



STATE OF NEW JERSEY

In the Matter of Natea Bomar
City of Orange Township, Police
Department

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC DKT. NO. 2020-2531
OAL DKT. NO. CSR 06023-20

ISSUED: APRIL 28, 2021 BW

The appeal of Natea Bomar, Police Officer, Orange Township, Police Department, removal effective December 17, 2019, on charges, was heard by Administrative Law Judge Nanci G. Stokes who rendered her initial decision on March 22, 2021. Exceptions and a reply were filed on behalf of the appellant and replies were filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of April 28, 2021, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Natea Bomar.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 28TH DAY OF APRIL, 2021



Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 06023-20
AGENCY DKT.NO. 2020-2531

**IN THE MATTER OF NATEA BOMAR,
CITY OF ORANGE,**

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

John J.D. Burke, Esq., for the City of Orange (Scarinci Hollenbeck, attorneys)

BEFORE Nanci G. Stokes, ALJ:

Record Closed: March 10, 2021

Decided: March 22, 2021

STATEMENT OF THE CASE

Natea Bomar's (Bomar) urine tested positive for illegal drugs using established collection and testing procedures employing industry cut-off levels without credible evidence challenging the results. Should the Orange Police Department's (Orange) removal of police officer Bomar be sustained? Yes. Some legally competent evidence must support each ultimate fact to an extent sufficient to provide assurances of reliability. N.J.A.C. 1:1-15.5(b). Further, Orange's Law Enforcement Drug Screening Policy and Procedures (LEDS Policy or Procedures) requires termination after a positive result.

PROCEDURAL HISTORY

On January 9, 2020, Orange served Bomar with a Preliminary Notice of Disciplinary Action (PNDA). In its notice, Orange charged Bomar with conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6) and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12). Orange bases its charge for other sufficient cause on violations of Orange's LEDS Policy.

The PNDA advised that Orange sought Bomar's removal.

In its specifications, Orange states that on October 24, 2019, following Attorney General Directive 2018-2 (Directive 2018-2), "Statewide Mandatory Random Drug Testing," Orange randomly selected Bomar to undergo drug testing. On October 29, 2019, Orange ordered Bomar to the Office of Internal Affairs (IA) to complete the necessary forms and provide two urine samples from a single void under monitoring, which she did.

On December 17, 2019, Orange received the results of Bomar's urinalysis, which tested positive for the presence of tetrahydrocannabinol (THC), a psychoactive compound in marijuana.

On February 13, 2020, Orange conducted a departmental disciplinary hearing.

On March 26, 2020, Orange issued a Final Notice of Disciplinary Action (FNDA), sustaining all charges and specifications, and removed Bomar from Orange's employment effective December 17, 2019.

On March 27, 2020, Bomar appealed to the Commission and the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6. On May 4, 2020, the Commission advised the OAL that it received the appeal and fee timely, perfecting

the appeal on that date. The OAL then received a copy of the appeal. On July 13, 2020, the OAL assigned the case to me for hearing.

On July 27, 2020, I held a prehearing conference under N.J.A.C. 1:1-13.1 to discuss when the parties and their witnesses would be available for the hearing, the nature of the proceeding, and the issues to be resolved, including any unique evidentiary problems. I set a discovery completion date and scheduled hearings for September 24, 2020, and October 9, 2020.

On September 18, 2020, Orange served the NJSTL with a subpoena to designate a person with knowledge of this case and drug testing of Bomar and appear at the hearings.

On September 24, 2020, the hearing proceeded via Zoom without the participation of the NJSTL, but counsel for Orange advised that the NJSTL was unavailable to appear for the October 9, 2020, hearing.¹ I adjourned the hearing until October 23, 2020, and on October 9, 2020, the NJSTL filed a motion to quash the September 18, 2020, subpoena served upon the NJSTL.

On October 19, 2020, Bomar opposed the motion, and on October 22, 2020, the NJSTL replied. I adjourned the October 23, 2020, hearing until October 29, 2020, to accommodate the motion. On October 26, 2020, I denied the motion to quash and ordered that the NJSTL designate a person with knowledge regarding the random drug testing of Bomar and appear at the hearing.

Because October 29, 2020, was a Jewish holiday, NJSTL's witness was unavailable, I rescheduled the hearing to November 19, 2020.

On November 18, 2020, Orange first received NJSTL's drug testing documents and witness designation, Dr. Havier. Bomar's counsel objected to proceeding with

¹ On March 17, 2020, the OAL stopped in-person proceedings due to the COVID-19 pandemic and conducted hearings via Zoom.

