STATE OF NEW JERSEY

In the Matter of Phillip Lau
City of Millville, Department of Parks and Public Property

CSC DKT. NO. 2019-3675
OAL DKT. NO. CSV 08910-19

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: AUGUST 6, 2021 BW

The appeal of Phillip Lau, Truck Driver, City of Millville, Department of Parks and Public Property, removal effective June 5, 2019, on charges, was heard by Administrative Law Judge Tama B. Hughes, who rendered her initial decision on June 30, 2021. Exceptions were filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting of August 4, 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 Phillip Lau

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 4TH DAY OF AUGUST, 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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Trenton, New Jersey 08625-0312

Attachment

**State of New Jersey**
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. CSV 08910-19
AGENCY DKT. NO. 2019-3675

**IN THE MATTER OF PHILLIP LAU, CITY OF MILLVILLE, DEPARTMENT OF PARKS AND PUBLIC PROPERTY.**

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**Kevin D. Jarvis,** Esq., for petitioner, Phillip Lau (O'Brien, Belland & Bushinski, L.L.C., attorneys)

**Alysia Remaley,** Esq., for respondent, City of Millville, Department of Parks and Public Property (Marmero Law, L.L.C., attorneys)[1]

Record Closed: January 28, 2021 Decided: June 30, 2021

BEFORE **TAMA B. HUGHES,** ALJ:

## STATEMENT OF THE CASE

Phillip Lau ("Lau" or "petitioner") appeals the City of Millville, Department of Parks and Public Property ("respondent" or "City") sustained charges of violation of N.J.A.C. 4A:2-2.3(a)(10) (Violation of Federal regulations concerning drug and alcohol use by and

[1] On behalf of the respondent, the hearing in this matter was initially handled by James Grace, Esq. of the firm Grace, Marmero, & Associates. However, prior to the last hearing date, Mr. Grace left the firm and the matter was assigned to Ms. Remaley, who appeared on the last hearing date and provided the written summation on behalf of the respondent.

testing of employees who perform functions related to the operation of commercial motor vehicles); City of Millville Personnel Policies, § 46-21- Article IV (Alcohol and Drugs); and violation of the Last Chance Agreement (LCA), and the disciplinary action taken – removal.

## PROCEDURAL HISTORY

The City issued a Preliminary Notice of Disciplinary Action (PNDA) on April 3, 2019, charging violation of N.J.A.C. 4A:2-2.3(a)(10); City of Millville Personnel Policies § 46-21 – Article IV; and violation of the last chance agreement. A disciplinary hearing was held on April 22, 2019, and thereafter, a Final Notice of Disciplinary Action (FNDA) was issued on June 11, 2019, sustaining all charges. The disciplinary action taken was removal, effective June 5, 2019.

Petitioner timely appealed the matters to the Civil Service Commission and the matter was transmitted to the Office of Administrative Law (OAL) on July 2, 2019, as a contested matter. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The hearing took place over a series of dates (February 27, 2020, September 4, 2020, September 8, 2020, September 9, 2020, and November 16, 2020) and the record was left open to allow the parties to submit post hearing briefs.[2] Upon receipt of the summation briefs, the record closed on January 28, 2021.

Due to restrictions/limitations imposed as a result of the coronavirus and the temporary inability to access office/administrative resources as well as the delay in receiving transcripts which caused a case backlog, three extensions were granted to complete and send out the Initial Decision. See Orders dated March 4, 2021, April 28, 2021 and June 10, 2021.

[2] The cover page for the transcript of September 4, 2020 hearing date has the wrong date listed. It lists a hearing date of June 26, 20201 rather than the September 4, 2020 hearing date.

## FACTUAL DISCUSSION

**Evelyn Balogun, M.D., MPH, MBA, FACOEM (Dr. Balogun)**, testified on behalf of the respondent, as an expert in the areas of Internal Medicine, Occupational Medicine and as a Medical Review Officer (MRO). (R-16, Page 3.) She is the Medical Director for Inspira Hospital (Inspira) and as part of her responsibilities, is the MRO. According to Dr. Balogun, Inspira has contracts with various employers in the community to conduct, among other things employee physicals, assessment of work related injuries and drug testing review.

She reviewed Lau's April 17, 2018, screening report and was the doctor who certified that he tested positive for cocaine. (R-13, Page 83.) Dr. Balogun went on to explain that testing at the lab goes through two different steps. An initial screen – Enzyme Linked Immunosorbent Assay (ELISA) and a gas chromatograph. For the initial screening, the Department of Transportation (DOT) has a set cutoff for different drugs that are being tested. If the levels are below the cutoff, then the lab will certify that the test is negative. If the levels are above the cutoff, then the second screening, the gas chromatograph is done. If the second level of testing is below the cutoff, then the test if negative. Anything above is a positive.

