for CBD or CBD's metabolite. However, there was little or no testimony from Dr. Lage which established that a finding of 40.79 ng/ml of BCD or BCD's metabolite would in any way correlate to establishing an accurate determination for the quantity of THC or THC's metabolite. Without such a correlation, the testimony about the quantity of CBD or CBD's metabolite is useless in determining whether Ferro's urine sample contained more than the allowable 15.0 ng/ml or less than the 15.0 ng/ml level of THC or THC's metabolite.

I could not determine from Dr. Lage's testimony that the 40.79 ng/ml figure stated in R-16 at p. 39 pertains to Ferro's urine sample or to a control sample. I did note that in various places R-15 (the December, 2018 testing) contains various numbers that may or may not represent test results, but there was no testimony from either side as to what these numbers represented. These numbers appear as follows:

(1) Date 12/3/2018, R-15 at p. 33 shows the number 2.8 crossed-out and replaced by 18.9, which may correspond with the number 18.94 ng/ml shown on p. 48;

(2) Date 12/4/2018, R-15 at p. 32 says 18.9 ng/ml; and

(3) Date 11/15/2018, R-15 shows the number 64.8285.

I do not agree that the crossing-out of numbers and writing-in of different numbers in R-15 or in R-16 necessarily means inaccuracy, or an attempt to ignore certain data, or an attempt to skew the test results. Nor could I determine that the abbreviations and

numbers on p. 39 of R-16 pertained to a test for the presence of any amount of CBD metabolite, to a test for the presence of any amount of THC metabolite, or to a control sample. I do not agree that the extension of graph lines would necessarily indicate that CBD metabolite would be detected. I found Dr. Lage's testimony regarding R-16 to be vague, not entirely explanatory of the numbers, and speculative in nature. Overall, Dr. Lage's use of R-16 did not convince me that CBD metabolite was detected in the February 6, 2020 testing. Moreover, I found that none of Dr. Lage's observations about the 40.79 ng/ml number in R-16 at p.39 appear in his Report. I simply allowed him to present them, but I have not found his testimony about the presence of CBD metabolite credible for the reasons stated above.

The Tribunal takes particular note of the fact that (1) Dr. Lage testified on direct that a dilute sample would mean that there would be a lower amount of drug or drug metabolite reflected in the number, but (2) on cross-examination, Dr. Lage conceded that a less dilute sample (i.e., a sample that was closer on the spectrum to the level of being considered "concentrated") must necessarily result in a higher number, not a lower number. Thus, Dr. Lage's direct testimony was seriously undermined during cross-examination.

Comments on the Testimony of Dr. Jackson and Dr. Falzon / Evidence Supporting the Charges Against Ferro

As noted above in the summary of Dr. Jackson' testimony, Jackson testified that the February 6, 2020 test was a qualitative test, which showed that there was no CBD or CBD metabolite in Ferro's urine at the cutoff level of 5 ng/ml. The BCSO deemed it important to re-test Ferro's urine sample in order to determine whether Ferro's claimed use of CBD products (which allegedly contained some THC) could explain the presence of THC metabolite in his urine. The centerpiece of Ferro's defense is that the THC metabolite detected by the December, 2018 test was actually due to his use of CBD products rather than his use of marijuana. By re-testing the urine, this time searching for CBD or the metabolite of CBD, the BCSO sought to debunk Ferro's claim and Dr.

Lage's expert conclusion that the THC metabolite was present due to traces of THC in the CBD product that Ferro used. Upon acquiring the February 6, 2020 test results in which no CBD or CBD metabolite was detected, the BCSO hoped to demonstrate that Ferro had not used a CBD product at all. That is to say, the BCSO hoped to demonstrate two things: (1) that if Ferro had used CBD, then CBD or its metabolite would surely be detected in his urine, and (2) that the actual presence of THC metabolite in the urine could not be due to Ferro's use of CBD. The February 6, 2020 test did not detect CBD or CBD's metabolite. From this, the BCSO argues that Ferro's statement (that he had used a CBD product) in his "Drug Testing Medication Information" form (see R-15, page 6) was a false statement, thus undermining his credibility.

The February 20, 2020 test demonstrates that CBD or its metabolite was not detected at the level of 5 ng/ml. The fact that CBD or its metabolite was not found debunks Dr. Lage's theory that it was Ferro's use of a CBD product (with its attendant traces of THC) which accounts for the presence of THC or THC's metabolite in the urine tested in December, 2018. I am satisfied that the BCSO has succeeded in demonstrating by use of the aforementioned testing that Ferro did not use CBD products. However, the non-use of CBD does not compel Ferro's removal. Moreover, I am not compelled to accept the result of the December, 2018 test (18.9 ng/ml being above the 15.0 ng/ml cutoff for THC or THC metabolite) as establishing a preponderance of the credible evidence in favor of the BCSO's removal action against Ferro because there is additional evidence to consider.

The evidence placed before me in support of the theory that Ferro used marijuana and that THC (the active ingredient of marijuana) or its metabolite carboxy-THC were detected in a quantitative screen (not merely in a qualitative screen) is contained in R-15, namely the testing done in December, 2018 at the N.J. State Toxicology Laboratory. I have found that the proper testing procedures were followed for both the December, 2018 testing set forth in R-15 and for the February 6, 2020 testing set forth in R-16. In R-15 at page 32, the presence of THC or 11-Carboxy-THC

is stated to be 18.9 ng/ml, which is above the 15 ng/ml cutoff level. If this were the only evidence in the case (i.e., the 18.9 ng/ml concentration found in Ferro's urine sample), that would be enough to support the BCSO's case for removal of Ferro from his position. However, as will be explained below, I cannot ignore the quantitative results of February 6, 2020, on page one, which show a result of "Not detected" for both CBD and CBD's metabolite and a result of 10.2 ng/ml for THC.