NJSTL's witness on November 19, 2020, because Orange did not timely supply materials from the NJSTL. In the alternative, Bomar's counsel requested another hearing day for cross-examination of Dr. Havier. I agreed, permitted direct examination, and scheduled Dr. Havier's cross-examination for December 17, 2020. On November 19, 2020, Orange also presented the testimony of Detective Ramirez via Zoom.

On December 17, 2020, under Executive Order 208 issued on December 16, 2020, the Governor ordered a delayed opening until 11:00 a.m. of all State of New Jersey offices because of inclement weather. The NJSTL witness did not appear at 9:00 a.m., and I rescheduled the hearing to December 30, 2020.

On December 30, 2020, I conducted the hearing via Zoom. The parties requested transcripts and agreed to submit post-hearing submissions fifteen days after receipt.

On February 24, 2021, Bomar filed her post-hearing brief. However, a transcript was missing, and I allowed Orange additional time to present its post-hearing submission.

On March 10, 2021, Orange filed its post-hearing brief, and I closed the record.

FINDINGS OF FACT

Background

The parties do not dispute the following facts, and I **FIND** them as **FACT**:

In April 2018, the New Jersey Attorney General (AG) revised the policy for random drug testing for law enforcement agencies (AG Policy) per Directive 2018-2, making the testing mandatory for law enforcement applicants, trainees, and sworn officers.

The AG Policy advises that a person testing positive "may only challenge the positive test result by having the second specimen independently tested" and that the

“first specimen will not be retested.” Id. at p. 9. Moreover, the AG Policy states that the second specimen will only be kept “for sixty [60] days following the receipt of a positive drug test result from the laboratory by the submitting agency.” Id. at p. 9.

Also, the AG policy requires that the law enforcement agency conduct testing consistent with due process:

The policy seeks to ensure that the employment rights of individual law enforcement officers are safeguarded consistent with legal principles. As a result, the policy sets forth procedures for the uniform collection, submission, and analysis of drug test specimens. The procedure further seeks to ensure the accuracy and reliability of the drug testing process. Every law enforcement agency must administer its drug testing program in a way that is fundamentally fair to individual law enforcement officers and is consistent with due process requirements.

[Id. at p. 3]

The AG Policy requires that every law enforcement agency “implement a drug testing program consistent with this policy.” On June 1, 2018, Orange adopted its revised LEDS Policy.

Bomar is a sworn law enforcement officer in the employ of Orange.

On October 24, 2019, Orange selected Bomar to undergo random drug testing. On October 29, 2019, Bomar provided a urine sample split into two specimens from a single void under Detective Nancy Ramirez's monitoring. As required by the AG Policy, the NJSTL conducted the drug testing of Bomar's urine collected by Orange.

On December 17, 2019, Orange received the testing results noting a positive test for the presence of tetrahydrocannabinol (THC). Orange commenced disciplinary actions because of the positive test resulting in Bomar's removal from employment as a police officer, effective December 17, 2019.

Although Bomar provided two samples from a single void, she did not seek second specimen testing following the positive first sample. Moreover, Bomar did not request a Loudermill hearing.

Respondent's Case:

Detective Lieutenant Paul Barbosa

Barbosa has been a member of the Orange police department for sixteen years in various positions and currently works in IA. Barbosa was familiar with Bomar given their employment in the same police department.

Orange's LEDS Procedures are available on an electronic system to distribute policies, directives, and procedures. On November 14, 2018, Bomar electronically signed her receipt of the revised LEDS Procedures.

Barbosa explained that Orange's LEDS Procedures require a ten percent sample of all law enforcement employees undergo random drug testing twice a year. Regardless of rank or assignment, each officer is assigned a number that is different for every drug testing selection process. Orange permits a representative of the S.O.A. or the P.B.A. to observe the selection process, and both the P.B.A. president and S.O.A. vice president witnessed the October 24, 2019, selection. Orange uses a computer-generated randomizer system that produces a numerical list selecting a ten percent officer sample.

Once IA selects the random numbers, the witnesses leave, and IA matches the numbers to the corresponding officer name. Bomar was one of the chosen officers.

IA did not test Bomar's urine on October 24, 2019, because she was off duty. On October 28, 2019, Bomar's first work date after the selection, IA requested Bomar come to its offices. IA waits until the officer's next shift to avoid any tampering with the results. A union representative or another officer already tested may know that Orange was conducting random drug testing, but they would not know which officers were

subject to the testing. Bomar's shift ended at 11:00 p.m., and the actual testing procedure commenced on October 29, 2019.