According to Dr. Balogun, the DOT has certain protocols in place for the testing of its employees which includes the training of the lab personnel from the collection process through to the certification. The DOT also requires that collection be lab based – no instant testing is allowed - with all testing conducted through "collection". The collection must also be observed by someone of the same gender. There is also a chain of custody that is followed which is in triplicate and requires that the donor sign off on the chain of custody.

In describing the chain of custody process, Dr. Balogun stated that when a collection is obtained, it is sealed and split into two tubes – Tube A and Tube B. The collector signs that they are the individual who did the collection. When the specimen is taken to the lab, they look for the donor's name and the collector's name. If the collector

is not identified, the lab will fill out an affidavit. The lab will run the test on one of the tubes and keep the second tube frozen and sealed. When the results come in, she contacts the donor with the results from whatever tube was tested. If the donor agrees with the results, no further action. If the donor disagrees, a "split test" is done. A split test requires that the second tube, which is still sealed, be sent to a separate lab and that lab will either validate or invalidate the findings from the first test. If the split test comes back and it does not confirm the first test, then the lab could potentially lose their certification.

Dr. Balogun is aware that on April 2, 2019, Lau was sent to Inspira for a follow-up drug test. Since Lau worked for the City of Millville, all of DOT's testing protocols were instituted. As the MRO, she reviewed his test and ultimately certified the results as a "refusal" which the DOT interprets as a "positive" test. Dr. Balogun went on to note however, that before a "refusal" determination is made, certain protocols are required to be followed – which in Lau's case, was the protocol for "shy bladder syndrome".

In discussing the April 2, 2019, drug screening, Dr. Balogun stated that Lau was provided three hours within which to provide a specimen. He failed to do so which automatically triggered the shy bladder syndrome protocol. After the test at Inspira, Lau went to a separate facility – Med Express, and took a test. (R-10.) In review of the results of the test performed at Med Express, she noted that it was a rapid test which was contrary to the DOT guidelines because it lacked the required cutoffs, and it also did not follow the DOT's stringent chain of custody guidelines.

The following day, on April 3, 2019, she sent Lau a letter which outlined what steps he had to take to confirm that he had a valid medical reason for his inability to provide the necessary sample.[3] (R-9.) The letter additionally provided a flowchart or breakdown of the analysis procedure and different conclusions that could be reached.

[3] Dr. Balogun testified that when a donor is at the testing site, they are provided fluid and given three hours to provide a specimen. It they cannot, the employer is informed, and the shy bladder protocol is implemented. The protocol allows the donor to go to his/her own provider to conduct a physical exam or they can go to Inspira who would conduct the exam. If the donor goes to their own provider, the provider is required to attest that the donor has a medical condition that precludes the donor from providing a urine sample. It is within the MRO's discretion to accept or reject the providers medical explanation. If the MRO accepts the provider' explanation, then the test will be cancelled. If it is not accepted, the test is marked a "refusal".

Lau chose to have a follow-up examination by one of Inspira's doctors – Dr. Cadell. According to Dr. Balogun, either at the exam or shortly thereafter, Lau provided Dr. Cadell with a note from his primary care provider, Dr. Davis. The note was on a prescription form, dated April 3, 2019, and stated: "Phillip has a longstanding struggle with anxiety and depression. He currently is on medicine. Phillip has difficulty urinating in public". (R-11.) Dr. Balogun testified that she found Dr. Davis's note to be insufficient to explain why Lau could not provide a urine sample. She was required to establish that Lau's condition was a chronic condition which is backed up with supporting documentation. Instead, what was provided suggested that he was being treated for longstanding mental health issues. She also found Dr. Davis's note contradictory to what Lau had told her which was that he had had life-long issues urinating in public and using urinals and that he had never spoken to his doctor about it because he was embarrassed. He also informed her that he had never received any treatment for the issue. When she spoke to Lau, she had asked to speak to his doctor explaining to him that it would be in his best interest to do so, however, he would not provide consent for a peer-to-peer review.

By letter, dated December 23, 2019, Dr. Balogun validated her findings. (R-16.)

On cross-examination, Dr. Balogun was questioned whether she was board certified in psychology or psychiatry. In response she stated that while she was trained in psychiatry, she was not board certified.

When asked what tests were monitored or observed, and which ones were not, she stated that only the June 2018, and April 2019, tests were directly observed.[4] Dr. Balogun went on to state that the DOT has guidelines of when an examination must be directly observed and when it is not required. Examples of when a direct observation would be required could include, among other things: if the donor demonstrates unusual

[4] According to Dr. Balogun's December 23, 2019, correspondence, Lau underwent testing on the following dates: April 18, 2018 (positive), June 13, 2018 (negative), July 23, 2018 (negative), September 4, 2018 (negative), November 30, 2018 (negative), April 2, 2019 (positive). (R-16.)

behavior during the collection process; if the donor gives a specimen that has temperature out of range; if a specimen comes back and it is diluted or adulterated.[5]

She acknowledged that Lau's April 12, 2018, test results did not come back as "adulterated" or "substituted". However, the test did come back as a "dilute" and in accordance with DOT protocol, the next steps were required to be taken. Dr. Balogun went on to state that she spoke to Lau about the April 12, 2018, test results and went through the DOT protocol. Lau declined having the "split" tested and did not challenge the findings or chain of custody.