Comments on the Testimony of Dr. Jackson and Dr. Falzon / Evidence supporting Dismissal of the Charges

The evidence placed before me in support of dismissal of the removal case against Ferro is contained in R-16, namely the testing done on February 6, 2020 at the N.J. State Toxicology Lab. In R-16 at page 1, Line 11 it reads that CBD was "not detected" and Carboxy-CBD (the metabolite of CBD, otherwise known as 7-Nor-7) was "not detected" at the level of 5ng/ml. There is no evidence before this Tribunal that suggests that the cutoff of 5 ng/ml was an a scientifically incorrect cutoff or was legally improper. Assuming that the December, 2018 test was scientifically valid and that the February 6, 2020 test was scientifically valid, i.e., that the urine sample did not degrade, then the February 6, 2020 test result, showing no detection of CBD or CBD's metabolite, proves that Ferro did not use CBD products. However, as noted above, there is additional data contained in R-16 that compels this Tribunal to pause. R-16 contains the records of the February 6, 2020 testing. When questioned about R-16, page 1, line 11, Dr. Jackson admitted that the sample number corresponded to Ferro; that the tissue tested was urine (the same sample tested in December, 2018); and that the last three columns of the page set forth what the testing found for the "Results/Concentration" of THC, of CBD and of carboxy-CBD (the metabolite of CBD) in Ferro's urine sample. (Dr. Jackson stated that "ND" was an abbreviation for "Not detected" at the level of 5 ng/ml). Dr. Jackson stated that the results of the February 6, 2020 testing were "not detected" for CBD and "not detected" for CBD's metabolite. In regard to the column showing the test result for THC, there is the number of "10.2". Dr. Jackson admitted that "10.2" meant that the test result for the presence of THC was

10.2 ng/ml and that this number was a quantitative number not a mere qualitative statement. In other words, the February 6, 2020 testing resulted in a finding that THC was not merely present in Ferro's urine sample, but also that the concentration of THC was at the level of 10.2 ng/ml. Jackson admitted that 10.2 ng/ml was below 15.0 ng/ml.

Although a numerical cutoff for THC and THC metabolite is not specifically stated in the Attorney General's Law Enforcement Drug Testing Policy (R-12), there was no dispute between the parties that the Attorney General's Law Enforcement Drug Testing Policy BCSO uses the cutoff of 15.0 ng/ml for determining the level of THC or THC metabolite to establish marijuana use. In the matter at bar, the case against Ferro was predicated on the results of the December, 2018 testing alleging a level of 18.9 ng/ml of THC or THC metabolite in Ferro's urine sample, which is above the cutoff level of 15.0 ng/ml. However, the February 6, 2020 testing of the same urine sample by the same laboratory rendered a THC level of 10.2 ng/ml, which is below the cutoff level. While it is plausible that all or most chemical samples will degrade with the passage of time, the evidence before this Tribunal does not demonstrate that the urine sample under consideration in this matter actually degraded. Dr. Jackson stated that the sample "could have" degraded but could not say that it actually did degrade. Moreover, even assuming that some degrading of the sample took place (i.e., some change in the urine sample or in the chemicals contained therein), Dr. Jackson stated under questioning that he could not say whether degradation would result in a higher, or in a lower, or in the same finding for THC in the subject sample when compared with the December, 2018 testing.

As shown by his testimony, Dr. Falzon agreed with Dr. Jackson and he conceded the same points.

FINDINGS OF FACT

The Appellant's and the Respondent's Statements of Fact, with their comments on each other's Statements of Fact are attached hereto as the Tribunal's Exhibits T-2

and T-3. It was agreed that where the parties are not in complete agreement regarding a particular issue of fact, then I, as judge of the facts, will rely on my own notes and recollection and, where I deem it to be appropriate and / or necessary, I will make my own findings of fact. From a reading of both counsels' submissions, it does not appear that they are in any disagreement about the following general overview of the facts of this matter expressed in numbered paragraphs (1) through (9) set forth below. I therefore **FIND** that:

(1) Corrections Officer Ferro submitted to random drug testing performed by the BCSO on November 7, 2018 by giving two urine specimens following the procedures prescribed by the Attorney General's Law Enforcement Drug Testing Policy.

(2) The BCSO delivered the subject urine specimens to the New Jersey State Toxicology Laboratory in accordance with established procedures. The State Toxicology Laboratory tested one of Ferro's urine samples on December 12, 2018 in accordance with established procedures.

(3) R-5 is the Toxicology Report dated December 12, 2018. It states that Ferro's urine tested positive (i.e., above the cut-off of 15.0 ng/ml) for the metabolite of THC, called 11-carboxy-THC. THC is the active ingredient in marijuana, a controlled substance. It also states that Ferro claims to have used CBD oil.

Among additional facts which the parties agree upon are the following. I therefore **FIND**:

(4) The parties agree that the following documents were kept in the normal course of business by the State of New Jersey, namely Respondent's Exhibit R-15 and Respondent's Exhibit R-16 and they agree that said documents contain information relevant to the case at bar.