On October 29, 2019, Barbosa informed Bomar that she would undergo a random urine drug test. Bomar completed the medication form listing all medications she used for comparison to any positive test result to determine if any medication could account for that result. Bomar also signed the "Drug Testing Officer Notice and Acknowledgment" form explaining the testing's mandatory nature and the consequences for a positive test or refusal to be tested. Bomar selected two specimen containers, wrote her Social Security number on each, and marked one container as A and the other as B.

Barbosa summoned Detective Ramirez to IA to act as a monitor or escort for Bomar during the collection. Bomar returned to IA with the sealed samples, and Barbosa placed the specimens in the refrigerator located in the IA offices until transported to the NJSTL. IA's office is locked, and only three IA officers, including Barbosa, worked in IA at the time. IA waited until collecting all selected officers' samples before transporting the specimens to the NJSTL. Before this collection process, Barbosa contacted the NJSTL about timing, and the NJSTL advised that Orange could hold the urine samples for up to thirty days. On November 6, 2019, Barbosa brought the specimens to the NJSTL. Barbosa testified that he had no personal knowledge concerning the chain of custody after that point.

On December 17, 2019, IA received a positive drug test result for Bomar. Under Orange's LEDES Policy, a positive drug test requires immediate suspension of all duties pending final disciplinary action of termination. Barbosa personally notified Bomar of her suspension, supplying a notification explaining the suspension and revocation of police duties pending final disciplinary adjudication. Bomar surrendered her police equipment, including her service weapon. Barbosa also provided Bomar with information concerning the process to challenge the positive drug test results.

Detective Nancy Ramirez

Orange employs Ramirez as a detective. At IA's request, on October 29, 2019, Ramirez escorted Bomar to the restroom, checked the bathroom to ensure that it was clear of other occupants, and Bomar provided two urine specimens. Ramirez walked Bomar from IA to and from the restroom and witnessed Bomar turn the sealed samples over to Barbosa. Ramirez testified that she observed nothing out of the ordinary and never touched Bomar's urine samples.

Dr. Robert Havier

Dr. Havier is a forensic toxicologist and the acting director of the NJSTL and accepted as an expert in toxicology without objection.

Dr. Havier acknowledges that he was not present when the NJSTL received the urine samples or when the NJSTL conducted testing on Bomar's urine.

Dr. Havier, however, reviewed the testing reports and testified regarding the significance of the results noted and the procedures employed by the NJTSL for police officer random drug testing. Dr. Havier also finalizes the test results by reviewing the testing data, checking the officer's medication sheet, and issues a final report that goes to the requesting department. In his position and as an expert in toxicology, Dr. Havier testified in numerous cases involving NJSTL drug testing and procedures.

Dr. Havier explained the testing process and chain of custody employed by the NJSTL. Initially, the receptionist at the NJSTL receives all drug testing specimens. In this case, Jean Smith, received the specimens from Orange, noting her initials after each sample and her name at the bottom of the submission form. The receptionist checks the social security on the label, compares it to the submission form, and then enters this information into the computer system, generating a toxicology number. After that, all documentation identifies the officer by his or her toxicology number. The NJSTL assigned Bomar's sample toxicology number 19L016377 (6377).

Upon receiving the urine samples, the NJSTL stores them in a secured refrigerator. Next, the urine sample undergoes an immunoassay screening, using

antibodies to identify drugs or drug classes present in the specimen, determining whether the urine is positive for any tested drugs.

The NJSTL notes the sample at each step, which the chain of custody form reflects. The form documents that on November 6, 2019, the NJSTL received law enforcement urine samples from Orange, including Bomar's. On November 12, 2019, at 9:58 a.m., the technician removed specimen 6377 from the refrigerator. At 9:59 a.m., the technician began sample preparation of a batch of specimens, roughly twenty-five total. At 11:02 a.m., the technician prepared a urine aliquot or small portion from urine specimen 6377. Then, at 11:03 a.m., the technician placed the specimen remainder of 6377 back in the refrigerator.

Under "Screening Results by Immunoassay," Dr. Havier noted that Bomar tested positive for cannabinoids or chemical compounds in marijuana. The industry cut-off level is twenty (20) nanograms per milliliter (ng/ml), and Bomar's sample revealed 84.261 ng/ml.