When asked, Dr. Balogun could not say why the some of the tests were direct observation and others were not. While she is familiar to some extent with DOT regulations, she could only speculate on the parameters of disciplinary action that the employer could impose for a refusal to take a test.

Dr. Balogun was also questioned about the rapid test that Lau took on April 2, 2019, at Med Express. (R-10.) Specifically, the concerns she raised about chain of custody. In response she stated that she is familiar with Med Express and their chain of custody practice and forms. If a result is submitted without a chain of custody form, then no chain of custody was done. In review of the test result sheet from Med Express, no chain of custody form was submitted therefore, based upon her experience with the facility, no chain of custody was done. She could not comment on Med Express's in-house chain of custody process and acquiesced that Lau could have handed his specimen directly to the lab tech who tested it immediately.

Regarding training, while she testified earlier about the DOT training requirements of all individuals who are in the collection process, she could not definitively say that everyone had received the required training. Dr. Balogun was also questioned about her earlier testimony that rapid tests did not always match the DOT cutoffs. Specifically, whether she had actual knowledge that the rapid test that Lau had obtained did not match

[5] When questioned, Dr. Balogun agreed that for a direct observation test, the donor is typically required to take their jacket off and take everything out of their pockets. The water in the bathroom is shut off and blue dye is placed in the toilet. The collector is required to watch the person as they give the sample.

the cutoffs. In response she stated that she did have such knowledge pointing to the fact that an adulteration strip was stuck in the specimen which could cause contamination. This in turn calls into question the accuracy of the test. She went on to state that a lab test is the gold standard.

While the negative test from Med Express did not change her mind on her final determination, it did cause her to question if Lau had a physical inability to provide a sample which was why she asked to speak to his doctor before she made a determination. She also reviewed Dr. Cadell's evaluation notes and spoke to him about his findings and the script that was sent over by Lau's physician - Dr. Davis. (P-19 and R-11.)

When asked if a history of depression and anxiety could contribute to an individual's ability to give a sample, she stated that individuals who suffer from depression and anxiety routinely come into the facility and have no problems giving a urine sample in an observed setting. While the facility does not see individuals with shy bladder syndrome often, she unequivocally stated that this was the first time that someone told her, as Lau did, that they could not provide a specimen because someone was observing them. Dr. Balogun went on to state that under DOT guidelines, a reviewer should not accept an explanation of situational anxiety - which was Lau's case. Lau informed her that he has anxiety but was not being actively treated - however, his anxiety affected his ability to give a sample. On this last point, she again reiterated that Lau's statements to her were inconsistent with his doctor's note. She did not recall discussing Dr. Cadell's findings with Lau.

When asked how long Inspira has had the contract to perform employee testing for the DOT, she stated that it was before she came on staff which was in 2014. Before Inspira, the entity who conducted the urine testing was Med Express.

In going through her December 23, 2019, letter to John Carlton, Esq., Dr. Balogun was asked to reconcile her statement that Lau was able to provide a specimen without issue for the June 13, 2018, test but further on in her report, she quoted Lau as stating that it was the most difficult thing he had ever done. (R-16.) In response she clarified her comments stating that "without issue" meant that he was physically able to give the

sample. Her comments about what Lau had told her were just that – she was quoting what he told her. She did take his comments into consideration which was why she wanted to speak to his doctor. She wanted to see if there was a history of documentation. Dr. Balogun went on to state that she cannot cancel a test based upon a statement by the donor, other evidence is required. Per the DOT protocol, pre-existing medical documentation is required.

Dr. Balogun acknowledged, when asked, that the report that she had prepared in this matter was done so in anticipation of the hearing. She does not normally prepare a report on "refusals".

When asked if Dr. Caddel was a qualified MRO, Dr. Balogun stated that he was a qualified MRO, but did not work in that capacity at Inspira. He was hired as a staff physician in the Department of Occupational Health. She was the only MRO for Inspira. According to Dr. Balogun, Dr. Caddell joined the Inspira staff three years prior and it was her responsibility to oversee what he does. In that regard, she speaks to him on the average of once or twice a week depending on the case.