R-15 is a packet of documents numbering 53 pages (also referred to throughout the course of this case as "Litigation Package" corresponding to the testing done shortly after the State Lab's receipt of the urine samples. Because there appear to be different dates (e.g., November 15, 2018 or December 3, 2018 or December 4, 2018) on various documents related to the testing, I will refer to the test date for R-15 as the "December, 2018" testing. R-15 contains among other things:

Page 3 showing the last four digits of Ferro's Social Security Number and the urine sample number of 18L014773 given by Ferro on November 7, 2018;

Page 6, the "Drug Testing Medication Information" form indicating Ferro's use of Advil and CBD oil on 11/6/2018;

Page 31, a New Jersey State Toxicology Laboratory form containing a "Patient ID" of 18L014773-1A, which corresponds to the aforementioned urine sample number, a date of 11/15/2018, and on the bottom line under "Assay" the term "THC20Q" and on the bottom line under "Result" the number "64.8285" with the word "Positive";

Page 32, a document dated December 4, 2018 entitled "GC/MS Drug Confirmation Report" with the urine specimen I.D. of 18L014773 showing an "Analytical Result" of "11-Carboxy-THC detected 18.9 ng/ml";

Page 33, a document dated December 3, 2018 entitled "Summary of Test Results" (for Cannabinoids), showing that "Item Number 14" on the list is the urine sample number 18L014773 with "Results/Concentration in ng/ml" showing the number 2.8 (which was crossed-out) and the number 18.9 and showing, at the bottom of the page, under "Certification of Test results" the word "Passed";

Page 36, a document referencing "Specimen number 64" and the urine sample number 18L014733;

Page 48, a document entitled "Quantitation Report for THC" referring to lab/GS-MS #1" containing the dates of November 30, 2018 and December 3, 2018, showing "Concentration 18.94 ng/ml";

Page 49, a document similar to Page 48, but showing "Concentration 2.85";

Page 51, a document entitled "Medical Review Officer Certification Form" dated December 10, 2018 showing a "Screening Result" of "Cannabinoids"; a "GC/MS Result" of "11-Carboxy-THC" and a checkmark in a box captioned "Not listed on Medication sheet"; In addition under "MRO Comments" there is a statement reading "Donor claims to have used CBD oil – this should not be expected to give positive (the word "positive" noted as a circled plus-sign) results for THC.";

Page 52, a document entitled "Toxicology Report" dated December 12, 2018 containing the following: under "Confirmation results by Mass Spectrometry" it states "11-Carboxy-THC"; under "Interpretation" it states "Positive"; and under "Cut off (Units)" it states 15 ng/ml". Two additional statements are listed on this document. The first states: "The following controlled substances were found and were not listed on a Medication Sheet: 11-Carboxy-THC". The second states: "Donor claims to have used CBD oil - this should not be expected to give positive results for THC."

R-16 is a package of documents numbering 43 pages (also referred to throughout the course of this case a "Litigation Package" corresponding to the testing done on February 6, 2020), which contains among other things:
Page 1, a document entitled "Summary of Batch Results", which on Line 11 shows the urine sample name of 18L014773 (corresponding to Ferro's aforementioned sample number) and showing "Results/concentration in ng/ml"

as follows: for THC, the number 10.2 (ng/ml); for CBD, the letters "ND"; and for Carboxy CBD, the letters "ND";

Page 38, a document entitled "Quantitation Report" For THC on: lab/GC-MS #1" containing the date of February 6, 2020 and "Concentration 20.51" and a handwritten note showing division by 2 with a quotient of 10.25.

(5) The December 10, 2019 report of Gary L. Lage, Ph.D., (Appellant's Exhibit A-1) consists of five pages, plus a one-page *curriculum vitae*. Dr. Lage's report contains the following statements.

(A) Dr. Lage states that he reviewed and analyzed (1) New Jersey State Toxicology Laboratory documentation, for urine samples submitted November 7, 2018; (2) Bergen County Sheriff's Office Drug Testing Medication Information, dated November 7, 2018; (3) GC/MS Drug Confirmation report, dated December 4, 2018; and (4) Medical Review Officer Certification Form, dated December 10, 2018.

(B) In his report, Dr. Lage states that he was asked to evaluate the evidence to determine if the State Laboratory's report can fairly be construed as evidence of marijuana use.

(C) In his report, Dr. Lage states that he considered the Laboratory's finding of a THC level of 18.9 ng/ml; and the cut-off of 15.0 ng/ml; and Ferro's age, height, weight and body mass; and the specific gravity of the urine sample; and the 89.3 ng/ml of creatinine in Ferro's urine sample. Dr. Lage referred to scientific literature (Barr) on urinary creatinine levels in the U.S. population stating that for non-Hispanic white males aged 40-49 the mean creatinine level is 142.3 ng/ml and stated that Ferro's 89.3 ng/ml creatinine level was lower than average. Dr. Lage also referred to the body of scientific knowledge about the sources of Delta-9-THC, which is found in marijuana and in cannabidiol (CBD) otherwise known

as hemp oil or CBD oil. Dr. Lage discussed that after a person smokes marijuana, he reaches a peak level of Delta-9-THC in his blood. Lage explained that the human body metabolizes Delta-9-THC and forms a metabolite called OH-THC (which is pharmacologically active) and which later metabolizes into Carboxy-THC (which is not pharmacologically active). In regard to urine samples, Dr. Lage discussed how and why the specific gravity of a urine sample and the creatinine level of a urine sample affects the outcome of testing. Using Ferro's reported creatinine level, Dr. Lage explained that Ferro had a lower than normal (i.e., dilute) concentration of urine on November 7, 2018. Drawing upon his experience, Dr. Lage noted that most laboratories recognize a margin of error which recognizes the uncertainty associated with quantitative value. Dr. Lage stated that for Delta-9-Carboxy THC the uncertainty is usually plus or minus 20 to 25 % of the reported value. Dr. Lage stated that this uncertainty means that Ferro's value of 18.9 ng/ml of 11-Carboxy-THC on November 7, 2018 could be as low as 15.12 ng/ml.