If a sample tests positive on immunoassay, the NJSTL conducts a confirmatory test using a more specific technique, gas chromatography, mass spectrometry (GC/MS). The NJSTL uses an aliquot of the original sample for GC/MS to obtain a particular drug metabolite. Because the test is more specific, the industry-standard employs a lower cut-off level of fifteen (15) ng/ml. Under "Confirmation Results by Mass Spectrometry," Dr. Havier noted that Bomar again tested positive for 11-carboxy-THC (THC), with a level of 52.9 ng/ml. But under "Medical Review Officer Review," Dr. Havier noted that no medication listed on Bomar's medication sheet accounted for the positive result.

Dr. Havier also explained that the NJSTL uses industry cut-offs and procedures based on the federal government's military urine testing program. The cut-off levels are designed to accommodate passive, second-hand inhalation or incidental surface contact by handling a particular drug. In other words, only active ingestion would yield a result above the cut-off level. Yet, Dr. Havier agreed that a person could ingest a significant amount of residue resulting in a positive test,

Q: But if somebody were to handle evidence and on their hands had marijuana residue and ingested it, wouldn't that result in a positive test?

A: it depends on how much marijuana was on their hands, or ingested. By just surface contact on the hands, no. The person would have to ingest certain [amount] of drug to reach a level above fifteen nanograms on a combination.

Dr. Havier also acknowledges that the test cannot determine when or how a person ingested the drug, the amount consumed, or whether that ingestion was accidental. Still, Bomar's test result was well above the cut-off level.

The NJSTL checks the instruments used for the screening and confirmation testing in advance to ensure proper function and calibration. Here, there was an error with the instrument detecting a concentration on an unrelated immunoassay test. Dr. Havier considers this a quality control issue and highlights that the calibrations precede an actual drug screening. The instrument, Architect, was re-calibrated and was able to identify both positive and negative specimens for all drugs. The NJTSL uses blanks that contain no drug materials expected to reveal negative results and other controls fortified to show positive results. Dr. Havier's review of all the data showed the Architect's functionality and that it performed correctly. Regardless, the analysis of an individual's actual sample is based solely on the value obtained after the machine's accuracy is determined.

The NJSTL tested Bomar's sample twice on GC/MS, with positive results at 52.9 ng/ml and 53.8. ng/ml and the NJSTL reported the lower number. Regardless, both results exceeded the industry cut-off of fifteen ng/ml. Dr. Havier noted that the difference between the two tests was not unusual and well within an acceptable range.

Lastly, Dr. Havier addressed concerns regarding the refrigeration of the sample. The NJSTL performs the drug testing in batches so that a specimen may sit out for some time or more than an hour in this case. However, Dr. Havier testified that urine samples do not deteriorate in such a short period. Moreover, the delay did not alter his opinion concerning the testing's accuracy.

Appellant's Case

Natea Bomar

Bomar served as a patrol officer with Orange for thirteen years before her termination related to the charges in this case. During that time, Bomar underwent two previous random urine drug tests yielding negative results.

Bomar denied ever knowingly ingesting edibles or smoking marijuana and did not know why she tested positive. Bomar suggests that the positive test was a false positive, resulted from her contact with marijuana at work, or was through unknowing consumption.

Before providing her sample on October 29, 2019, Bomar responded to numerous patrol calls that month involving drug use, including marijuana. Bomar testified that she frequently handled drugs without gloves during these calls, placing them in bags and lockers as evidence, and was often in the presence of marijuana smoke. Her duties not only included drug-related calls but also patrolling assigned areas, apprehending, and transporting victims, suspects, or witnesses to headquarters, writing citations, completing incident reports and complaints.

Bomar's ex-fiancée used marijuana and ingested edibles, but she never participated. Yet, Bomar was unsure if she was with her ex-fiancé around October 2019.

Bomar received no training on edible marijuana products and was not involved in arrests for such products. In other words, Bomar does not know what edibles would look or taste like.

Additional Findings

When witnesses present conflicting testimonies, the fact-finder must weigh each witness's credibility and make a factual finding. Credibility is the value a fact-finder assigns to a witness's testimony incorporating an overall assessment in light of its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 474 (1999).

A fact-finder "is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions ...[that] excite suspicion as to its truth." In re Perrone, 5 N.J. 514, 521-22 (1950). Credible testimony must not only proceed from the mouth of credible witnesses but must be credible in itself. Id. at 522. Indeed, rejecting a witness's testimony, in whole or in part, rests with the trier and finder of facts and must be reasonable. Renan Realty Corp. v. Community Affairs Dept., 182 N.J. Super 415, 421 (App. Div. 1981).