She agreed that if the test had been "cancelled", as opposed to a "refusal", there would have been no employment repercussions to Lau. She was aware of Dr. Caddell's examination under the shy bladder protocol and his determination that Lau had underlining anxiety which was the reason he could not provide a sample. She did not adopt his finding because he did not conduct a higher level of fact finding, nor did she reference Dr. Caddell's findings in her report. Dr. Balogun also noted that she could not, under DOT guidelines, allow situational anxiety as a basis to cancel a test. The language under the guidelines was clear that a high degree of probability was required which in Lau's case, was not met. She acknowledged that at no time did she contact Shapiro to let her know about Dr. Caddell's findings. Dr. Balogun clarified this last point by saying that the review process is never discussed with the city. What is provided to the city is the final conclusion. In reaching her final determination in Lau's case, all things were taken into consideration.

When questioned whether it would have been important for the Tribunal to be informed of Dr. Caddell's findings when questioned on direct, she stated that it was not. At the end of the day, Dr. Caddell made an assessment based upon certain information available at the time. This information included his personal observation and examination of Lau, and Dr. Davis's unverified note. (P-19 – Bate Stamp 000177.) When she spoke to Dr. Cadell about his findings, there appeared to be gaps of information that needed to be addressed. One such gap was the authentication of Dr. Davis's note which Dr. Caddell had not done. Given that fact, she as the MRO attempted to "close the gaps" when she requested permission from Lau to speak to Dr. Davis. Lau refused to provide permission. Therefore, no authentication occurred. She disagreed with Dr. Caddell's findings for a couple of reasons – one of which was the fact that no authentication of documentation occurred. Another reason was from a safety-sensitive standpoint, once an individual is deemed unable to provide a specimen for a medical condition, it should rise to the level of confirmation of the condition because if not, in perpetuity, that individual will never have to take a drug test again. For someone who works in a safety-sensitive position, this is significant. Therefore, before anyone signs off, it must be clear that there is a verified and validated basis to do so.

Dr. Balogun was also asked whether she ever spoke or directed Dr. Caddell to speak to Dr. Hammer, the psychologist who Lau was seeing. In response, she stated that she had not.

**Pamela Shapiro (Shapiro)**, the Personnel Officer for the City, testified on behalf of the respondent. She started with the City in 2015 and as part of her job responsibilities, she handles the hiring of employees, employee relations issues, training, and employee counselling among other things.

According to Shapiro, when an employee is hired, they are given a copy of the city of Millville Employee Handbook and undergo orientation training. (R-14.) The handbook is lengthy and is updated every two or three years. Employees are required to read and understand their responsibilities under the employee handbook. The handbook provides information and policies and procedures on a myriad of subjects such as alcohol, drugs, illness, conflicts of interest, etc. Additionally, depending on the employees' job, they may

also be subject to other rules and regulations – depending on their job. For example, if an employee holds a Commercial Driver's License (CDL), they would be subject to the DOT's rules and regulations.

She is familiar with Lau and the department that he worked in – streets and roads. Lau had been with the city for over fourteen years and at the time all this happened, he was a truck driver and held a CDL. As a holder of a CDL, Lau was subject to the rules and regulations of both the City and the DOT.

According to Shapiro, the city has a contract with Inspira Occupational Health (Occupational Health) to conduct, among other things, pre-employment physicals, workers compensation issues, random drug/alcohol selection for the CDL drivers. Inspira is the only provider that the city uses. With regard to the random testing, on a yearly basis, she sends Inspira a list of the City's CDL drivers. Inspira in turn has a random selection process wherein they will send Shapiro a list of four drivers to send to Occupational Health for their random CDL testing. With no exception, all testing must take place at Inspira. Failure on the employees part to get tested at the designated facility, will result in disciplinary action.

In discussing the handbook, Shapiro cited to Article Four of Chapter forty-six of the handbook which outlined the city's drug and alcohol policy. The policy is a zero-tolerance policy with the caveat that employees are not prohibited from the lawful use and possession of properly prescribed medication. It is the employee responsibility, however, to let the City know what medications they are on. The handbook also states that employees with a CDL, are subject to random drug and alcohol testing. When Occupational Health provides her with the names of the employees who were selected to get tested, she notifies their supervisor to let them know that the employee was required to report for testing later in the day.

In Lau's case, over his tenure with the City, he had been tested several times. In April 2018, during a random drug test, he tested positive for cocaine. When this occurred, Lau was immediately suspended, his union representative was notified as was the City's attorney. As part of the DOT regulations, Lau was also referred to the Substance Abuse

Provider (SAP) which is a substance abuse program for CDL drivers. When he completed the SAP program, Lau was tested by that facility and when he was ready to return to work, he was again tested by Occupational Health. Prior to returning to work, Lau signed a LCA wherein he agreed to periodic random drug testing for a period of one year. (R-6.) The agreement also stated that if he failed to submit to testing, he would be subject to immediate termination.