(D) Dr. Lage stated that CBD is found in both the hemp and marijuana plants and stated that CBD oil contains low levels of THC.

(E) Dr. Lage expressed two opinions in his report. The first was that the low level of THC-COOH found in Ferro's urine sample was attributable to his use of CBD oil. The second was that the 18.9 ng/ml positive urine result was insufficient to scientifically determine marijuana use.

(6) The February 24, 2020 report of Andrew L. Falzon, M.D. (Exhibit R-17) contains the following statements.

(A) A February 10, 2020 Memorandum for Record (also referred-to as a "qualitative screen") written by George F. Jackson, Ph.D., Director, and by Sorin Diaconescu, M.S., Laboratory Manager, is attached to the expert report authored

by Andrew L. Falzon dated February 24, 2020. Jackson and Diaconescu wrote: "CBD and Carboxy-CBD were not detected at the 5 ng/ml cutoff level.

(B) Referencing the above-quoted statement from the qualitative screen, Dr. Falzon stated in his Report, "The above result would not be consistent with recent use of CBD containing products, and therefore, the use of CBD containing products would not explain the present [sic, presence] of 11-Carboxy-THC in the sample provided."

(7) I **FIND** that the results set forth on page one of R-16 demonstrate that CBD and CBD metabolite were not detected in Ferro's urine during the February 6, 2020 testing. I further **FIND** that Dr. Lage's opinion that the presence of THC or THC metabolite in Ferro's urine during the December, 2018 test was due to his use of CBD products has been proven false.

(8) I **FIND** that the laboratory evidence presented by the Respondent for the presence of THC at or above the 15 ng/ml cutoff level (i.e., the two different results) is inconclusive.

(9) My comments and findings regarding any discrepancies in the Parties' are set forth below:

In regard to T-2:

I **FIND** that the parties are in agreement about Appellant Ferro's Statements of Fact Numbers 1-6; 8; 10-22; 25-28; 31; 33-35; 38; 41-44; 46; 48-51; 54; 56; 58-65; 67-68; 70-72; 74; 76-77; 81; 83-91; 93-94; 96-97; 99-100; 114; 118-119; 124-125; 127-128;131-135; 137; 145-146; 150-151; 156; 159;

I **FIND** that in the following Statements of Fact the parties are in agreement only about what the witness said or what a document states, but do not necessarily

agree about the accuracy or truthfulness of the content thereof: 103-113; 115-116; 120, 123, 126; 129-130; 136, 138-144; 147-149; 152-155; 157-158; 160-165;

I **FIND** that the following Statements of Fact and corresponding comments represent minor or insignificant disagreements, which do not affect the outcome of the matter before the Tribunal: 7; 9; 23; 24; 29; 30; 32; 57; 66; 69; 73; 82; 92; 98; 117;

The following Statements of Fact and corresponding comments stated therein represent areas of disagreement in the parties' recollections of the facts. My recollection of the facts concerning the areas in question, based on my memory and my notes, are stated herein. I **FIND** as follows:

36 My recollection is that Altieri asked Dr. Falzon about "general acceptance in the scientific community", not Dr. Jackson.

37 Dr. Jackson did not use the word "reliably".

39 & 40 My recollection is that Dr. Jackson did not make these statements. Rather, these statements represent Altier's conclusions about the content of Dr. Jackson's testimony. My recollection is that Dr. Jackson testified that the 2/6/2020 testing was qualitative because the lab was merely looking for the presence of CBD. Further, he said that in order to conduct the test, the lab had to establish a "cutoff". The Lab chose 5 ng/ml as the cutoff. So, in that limited sense, the test rendered a quantitative result of "below 5 ng/ml" which the Lab reported as "ND" (i.e., "not detectible").

45 My recollection is that Dr. Jackson testified that a year-old sample, when tested for the quantitative level of a given substance "could" show results that are more, the same, or less than the original test results.

47 My recollection is that Dr. Jackson did not say that the Lab developed their own method of analyzing samples. However, either way, it would not affect the outcome of the matter.

52 & 53 Dr. Jackson testified that the level of THC / THC metabolite found by the December, 2018 test was 18.9 ng/ml. Dr. Jackson testified that the level of THC / THC metabolite found by the 2/6/2020 test was 10.2 ng/ml. The tests resulted in two different findings.

55 Dr. Falzon issued only one report.

72 Dr. Falzon testified that since CBD may contain up to.03% THC, the ratio of CBD to THC would be greater that 100 to 1. Therefore, if the only source of THC comes from CBD, and if a quantity of THC is found in a specimen, then the level of CBD should be one hundred (or greater) times that of THC found in the same specimen.

75 My notes only show that Dr. Falzon said that the samples would deteriorate over time. My notes do not show that Dr. Falzon testified that the February 6, 2020 test would be "less reliable". My notes show that Dr. Falzon did not specify whether the second (i.e., the February 6, 2020) test results would be "less reliable" in terms of the level of THC.