Based upon the testimony provided, and my assessment of its credibility, together with the documents submitted, and my assessment of their sufficiency, I make the following additional **FINDINGS of FACT**:

I **FIND** the testimony of Orange's witnesses to be credible regarding the selection and collection procedures followed in obtaining Bomar's random drug sample. Both Barbosa and Ramirez spoke directly and professionally concerning the steps taken during the process without any hesitation. Indeed, I **FIND** the testimony of Barbosa and Ramirez demonstrates by a preponderance of the evidence that Bomar's selection for random urine drug testing and urine collection adhered to Orange's LEDS Procedures. Further, I **FIND** that Orange stored the urine sample in a controlled-access refrigerator until transporting the sample to the NJSTL.

Undeniably, Bomar was familiar with Orange's LEDS Procedures, signed the officer acknowledgement form, and underwent several prior random drug screenings as a condition of her employment. Thus, I **FIND** Bomar was aware of the consequences for a positive random drug test.

Although Bomar denies knowingly ingesting marijuana, I **FIND** a preponderance of the evidence does not support her explanation that her positive test result was due to "second-hand" smoke or handling marijuana evidence during drug raids. Bomar did not testify whether she held marijuana or was in the presence of marijuana smoke on the day of the testing. Instead, she stated that she was on drug-related calls numerous times in the month before the testing but was unsure how many times. Moreover, Bomar's responsibilities involved many tasks other than drug offenses. Similarly, I **FIND** that a preponderance of the evidence does not exist that she may have inadvertently ingested an edible marijuana product given her lack of edible knowledge without other credible details about when or how this occurred.

Regardless, I **FIND** Dr. Havier's testimony to be persuasive and credible concerning the drug analysis and the industry cut-off levels used to establish positive results. His testimony was straightforward and consistent. Indeed, I **FIND** that a preponderance of the evidence exists that the industry cut-off levels account for surface contact or passive, second-hand exposure Bomar suggests. Instead, a positive finding above the cut-off equates only to active marijuana ingestion in some form. Bomar supplies no contrary evidence as to the meaning or purpose of the industry cut-off levels. Thus, I **FIND** that a preponderance of the evidence exists that the industry cut-off level is twenty ng/ml for cannabinoids on immunoassay testing, and Bomar's sample revealed 84.261 ng/ml supporting the need for further confirmatory testing. Similarly, I **FIND** that a preponderance of the evidence supports confirmatory testing revealed a positive result for 11-Carboxy-THC, 52.9 ng/ml, above the cut-off concentration of fifteen (15.0) ng/ml. While Dr. Havier acknowledges that 52.9 ng/ml is not a high THC concentration, the result far exceeds the fifteen ng/ml cut-off. Notably, Bomar identified no medications that could explain her test result.

Bomar takes issue with the time gap between removing the urine sample from the NJSTL refrigerator and the testing. Bomar also highlights that there was a calibration error. However, no expert supports any testing abnormality interfering with the results or sample deterioration from the delay.

Instead, I **FIND** that Dr. Havier credibly and logically explained the testing delay and purpose and manner of calibrations before testing a sample. Thus, I **FIND** that a preponderance of the evidence exists that the NJSTL tests urine specimens in batches and that a time delay of more than an hour was not unusual. I also **FIND** no evidence exists that such a minimal delay would deteriorate the urine specimen or left the sample unattended or open to tampering. Further, I **FIND** that a preponderance of the evidence exists that the NJSTL runs machine calibration testing, ensuring that the device is working correctly before testing a sample, including Bomar's urine specimen. Moreover, I **FIND** that a preponderance of the evidence exists that an unrelated test for another drug material revealed an error and that no error interfered with Bomar's drug test results.

DISCUSSION AND CONCLUSIONS OF LAW

Drug Analysis

Although Bomar focuses on Dr. Havier's lack of personal involvement in the testing, such knowledge is unnecessary to provide testimony regarding the laboratory, procedures, and testing results.

Under the OAL procedural rules, expert testimony is admissible if such testimony will help the judge understand the evidence or determine a fact in issue. The judge must consider that (1) the opinions or inferences are based on facts and data "perceived or made known" to the witness at or before the hearing, and (2) the opinions or inferences are within the special "knowledge, skill, experience, or training" of that witness. N.J.A.C. 1:1-15.9(b).

Further, facts and data upon which expert witnesses reasonably rely need not even be admissible:

If facts and data are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, those facts and data upon which an expert witness bases opinion testimony need not be admissible in evidence.