Shapiro went on to testify that less than a year later, on April 3, 2019, a PNDA was issued against Lau for refusing to take the random drug test required under the LCA. The PNDA charged Lau with violation of N.J.S.A. 4A:2-2.3(a)(10) violation of federal regulations concerning drug and alcohol use violation of the Personnel Policy §46-21 – Article IV (alcohol and drugs) and violation of the LCA. The disciplinary action sought under the PNDA was removal.

She is familiar with Occupational Health's drug testing procedures. An employee is given up to three hours to submit a urine specimen. If they cannot do so within that time frame, the DOT views it as a failure to submit and deemed a positive test. In Lau's case, on April 2, 2019, he was required to submit a specimen to Occupational Health, however, failed to do so in the time frame allotted. Shapiro was aware that hours later, he went to Med Express, a facility that the city had not used for several years, where he provided a specimen. The test was a five-panel drug test as opposed to a ten panel. A five-panel test looks for amphetamines, cocaine, marijuana, PCP and opiates. A ten-panel test looks for amphetamines, methamphetamines, cocaine metabolites, marijuana metabolites, opiates, oxy and barbiturates. (R-10.)

According to Shapiro, under DOT rules, when an employee has not provided a sufficient specimen amount, the MRO must be notified and thereafter a medical analysis of the situation must be undertaken. This was done in Lau's case. Dr. Balogun was notified and after conducting her review, determined that because he could not provide a specimen, per DOT guidelines, it is deemed a positive test. The positive result violated the LCA and was a violation of both the DOT and city's rule and regulations.

On cross-examination Shapiro testified that when she started with the City, she played a role in changing occupational health providers which was when the City stopped using Med Express and retained Inspira for its occupational health services. There were several reasons for the change among which was the ability to have all services offered by the same provider, and the fact that employees were complaining about the level of customer service – or lack thereof, at Med Express. She did not know how long Med Express had been the City's provider prior to that.

Shapiro was asked about the process of how an employee is randomly selected to get drug tested and who notifies the employees. In Lau's case, she notified his immediate supervisor, Wayne Gressman (Gressman) who in turn told Lau that he was required to submit to testing. Prior to April 2018, Lau had never tested positive, nor did he have any other disciplinary incidents. When he was told to get tested in April 2018, he did not avoid getting tested.

In going through the LCA, she acknowledged that one of the requirements was that Lau attend the SAP program which he had done voluntarily, prior to entering into the agreement, and had successfully completed. She also acknowledged that Lau also submitted to random drug testing per the agreement – all of which were negative. At no time did he refuse to submit to a test.

In discussing the drug testing that occurred when he returned to work, Shapiro stated that prior to returning to work, on June 13, 2018, he submitted a urine sample. She did not know if Lau was monitored during the test or if he had difficulty providing a sample. The test came back negative. (R-13.) The same with the testing done on July 23, 2018, September 4, 2018, and November 30, 2018. According to Shapiro, she called Occupational Health to schedule the tests in question, however, unfortunately failed to properly inform them that the tests were follow-up tests to the LCA. Therefore, none of the tests were observed as required.

Shapiro went on to state that for the April 2, 2019, test, she called Grafman to make sure Lau was working that day and when informed that he was, told him to send Lau over to Occupational Health for testing that day. She then scheduled an appointment

for the test later in the day. At no time did she hear that Lau hesitated or refused to get tested. She remembered receiving a call from Occupational Health (Lynette Reeves) who informed her that Lau was unable to provide a sample despite drinking additional water. She was contacted again after the three hours were up that Lau had been unable to provide a sample and had left the facility. When questioned, she acknowledged that later that same day, she had received an email from Lau's union representative, Chris Finch (Finch), who advised that Lau had had difficulty providing a sample during his return to work test which was observed. Finch also stopped by her office the following day and dropped off Lau's Med Express testing results. (R-10.) According to the report, Lau went to Med Express two hours after he had left Inspira. She sent the results to their attorney, however, could not recall whether Dr. Balogun had also received a copy.

According to Shapiro, both she and the business administrator reached out to Dr. Balogun the following day who informed them that Lau was to reach out to Dr. Caddell to schedule an appointment to undergo an analysis for shy bladder. She was aware that if Dr. Balogun had determined that the testing should be "cancelled", under DOT guidelines, the results would not be considered a "positive". She acknowledged if that were the case, then there would not have been a violation of the LCA or the DOT rules and regulations. She also acknowledged that under the DOT rules and regulations, an employer is not required to terminate an employee if they test positive for drugs.

**Philip Lau (Lau)**, testified that he was employed by the City for over fourteen years and holds a CDL. Since he has held a CDL, he has submitted to random drug and alcohol tests and has never refused to take one. Prior to 2018, he never tested positive on any of the tests. During his tenure with the City, the City used several different drug testing facilities – one of which was Med Express. Most recently, the City had used Inspira.