78, 79, & 80 Dr. Falzon did attribute the cross-out to a "clerical error". This would not affect the outcome of the matter.

95 My notes do not show that Dr. Falzon was speculating about the meaning of the records.

101 & 102 My notes indicate and recollection is that Dr. Falzon testified that over the period of time between the two tests, the urine specimen's concentration could have gone up, or down, or stayed the same.

121 & 122 Dr. Lage's assertion that the second test of Ferro's urine produced a CBD concentration of 40.79 ng/ml and his assertion that there were inconsistencies in the reports found in R-16 are arguments, not indisputable

statements of fact. His testimony did not make certain whether the data referred to a urine test or a control.

140-143 & 163-164 The parties' dispute regarding whether or not Ferro used CBD or is for the Tribunal to decide. As noted above, I am satisfied that the February 6, 2020 test did not detect CBD or CBD metabolite in Ferro's urine specimen, and so I **FIND** that Ferro did not use CBD during the time period immediately preceding the donation of his urine.

166 Ferro admitted on cross-examination that he was aware that THC is an illegal drug. He also admitted that CBD contains various amounts of THC. Ferro also admitted that a law enforcement officer who tests positive for illegal drugs would be terminated.

In regard to T-3

I **FIND** that the parties are in agreement about the BCSO's Statements of Fact Numbers: 1; 6; 7; 19-21; 26; 62-65; 70-72; 74; 76; 79;

I **FIND** that in the following Statement of Fact the parties are in agreement only about what the witness said or what a document states, but do not necessarily agree about the accuracy or the truthfulness of the content thereof: 3; 5; 8; 9; 11-17; 24-25; 27-29; 33-34; 38; 42; 46-48; 57-58; 66-67;

I **FIND** that the following Statements of Fact and corresponding comments represent minor or insignificant disagreements, which do not affect the outcome of the matter before the Tribunal: 4; 18; 22-23; 31; 32; 35; 37; 39; 40; 44; 45; 49; 59-61; 73, 77; 78; 79; 80; 81; 82;

The following Statements of Fact and corresponding comments stated therein represent areas of disagreement in the parties' recollections of the facts. My recollection of the facts concerning the areas in question, based on my memory and notes are stated herein. I **FIND** as follows:

2 I am satisfied that the testing was done randomly;

10 The exact date when the urine specimen was tested is unclear, but what is clear is that it was tested by the Lab shortly after the specimen was donated by Ferro and kept secure in the State's custody. I note that the first phase of testing was a qualitative screen to test merely for the presence of a substance (i.e., an illegal drug). A second phase of testing would be performed if a prohibited drug or its metabolite was detected so that the amount (level) of the drug could be ascertained. The second phase of testing is called a quantitative analysis. These phased tests could have been performed on different dates in November and December, 2018, and so the Tribunal is referring to the first or initial testing of the urine specimen as the "December, 2018 test".

30 I am satisfied that the Attorney General' Guidelines require that a Law Enforcement Officer who tests positive for an illegal drug must be terminated. On cross-examination, Ferro himself admitted that he knew that if he tested positive for an illegal drug he would be terminated.

36 I am satisfied that what Dr. Falzon stated was that, based on the Memorandum for record and the Initial Toxicology Report, Ferro's purported use of CBD "should not be expected to produce a positive result for THC." The other comments about Falzon's testimony do not affect the outcome of the matter.

41 Regardless of what the BCSO or the Lab was "looking for", the 2/6/2020 Lab report (Page 1 of R-16) shows quantitative results for THC, CBD and carboxy-BCD (CBD metabolite).

43 Regardless of the controls used in the December, 2018 test and in the 2/6/2020 test, I am satisfied that both tests gave valid results.

49-52 The Appellant's comments do not dispute the content of Dr. Falzon's statements, but he merely criticizes Dr. Falzon and comments about him testifying beyond the boundaries of his report. Said comments do not affect the outcome of the case.

53-56 The first phase of testing was to determine whether a given substance was merely present; this was a qualitative screen. If the substance was present, then the second phase of testing was performed to determine how much of the substance was present; this was the quantitative analysis. Regardless of the controls used in the December, 2018 test and in the 2/6/2020 test, I am satisfied that both tests gave valid results.

68 During cross-examination it was established that Dr. Lage stated that Ferro's urine specimen was dilute and that it was Dr. Lage's opinion that with a 20-25% margin of error in place, Ferro's 18.9 ng/ml level would have been as low as 15.1 ng/ml. Then Dr. Lage was asked whether or not the level would have been higher than 18.9 if the urine specimen had been less dilute (i.e., more concentrated or closer to "average", meaning a concentration that was neither dilute nor concentrated). To this

question, Dr. Lage responded, "Yes, somewhat." I **FIND** that this response means that after a 20-25% margin of error is applied, the result would be correspondingly higher than 15.1 ng/ml.

69 Dr. Lage testified that given the 18.9 ng/ml level found in the December, 2018 test, after a 20-25% margin of error were applied, Ferro's level could have been as low as 15.1 ng/ml. I recall and my notes confirm that Dr. Lage spoke about the 15.1 ng/ml figure. I do not, and my notes do not contain, a figure of 14.175 ng/ml.

75 Ferro testified that he started taking CBD products in September, 2018 and stopped taking them in December, 2018.

83-84 Ferro testified that he was aware that he was , as a Law Enforcement Officer, subject to random drug testing and he testified that he was aware that if he tested positive for an illegal drug he would be terminated.