[N.J.A.C. 1:1-15.9(f).]

Moreover, hearsay evidence is admissible at the OAL. Under our rules of procedure, hearsay evidence shall be admissible and accorded whatever weight the judge deems appropriate, subject to the residuum rule. N.J.A.C. 1:1-15.5. As such, some legally competent evidence must still exist under the residuum rule to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the appearance of arbitrariness. N.J.A.C. 1:1-15.5(b).

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

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

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

Notably, “[t]he reliability of . . . hearsay statements [contained in business records] is based on the regularity with which business is done, the routine quality of each transaction, the lack of motive to single out any transaction for the purpose of making an untrustworthy statement and the responsibility of each employee to make accurate and reliable statements.” State v. Moore, 158 N.J. Super. 68, 77-78 n.1 (quoting 1963 Report of New Jersey Supreme Court Committee on Evidence). The business records exception relieves the offering party from producing the witnesses

who participated in the routine activity. State v. Martorelli, 136 N.J. Super. 449, 455 (App. Div. 1975), certif. denied, 69 N.J. 445 (1976).

Dr. Javier routinely testifies about the testing procedures employed by the NJSTL, testing data, and the final report he issues regarding the drug analysis results. Dr. Javier qualifies as an expert in toxicology and serves as the Acting Director of the NJSTL where he worked for forty-one years as a forensic toxicologist.

For example, in In re Picariello, A-3270-10T2 (App. Div. July 9, 2012),² <http://njlaw.rutger.edu/collections/courts/>, cert. denied, 212 N.J. 462 (2012), the court addressed a challenge to the appointing authority's witness who was unable to verify the temperature of the urine sample in the lab. The court concluded the objection irrelevant since Dr. Javier testified concerning the procedures for handling samples at the NJSTL and the lab's testing documentation. See also In re Mark DiPasquale, Southern State Correctional Facility, CSR 00903-2018, Initial Decision (June 18, 2018), aff'd, Commission (July 18, 2018), 2018 NJ CSC LEXIS 512 (finding the evidence presented by the NJSTL through the testimony of Dr. Javier supported the positive drug test results).

Here, Dr. Javier is responsible for the final test report and that report involves his review of the testing data of the lab technician and medical review officer report addressing Bomar's medication list. It is sufficient to produce a lab supervisor, Dr. Javier, who can testify regarding the NJSTL's procedures and has adequate expertise to analyze the records and correlate them to the required protocols to ascertain that the NJSTL made these documents in the regular course of business. In performing her usual duties at the NJSTL, an employee prepared the materials and forms near her observations. The employee's standard practice is to document her activities in the submitted reports made in the regular course of the NJSTL's business. Similarly, the medical review officer had a duty to make an accurate determination in reviewing

² While R. 1:36-3 precludes a court's consideration of unpublished decisions, the OAL is not a court. See 37 New Jersey Practice, Administrative Law and Practice s.250, at Supp. p. 89, (Steven L. LeFelt) (1995) (noting that the U.A.P.R. contain no restrictions on the use of unreported Appellate Division cases and that "any authority by a court, even if contained within an unreported case, should be carefully considered by ALJs."). Nonetheless, the decision is identified to demonstrate Dr. Javier is often permitted to testify in administrative cases.

Bomar's medication list in issuing the report. Therefore, I **CONCLUDE** that the NJSTL documents are properly admitted and considered as non-hearsay evidence under the business records exception of N.J.R.E. 803(c)(6).³

The proponent of drug test results must establish the chain of custody to avoid any inference of substitution or tampering. State v. Johnson, 90 N.J. Super. 105, 113 (App. Div. 1965), aff'd, 46 N.J. 289 (1966). Moreover, the legal standard applied for the chain of custody validity is a "reasonable probability" that no tampering occurred. State v. Brown, 99 N.J. Super. 22, 28 (App. Div.) certif. denied, 51 N.J. 468, (1968). Yet, "reasonable probability" does not mean an uninterrupted chain of possession or that the appointing authority must negate "every possibility of substitution or change in condition[.]" Id. at 27. See In re Lalama, 343 N.J. Super. 560, 565-66 (App. Div. 2001) (finding that where the evidence adequately supports the reasonable probability that a sample has not been "changed in important respects" before reliable drug analysis (screening and confirmation), a court should not exclude the analysis's result from evidence). Notably, the Commission does not "require an appointing authority to pinpoint the exact cause which led to a positive drug result." In re William Shorter, Dept. of Corrections, 2018 N.J. AGEN LEXIS 859 at *8 (June 22, 2018).