In explaining the random test process that the City used, Lau stated that he would receive a call from his supervisor who would instruct him to immediately go and get tested. Upon arrival at the testing site, he was required to take his jacket off and empty his pockets. The water in the toilet was dyed blue. Up until April 2018, all tests were "unobserved".

Lau went on to state that for as long as he could remember, he had an issue with urinating in public places. When he was sent to take a random test in April 2018, he did not hesitate to report for testing, which was unobserved, and provided a urine sample which came back positive for cocaine. Upon receiving the results, he immediately drove to Seabrook House and enrolled in the Intensive Outpatient Program (IOP). As part of the program requirements, he was subject to random drug and alcohol testing – all of which were negative. Upon successful completion of the program, he had Seabrook forward his records to the City and his primary care doctor of fourteen years – Dr. Davis. (P-14.)

After completing his treatment with the Seabrook House, he went back to work with the City, under a "Last Chance Agreement". (P-3.) The agreement noted that he had undergone weekly urine drug screens while participating in the Seabrook program and also required that he undergo random drug testing with the City in accordance with the City's policies and procedures for the remainder of his employment. According to Lau, the City's policies at the time did not require "observed" testing, just random testing. Additionally, there was nothing in the LCA that stated that the testing would be "observed". (R-6.)

Lau went on to state that prior to returning to work, he was required to undergo an observed urine test. It took almost the entire three hours for him to provide a sufficient specimen – a fact that he shared with his supervisor, Gressman and his union representative, Finch given the ramifications had he failed to provide a sample. Despite the difficulty in providing the sample, he did not seek treatment because in his mind, there was no condition to be treated – he didn't know that one existed. He also did not believe that any subsequent test would be observed. Once he returned to work, he had to undergo several random tests, none of which were observed until the April 2, 2019, test.

On April 2, 2019, Gressman called him and told him around lunch time to report for a random test which he did around two o'clock. He did not find out until he went into the exam room that the test was going to be observed. According to the nurse, the test was going to be observed because it was a follow-up test. When he informed the nurse that he may not be able to provide a sample, the nurse told him that he would be okay.

Lau went on to state that Dr. Cadell went into the bathroom with him to observe the test – standing approximately two feet away. His proximity made it difficult for him (Lau) to provide a sample. After about two minutes, Dr. Cadell told him to exit the bathroom and he was provided a couple of bottles of water and placed in a room by himself so that other patients could be seen. About twenty minutes later, he again tried to provide a sample with Dr. Cadell observing - to no avail. Over the course of three hours, he tried multiple times to give a sample - all without success.

After the three hours were up, which was around five o'clock, he left the facility. Prior to leaving, he overheard the nurse calling Shapiro and informing her what had occurred what the next steps would be for him would be which included seeing a urologist.

When he left the facility, he drove directly to Quest Diagnostics to see if he could get a drug test. Unfortunately, he needed a prescription and was turned away. Given the fact that he still had his state vehicle, which he had driven to get tested earlier that day, he drove back to the yard, dropped the vehicle off and got his own car. He then drove home, picked up some money and went to Med Express – the facility that the City had previously used for its testing. This was about six o'clock in the evening.

Upon arrival at the facility, he picked the type of test (five panel) that he wanted and submitted a sample. The sample came back "clean". The reason he picked a five-panel test as opposed to a ten-panel test was because of the cost. According to Lau, he wanted to get the test done immediately to show the City that he had nothing to hide and that he was "clean". The only reason he could not provide a sample earlier was because he was being observed.

In describing how the test was done, Lau stated that he filled out forms upon arrival at Med Express and had to provide his photo identification. When he went back, he had to remove his jacket and empty his pockets. The sink in the room was disabled and there was dye in the toilet. He was left in the room alone to provide the sample. When he was done, he handed the sample directly to the nurse. The nurse held it up, shook it in front of him and said it was negative for everything. This was all done in front of him. When

he was done, the nurse handed him a copy of the results which showed that he was negative for all of the substances that he had been tested for. Upon receiving the results, he gave them to Finch. From start to finish he was at Med Express for approximately ninety minutes.

The following day he received a call from Shapiro and the City Administrator, Regina Burke, who informed him that he had an appointment with Occupational Health later that day. When he asked if the appointment could be postponed because he had an appointment scheduled with Dr. Davis in the morning, he was told no. He was able to keep his appointment with Dr. Davis who increased his dosage of Lexapro – his anxiety medication and wrote him a note. (P-13.) According to Lau, he had been on anxiety medication since 2016.

Lau went on to state that he asked Dr. Davis to provide a note after explaining to him what had happened the day prior. He had previously discussed his difficulty of urinating in public with him after he took the return-to-work which was an observed test.