APPLICABLE LAW

Substantive Orders Governing Drug Use by Sheriff's Officers and the Attorney General's Law Enforcement Drug Testing Policy

General Order, Index Number GO-06-1.30 was issued by the Bergen County Sheriff's Office (BCSO) to its law enforcement personnel regarding prohibited drug use and random testing of said personnel for drug use and the penalties to be imposed for violations of said Orders. (In the matter at bar it is marked as Exhibit R-10.) In Section Roman Numeral One, R-10 defines prohibited drugs as any controlled substances defined in N.J.S.A. 2C:35, unless lawfully subscribed by a licensed physician. In Roman Numeral Four, R-10 states that all sworn officers of the BCSO are subject to being randomly tested for drug use. In Roman Numeral Seven it sets forth the testing procedures including the safeguarding of specimen samples in the chain of custody. In Roman Numeral Nine, it states that the New Jersey State Toxicology Laboratory shall constitute the sole facility for the analysis of law enforcement drug tests. In Roman Numeral Ten (c) (2), it states that if a sworn law enforcement officer tests positive for

illegal drug use the officer shall be terminated from employment as a law enforcement officer, upon final disciplinary action by the Sheriff or his designee.

General Order, Index Number GO-00-1.2 (R-11) was issued by the BCSO to its law enforcement personnel regarding the Rules and regulations governing law enforcement officers in their conduct, attitude and general deportment as related to their employment as law enforcement officers. Chapter One includes a Code of Ethics governing conduct in a law enforcement professional's official life and in his private life. Chapter Three includes a command (3:1.1) to law enforcement personnel to obey all laws and the rules and regulations of the agency (BCSO). Chapter Three (3:2.2) also includes specific regulations governing the use of alcohol, drugs and medications by law enforcement personnel. Chapter Three (3:3.12) governs substance testing, including random drug screening.

The BCSO follows the Attorney General's Law Enforcement Drug Testing Policy (R-12), hereinafter referred to as the AG's Policy. Roman Numeral Two of the AG's Policy states that all sworn state, county and local law enforcement officers are required to submit to the collection of specimens and otherwise cooperate in the testing process. The AG's Policy contains procedures for the random selection of personnel and for the collection, safekeeping, preservation and prompt transportation of specimens to the N.J. State Toxicology Laboratory (hereinafter "the State Lab"), which is required to make written test results for every specimen submitted for analysis. The State Lab utilizes a two-stage testing procedure to analyze specimens. The first stage an initial screening determines whether one or more of the nine substances listed or their metabolites are present at or above a designated cutoff level. If the substance one or more of the substances are detected a second test employing mass spectrometry detection for the definitive identification and quantitation of drugs and/or metabolites presumptively identified by the initial screen. The AG's Policy provides that when a specimen tests positive, the medical review officer shall review the test results and determine whether any of the substances listed by the tested officer on his medical information form would explain the positive test result. Roman Numeral Eight of the AG's Policy states that

when a sworn officer tests positive for illegal drug use, he shall be immediately suspended from all duties, shall be administratively charged and, upon final disciplinary action, terminated from employment as a law enforcement officer.

The Law Regarding Employee Discipline

The Civil Service Act and the implementing regulations govern the rights and duties of public employees. N.J.S.A. 11A:1-1 to 12-6; N.J.A.C. 4A:1-1.1 to 4A:10-3.2. The Act is an important inducement to attract qualified personnel to public service. It is to be liberally constructed toward attainment of merit appointments and broad tenure protection. See 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). The Act also recognizes that that the public policy of New Jersey is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2 (b). To carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

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; and N.J.A.C. 4A:2-2.3. Major discipline involves removal, suspension, or fine for more than five working days.

An appointing authority may discipline an employee on various grounds, including inability to perform duties, conduct unbecoming a public employee, insubordination, and other sufficient cause. N.J.A.C. 4A:2-2.3(a). Such action is subject to review by the Civil Service Commission, which after a de novo hearing makes an independent determination as to both guilt and the "propriety of the penalty imposed below." W. New York v. Bock, 38 N.J. 500, 519 (1962); In the Matter of Morrison, 216

N.J. Super. 143 (App. Div. 1987); Ennslin v. Twsp. of N. Bergen, 275 N.J. Super. 352 (App. Div. 1994) certif. den., 142 N.J. 446 (1995).

The Necessity for Maintaining Discipline

Maintenance of strict discipline is important in quasi-military settings such as police departments and correctional facilities. Rivell v. Civil Serv. Comm'n., 115 N.J. Super. 64, 72 (App. Div. 1995), certif. den. 142 N.J. 446 (1995). City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). In such settings, the primary duty of the officers and supervisors is the safety and security of the facility. Police (and correction) officers are held to a higher standard of conduct than ordinary public employees. In Re Phillips, 117 N.J. 567, 576-577 (1990). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966).

Burden of Proof in Disciplinary Matters

In a civil-service disciplinary case, the employer bears the burden of providing sufficient, competent and credible evidence of facts essential to the charge. N.J.S.A. 4A:2-1.4. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relies 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). Put another way, in an administrative proceeding concerning a major disciplinary action, the appointing authority must prove its case by a "fair preponderance of the believable evidence." N.J.A.C. 4A:2-1.4(a); Polk, supra, 90 N.J. at 560; Atkinson, supra, 37 N.J. at 149. The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Greater weight of credible evidence in the case - a preponderance - depends not only on the number of witnesses, but "greater convincing power to our minds." State v. Lewis, 67 N.J. 47, 49 (1975) (citation

omitted). Similarly, credible testimony "must not only proceed from the mouth of a credible witness, but it must be credible in itself." In re Estate of Perrone, 5 N.J. 514, 522 (1950). The judge 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. Delaware, Lackawanna and Western Railroad, 111 N.J.L. 487, 490 (E.&A. 1933).