Likewise, the proponent of a drug test has the burden to establish the scientific reliability of its testing procedures and equipment. State v. Miller, 170 N.J. 417, 428 (2002), citing State v. Matulewicz, 101 N.J. 27, 32 (1985). Reliability is established in three ways: "(1) the testimony of knowledgeable experts; (2) authoritative scientific literature; and (3) persuasive judicial decisions which acknowledge such general acceptance of expert testimony." Windmere, Inc. v. Int'l Ins. Co., 105 N.J. 373, 379 (1987). The standard of proof in an administrative hearing is a preponderance of believable evidence. In re Polk License Revocation, 90 N.J. 550, 560 (1982).

Here, Bomar offers no specific evidence of a relevant break in the chain of custody or evidence undermining the validity or reliability of the test itself.

³ Bomar's counsel did not object to admitting the NJSTL's records, R-8 or R-9, into evidence but did question Dr. Havier's lack of personal knowledge concerning this evidence.

Having found that Orange followed its LEDS policy concerning Bomar's urine drug testing, I **CONCLUDE** that the chain of custody is intact from the time Orange obtained Bomar's urine sample until the time Orange brought the sample to the NJSTL.

Having found that the delay between leaving the refrigerator and the testing was inconsequential to the integrity of the sample and did not alone support tampering, I **CONCLUDE** that the NJSTL's chain of custody is also established.

Moreover, the delay in presenting the specimen to the NJTSL a week after Orange collected Bomar's sample or the testing by the NJTSL a week after that does not suggest an invalid result. Significantly, the AG Policy requires the NJTSL to maintain possession of the second specimen for sixty days after a positive result. Thus, I **CONCLUDE** that a specimen, stored in a controlled-access refrigerated storage area, is still a viable specimen for at least sixty days.

Similarly, I found that the NJSTL ran machine calibration testing to ensure that the device worked correctly before testing Bomar's sample and that any error did not impact the validity of Bomar's result. The testing methods are routinely accepted by court and other administrative decisions. Therefore, I **CONCLUDE** that Dr. Havier's testimony and NJSTL records established the procedures used by the NJSTL, including chain of custody, the scientific basis for both immunoassay screening and GC/MS confirmation testing, the reliability of the scientific equipment used to test Bomar's sample, and the results of that testing.

Discipline

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, including removal, disciplinary demotion, and suspension or fine no greater than six months. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2. Indeed, "[t]here is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998).

In appeals concerning major disciplinary action, the appointing authority bears the burden of proof. N.J.A.C. 4A:2-1.4(a). The burden of proof is by a preponderance of the evidence, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), and the hearing as to both guilt and the penalty is de novo, Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

Although administrative hearings follow a relaxed evidentiary standard, there must be substantial or sufficient, credible evidence in the record to support the charges. N.J.S.A. 52:14B-10(a); In re Taylor, 158 N.J. 644, 656-57 (1999). The evidence must be to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). One can describe preponderance as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses but with greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

"Conduct unbecoming a public employee" is an elastic phrase encompassing conduct that adversely affects the morale or efficiency of a governmental unit or that tends to destroy public respect for governmental employees and confidence in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998). The complained-of conduct and its attending circumstances need only "be such as to offend publicly accepted standards of decency." Ibid. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)).

Misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). Suspension or removal may be justified where the misconduct occurred while the employee was off duty. In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

Police officers and correction officers are held to a higher standard of conduct than other citizens due to their community roles. In re Phillips, 117 N.J. 567 (1990).

Indeed, adherence to this high standard of conduct is an obligation that a law enforcement officer voluntarily assumes when entering public service. Emmons, 63 N.J. Super. at 141-42. In Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966), the court explained a stricter standard of conduct applies to police officers because of the nature of the position:

[A] police officer is a special kind of public employee. His primary duty is to enforce and uphold the law. He carries a service revolver on his person and is constantly called upon to exercise tact, restraint, and good judgment in his relationship with the public. He represents 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 .

...
[ibid.]

Significantly, “[e]very police officer understands that an officer who uses or sells drugs is a threat to the public.” Rawlings v. Police Dep’t of Jersey City, 133 N.J. 182, 189 (1993). As a police officer, Bomar represented law and order to the public and must present an image of personal integrity. Drug use among law enforcement personnel is conduct that adversely affects a governmental unit’s morale or efficiency and tends to destroy public respect in governmental services. Therefore, I **CONCLUDE** that a preponderance of the evidence exists that Bomar engaged in conduct unbecoming.