When he went to Occupational Health that afternoon, he saw Dr. Cadell. He explained to Dr. Cadell his history of having difficulty urinating in public. He believes that Dr. Cadell saw how genuine he was and after examining him, told him that he needed to get some help with the problem. Dr. Cadell, however, did not provide a referral to a doctor or seek permission to view his medical records. It did not occur to him to tell Dr. Cadell that he had gotten a test done at Med Express after he had left the night before, nor did he provide him with the note from Dr. Davis. Five days later, on April 8, 2019, he returned to see Dr. Cadell and gave him Dr. Davis's note and a psychologist's business card - Dr. Hammer, whom he had started seeing. (P-13.) He went back to see Dr. Cadell for a couple of reasons. First, to let Dr. Cadell and the MRO know that he had followed up with his primary care doctor and had also sought additional treatment. Second, the hope that Dr. Cadell/MRO would follow-up with his health care providers although he had not expressly asked Dr. Cadell to reach out to his doctors. This testimony subsequently changed on cross-examination when stated that he had in fact requested Dr. Cadell to reach out to Dr. Hammer.

Lau went on to testify that on April 17, 2019, he received a call from Dr. Balogun. The conversation started with Dr. Balogun explaining to him about DOT regulations and how rigid they were and not subject to interpretation. Dr. Balogun then went on to state that due to his failure to provide a urine sample, it was considered a refusal to test. He explained to her the problems that he had had during his return to work test, however, she reiterated that the last test would be considered a refusal. The call lasted ten to fifteen minutes. He was present when Dr. Balogun had testified and disagreed with her statement that she informed him that the test would be deemed a refusal at the end rather than the beginning of their conversation.

According to Lau, when Dr. Balogun informed him that his inability to provide a sample would be deemed a refusal he was stunned. This was particularly shocking given his interaction with Dr. Cadell whom he felt understood and was sympathetic to his condition. He asked Dr. Balogun if she had read Dr. Cadell's report to which she responded with derision - "I'm the medical review officer. I make the final decision." When he questioned the basis for her decision, she stated, "I'm basing it on a lot of things". To him, it was apparent that Dr. Balogun had already made up her mind that it was a refusal – despite his explanation to her that he had had issues with urinating in public since childhood. At one point Dr. Balogun did ask him if he wanted her to reach out to Dr. Davis – however the way she said it was humiliating, so he responded by saying what was the point since she had already made up her mind.

At no time did Dr. Balogun advise him to go see a urologist or his family doctor. Nor did she request to see any of his medical record or seek an authorization to obtain them.

According to Lau, he started seeing Dr. Hammer, a psychologist in April 2019, who diagnosed him with generalized anxiety disorder (GAD) with specific phobia, and in July 2019, Dr. Lee, a urologist, who diagnosed him with an enlarged prostate. On this last note, Lau stated that he had had previous prostate issues in 2015 and was diagnosed at that time with acute prostatitis. (P-15 – Bate Stamp 000116.)

On cross-examination, Lau acknowledged that one of the requirements of maintaining a CDL and his continued employment with the City, was the requirement that he undergo periodic drug testing.

He was aware that his failure to submit to the random testing could result in a revocation of his CDL and/or employment with the City. He was also aware that under the DOT guidelines, there were different testing methods – however, he could not recall if one of those mechanisms was an observed test. He went on to state that over the tenure of his employment with the City, none of the drug testing was observed until after he had tested positive in April 2018. His first "observed" test occurred in June 2018, when he was required to take the return-to-work test.

Prior to returning to work, he attended IOP through the Seabrook House. He had never before attended a treatment program. Throughout the course of the program, he was subject to testing, however, none of the testing was observed. He believed that the test was a five-panel rapid test for drugs and alcohol but could not say that with certainty. Lau acknowledged that upon discharge from Seabrook House program, he was provided a discharge plan which included physician recommendations. (P-14 – Bate Stamp 000045 – 46.) One of the recommendations was attendance at a twelve-step recovery program. When asked if he attended the program, Lau stated that he chose not to attend the program despite it being recommended by the physicians at the Seabrook House.

Law was also asked to walk through the return-to-work test which was an observed test. In response he went through the procedures prior to taking the test – emptying pockets, taking his coat off, etc. It took him almost three hours to submit a sufficient specimen amount during which he consumed several bottles of water to help him urinate. Lau went on to state that it wasn't a question of him having to urinate – rather, inability to do so when a person is in the room with him.

When asked if he told Dr. Davis of his difficulty in giving a specimen, Lau stated that he had. After he was discharged from the Seabrook House, he had a routine visits with Dr. Davis who commented that he had received records from the facility. According

to Lau, he explained what had occurred and also spoke to him about his difficulty in providing a sample during the return-to-work test.

Lau was also questioned when he first learned that the return-to work test would be observed. In response he stated that per the DOT guidelines, in order to return to work, he had to have a substance abuse counsellor oversee his treatment. He sought the services of a Sheila Green from Journey Into Wellness. After he had completed his treatment at the Seabrook House. He met with her twice – once when he was in the IOP program and the second time when he had completed the program. She was the individual who informed him that in order to return to work, he had to get tested and that the test would be observed.