Applicable Regulations, Rules and Orders

The list of General Causes of action for Civil Service employee discipline are set forth in N.J.A.C. 4A:2-2.3 (a), which provides:

(a) An employee may be subject to discipline for:

1. Incompetency, inefficiency or failure to perform duties;
2. Insubordination;
3. Inability to perform duties;
4. Chronic or excessive absenteeism or lateness;
5. Conviction of a crime;
6. Conduct unbecoming a public employee;
7. Neglect of duty;
8. Misuse of public property, including motor vehicles;
9. Discrimination that affects equal employment opportunity (as defined in N.J.A.C. 4A:7-1.1), including sexual harassment;
10. Violation of Federal regulations concerning drug and alcohol use by and testing of employees who perform functions related to the operation of commercial motor vehicles, and State and local policies issued thereunder;
11. Violation of New Jersey residency requirements as set forth in P.L. 2011, c. 70; and

12. Other sufficient cause.

Conduct Unbecoming a Public Employee, Insubordination and Neglect are three of the above-listed types of charges that are frequently litigated. A brief analysis of each of these three charges follows.

N.J.A.C. 4A:2-2.3(a)(6), Conduct Unbecoming a Public Employee under N.J.A.C. 4A:2-2.3(a)(6), an employee may be subject to major discipline for conduct unbecoming a public employee. Although not strictly defined by the Administrative Code, "conduct unbecoming" has been described as that conduct "which affects the morale or efficiency of the [governmental unit] [or] which adversely affects the morale or efficiency" of the public entity or tends "to destroy public respect for . . . [public] employees and confidence in the operation of . . . [public] services." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960); see Karins v. City of Atl. City, 152 N.J. 532, 554 (1998) (citation omitted). The conduct need not 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). Unbecoming conduct may include behavior that is not in accord with propriety, modesty, good taste or good manners, or behavior that is otherwise unsuitable, indecorous or improper under the circumstances. Conduct unbecoming a public employee may be less serious than a violation of the law, but it is inappropriate to on the part of the public employee. Ferrogine v. State Dep't. of Human Servs., Trenton Psychiatric Hosp., CSV 2441-98, Initial Decision (April 17, 1998), modified MSB (July 6, 1998), http://njlaw.rutgers.edu/collections/oal/. It is a fact-sensitive determination rather than one based on a legal formula.

N.J.A.C. 4A:2-2.3(a)(2), Insubordination (or Disobedience of Orders)

"Insubordination" is not defined in the regulations. Assuming that its presence is implicit, courts generally apply its ordinary definition since it is not a technical term or term of art, and because there are no circumstances indicating that a different meaning is intended. Ricci v. Corp. Exp. of the East, Inc., 344 N.J. Super. 39, 45–46 (App. Div. 2001).

Black's Law Dictionary 802 (7th Ed. 1999) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person Insubordination is always a serious matter, especially in a paramilitary context. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971).

N.J.A.C. 4A:2-2.3(a)(7), Neglect of Duty

The term "neglect" means a deviation from the normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" means conformance to "the legal standard of reasonable conduct in light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (citation omitted). Neglect of duty has been interpreted to mean that "an employee . . . neglected to perform an act required by his or her job title or was negligent in its discharge." In re Glenn, CSV 5072-07, Initial Decision (February 5, 2009) (citation omitted), adopted, Civil Service Commission (March 27, 2009), < http://njlaw.rutgers.edu/collections/oal/>. Neglect of duty can arise from omitting to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Neglect of duty does not require an

intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job.

Penalties and Progressive Discipline

In determining the appropriateness of a penalty, several factors must be considered including, but not limited to: the nature of the offense, the previous use of progressive discipline, the employee's prior record, and the seriousness or severity of the offense under consideration.

The theory of progressive discipline is based on the following principles:

> (1) that discipline should be designed to be corrective and to further the development of the employee; (2) that the penalty should be proportionate to the severity of the offense; and (3) that where there is a pattern of violations, progressively more severe penalties should be imposed for each occurrence. The disciplinary process in New Jersey's Civil Service incorporates the concept of progressive discipline. It is well-settled that an employee's past disciplinary record may be used as guidance in determining what an appropriate penalty should be in a given case. See West New York v. Bock, 38 N.J. 523 (1962). However, the theory of progressive discipline is not a fixed and immutable rule to be followed without question. Some disciplinary infractions are so serious that removal is appropriate notwithstanding an unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007).

Theft is considered a serious offense. A police officer who commits a theft is subject to removal. In re Cohen, 56 N.J. Super. 502 (App. Div. 1959) (upholding the removal of a police officer in the theft of parking meter funds; In re Hall, 335 N.J. Super. 45, 51 (App.Div. 2000) (sustaining the removal of a police officer for attempted theft).

LEGAL ISSUES PRESENTED

The two legal questions to be answered by this Tribunal are the following:

(1) Has the Bergen County Sheriff's Office proven, by a preponderance of the credible evidence, that the disciplinary charges set forth in the FNDA should be sustained?