Orange also charged Bomar with violating N.J.A.C. 4A:2-2.3(a)(12), “Other sufficient cause.” Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye. Often, this charge addresses violations of policies and procedures established by the employer, such as Orange’s LEDS Policy. Bomar tested positive for the THC metabolite following her random drug test on October 29, 2019, and Orange prohibits law enforcement personnel from using illegal drugs or controlled substances. Bomar’s conduct violates Orange’s LEDS Policy and implicit standard of good behavior one would expect from a police officer. Therefore, I **CONCLUDE** that a preponderance of

the evidence exists that Bomar engaged in other sufficient cause by violating Orange's LEDS policy.

Penalty

A progressive discipline system has evolved in New Jersey to provide employees with job security and protect them from arbitrary employment decisions. West New York v. Bock, 38 N.J. 500 (1962). However, where the underlying conduct is egregious, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. See Henry v. Rahway State Prison, 81 N.J. 571 (1980).

Indeed, an "[u]nrefuted positive test result for a controlled substance use has uniformly been held by the Commission to warrant removal from employment for law enforcement employees." See In re Lopez, CSV 08205-08, Final Decision (Feb. 24, 2010), <http://njlaw.rutgers.edu/collections/oal/>; See also Migliaccio v. Trenton City Dep't of Public Safety, CSV 4498-98, Initial Decision (April 7, 1999), aff'd, Merit Sys. Bd. (May 18, 1999), <http://njlaw.rutgers.edu/collections/oal/> (upholding the termination of a police officer because of positive drug testing for marijuana use). Undeniably, Bomar need not admit or confirm the circumstances that led to her positive THC result to warrant her removal.

Under the AG Policy and Orange's LEDS Policy, when a sworn law enforcement officer tests positive for illegal drug use, the only penalty is termination from employment upon final disciplinary action. Undeniably, the AG Policy applies to municipal police departments. Rawlings, 133 N.J. at 192. Bomar knew that she had to pass random drug urine screens as a condition of her continued employment with Orange. Bomar acknowledged that she understood that if her urine test result tested positive for illegal drug use, Orange would terminate her work as a police officer.

Here, a review of the Bomar's past disciplinary history is unnecessary given the mandatory termination under the AG Policy and Orange's LEDS Policy for positive illegal drug testing. Regardless, it is clear that removal is the proper penalty based on the egregious nature of the offense and because Bomar, as a law enforcement officer, is held to a higher standard than other public employees. See Moorestown, 89 N.J.

Super. at 566. Therefore, I **CONCLUDE** that Orange's removal of Bomar was appropriate.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that all of the charges against Bomar be **SUSTAINED**, and Orange's action terminating Bomar be **AFFIRMED**.

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 is authorized by law to make a final decision in this case. 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 under 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.



March 22, 2021

DATE

NANCI G. STOKES, ALJ

Date Received at Agency:

March 22, 2021

Date Mailed to Parties:
ljb

March 22, 2021

APPENDIX

Witnesses

For Petitioner:

Natea Bomar

For Respondent:

Det. Lt. Paul Barbosa

Det. Nancy Ramirez

Dr. Robert Havier

Documents

For Petitioner:

- P-1 Preliminary Notice of Disciplinary Action dated January 9, 2020
- P-2 Preliminary Notice of Disciplinary Action dated March 26, 2020
- P-3 City of Orange Police Department Law Enforcement Drug Screening Policy and Procedures
- P-4 Attorney General's Law Enforcement Drug Testing Policy, 2018
- P-5 Computer signature list noting receipt of the law enforcement drug screening document
- P-6 Random drug test numerical selection and match-up to specific officers dated October 24, 2019
- P-7 Officer Notice and Acknowledgement form dated October 29, 2019
- P-8 New Jersey State Toxicology Laboratory, law enforcement drug testing custody and submission form
- P-9 Not in evidence
- P-10 Not in evidence
- P-11 Not in evidence

For Respondent:

- R-1 Attorney General Law Enforcement Directive Number 2018 – 2
- R-2 Toxicology report dated December 3, 2019
- R-3 Immediate suspension notice dated December 17, 2019
- R-4 Weapon surrender form
- R-5 Surrender of City property form dated December 17, 2019
- R-6 Letter from Police Director Warren dated December 17, 2019
- R-7 Letter from Det. Lieut. Barbosa to Natea Bomar dated December 18, 2019
- R-8 New Jersey State Toxicology Lab records
- R-9 New Jersey State Toxicology Lab chain of custody record