(2) If so, is the removal of Ferro from the BCSO the appropriate disciplinary penalty?

LEGAL ANALYSIS AND CONCLUSION

According to the Attorney General's Law Enforcement Drug Testing Policy (R-12), Section VI (C), ps. 10 to 11, the standard (referred to as "the cutoff") for finding a "positive" result (meaning that a level exceeding the cutoff) of the specified prohibited drug, in this case THC or THC metabolite, is 15 ng/ml. When the test of a urine sample of Law Enforcement officer shows that is there is in excess of 15 ng/ml of THC or THC metabolite, then the test is "positive" and the officer is subject to discipline. In this matter, the burden of proof is on the BCSO to prove that Ferro's urine specimen contained 15 ng/ml or greater of THC or THC metabolite.

This Tribunal has before it two different test results. Both test results were derived from valid testing procedures at the State Lab. The one (in R-15) rendered a quantitative result of 18.9 ng/ml, which is over the 15.0 ng/ml cutoff, warranting removal of Ferro; and the other (in R-16) rendered a quantitative result of 10.2 ng/ml, which is under the 15.0 ng/ml cutoff, warranting dismissal of the action against Ferro. The evidence is equivocal and therefore it does not support a conclusion either in favor of the BCSO or in favor of Ferro. The burden of proof is on the employer BCSO. I **CONCLUDE** that the BCSO has not carried its burden of proving the charges against

Ferro by a preponderance of the credible evidence. Therefore, I **CONCLUDE** that the BCSO cannot prevail in its removal action against Ferro.

ORDER

Based upon the forgoing, I **ORDER** that the disciplinary charges set forth in the FNDA dated August 12, 2019 be and hereby are **DISMISSED**. I further **ORDER** that the termination of Christopher Ferro's employment with the Bergen County Sheriff's Office (BCSO) be and hereby is **REVERSED** and, pending the issuance of a final decision by the Civil Service Commission affirming this Initial Decision, that all back pay, all benefits and all seniority will be restored to Christopher Ferro. I further **ORDER** the appointing authority (i.e, the BCSO), in the interim, to begin paying appellant Ferro his base salary and to provide medical benefits immediately, pending issuance of a final decision by the Civil Service Commission. This **ORDER** is effective immediately and shall continue in effect until issuance of the Final Decision in this matter by the Civil Service Commission.

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.

May 21, 2021
DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency:

Date Mailed to Parties:

db

APPENDIX

List of Witnesses

For Appellant:

Christopher Ferro, Appellant
Gary L. Lage, Ph.D.

For Respondent:

Detective Steve Ruiz
Detective Raymond Paradiso
Detective-Sergeant Christopher Howe
George F. Jackson, Ph.D., Executive Director of the N.J. State Toxicology Laboratory
Andrew L. Falzon, M.D., Medical Review Officer at N.J. State Toxicology Laboratory

List of Exhibits

For Appellant:

A-1 Report of Gary L. Lage, Ph.D. dated December 10, 2019 (5 pages)
A-2 *Curriculum Vitae* of Gary L. Lage, Ph.D.
A-3 BCSO's Corrections Officer Performance Evaluation Reviews regarding Christopher Ferro for the years 2005 through 2018
A-4 Photo depicting Ferro associated with November 3, 2018 concert event at Beacon Theatre
A-5 (Same as R-14) Manufacturer's information, Purekana Natural CBD Oil 5000

For Respondent:

R-1 Internal Affairs Investigation Report by Detective Steve Ruiz, dated January 30, 2019

R-2 Drug Screening Package Report, dated November 7, 2018

R-3 Drug Testing Officer Notice and Acknowledgment for Christopher Ferro, dated November 7, 2018

R-4 New Jersey State Toxicology Laboratory, Law Enforcement Drug Testing Custody and Submission Form

R-5 New Jersey State Toxicology Laboratory , Toxicology Report, dated December 12, 2018

R-6 Immediate Suspension Notice for Officer Christopher Ferro, dated January 7, 2019

R-7 "Loudermill" Notice apprising Officer Christopher Ferro, dated January 7, 2019

R-8 Preliminary Notice of Disciplinary Action (31-A) , dated January 11, 2019

R-9 Email from Sergeant Lauren Barbosa to Detective Sergeant Christopher Howe regarding Ferro-DHS History, dated October 18, 2019

R-10 Bergen County Sheriff's Office, General Order -GO-06-1.30-Drug free Workplace-Law Enforcement Employees, effective 12/08/08

R-11 Bergen Cunty Sheriff's Office, General Order))-12-1.2-Employee Rules and Regulations, effective 3/14/2000

R-12 New Jersey Attorney General's Law Enforcement Drug Testing Policy, revised April 2018

R-13 Bergen County Prosecutor's Office, Infoshare "RANDOMIZER" Instructions. Release 1.0 September 2018

R-14 Manufacturer's Information, Purekana Natural CBD Oil 5000

R-15 Complete "Litigation Package" from the New Jersey State Toxicology Laboratory related to the random

R-16 Complete "Litigation Package" from the New Jersey State Toxicology Laboratory related to the CBD testing

R-17 Expert Report of Andrew Falzon, M.D.

R-18 C.V. of Dr. Andrew Falzon

Tribunal's Exhibits

T-1 FNDA dated August 12, 2019

T-2 Appellant's Statement of Facts with Comments by Respondent's Counsel

T-3 Respondent's Statement of Facts with Comments by Appellant's Counsel