Lau was also asked why, if he saw Dr. Davis on April 3, 2019, in the morning, and Dr. Cadell in the afternoon, he did not give Dr. Cadell the note from Dr. Davis. He responded by stating that he wanted to get the psychologist information so that he could hand Dr. Cadell and the MRO, all the information at once. When asked about the contradiction in his earlier testimony wherein he refused to give Dr. Balogun permission to speak to Dr. Davis, Lau stated that it was his belief that Dr. Balogun had already made up her mind.

He was also asked about Dr. Davis's diagnosis from his examination on April 3, 2019 – specifically the fact that there was no notation about shy bladder syndrome. Lau acknowledged that there was nothing noted in Dr. Davis records as it related to shy bladder syndrome. He also acknowledged that while Dr. Davis had diagnosed him with anxiety disorder, unspecified and other bipolar disorder, there appeared to be no comment or care plan associated with either of those diagnosis. He also agreed that when he saw Dr. Davis in December 2018, there was no such diagnosis.

In questioning Lau about his visit to Dr. Davis on June 8, 2018, five days prior to his back-to-work test, he acknowledged that he did not discuss his concerns with Dr. Davis about having an observed test. He also acknowledged that there was nothing in his medical records which reflected the fact that he had had issues with shy bladder since childhood. In going through all of the testing that was done after he had returned to work,

Lau acquiesced that none of the tests were rapid tests and all tested more than five categories.

**Matthew Caddell, D.O. (Dr. Caddell)**, an Occupational Health Staff Physician for Inspira, testified on behalf of Lau. (P-20.) He has been at Inspira since 2017. Among other certifications, he is a certified MRO and has retained such certification for the past twenty years. He is familiar with shy bladder protocol and has in the past evaluated individuals using the protocol. In describing the protocol, Dr. Caddell explained that for testing purposes, an individual is required to submit forty-five cc's of urine. If they cannot submit the requisite sample amount, the worker is given three hours within which to do so and given forty ounces of water to facilitate the process. If, after the three hours are up, the individual still cannot provide the requisite amount, the shy bladder process starts. The collector notifies the designated employee's representative (DER) of the situation. The DER then coordinates with the MRO to set up a shy bladder exam.

In Lau's case, he was the physician assigned to handle the examination. As part of his examination, he is tasked with determining whether there was a structural issue that interferes with voiding. In men, it could be due to an enlarged prostate. There could also be a medical reason that interferes with voiding such as the individual being a diabetic or on dialysis. There could also be a psychological issue called "paruresis" or an anxiety issue.

Dr. Caddell went on to state that he has acted in the capacity of a referring physician several times. He could not say for sure whether the MRO overseeing the matters in those cases had ever overturned his determination. Likewise, when he was acting in the capacity of an MRO, he could not recall overturning a referring physician's determination. He went on to note, however, that his style as an MRO was different.

He is familiar with Lau having been the referring physician who examined him under the shy bladder protocol. He had never met Lau prior to April 2, 2019. Dr. Caddell recalled that Lau attempted three times to provide a urine sample and was very distraught in not being able to do so.

In his opinion, Lau's efforts appeared to be genuine. Lau was provided three hours to provide a sample, however, was unable to do so. Lau at one point informed him that he suffered from an anxiety condition to which he (Dr. Caddell) recommended that he follow-up with his primary care doctor. Apparently, Lau did follow-up with his primary doctor – Dr. Davis because the following day he brought in a note from Dr. Davis which stated that Lau had an anxiety condition. The note appeared to be legitimately from Dr. Davis. Lau also provided him with some additional medical history – informing him that he (Lau) was on medication for his anxiety. Subsequent to his evaluation on April 3, 2019, on April 8, 2019, Lau also brought him a business card from Dr. Hammer a psychologist whom he had begun seeing. This was all reflected in his report. (P-18, Bate Stamp 000177.) Based upon his examination of Lau and the totality of information provided to him, it was his opinion that Lau had a pre-existing disorder – generalized anxiety, which contributed to his inability to void.

He was aware that Lau had gone to Med Express after leaving Inspira on April 2, 2019, however, noted that the results from that facility were not acceptable under the DOT guidelines because the DOT does not allow for rapid screening tests, and Med Express's collection process did not follow DOT guidelines. When asked if two hours – which was the time frame between leaving Occupational Health on April 2, 2019, and going to Med Express, was sufficient time for a chemical to dissipate from a person system, he stated that it depends. More specifically, it depended on the type of chemical/drug. Some could dissipate that quickly, others would not.

Dr. Caddell testified that once he examined Lau and made his findings, he sent them to Dr. Balogun. He went on to state that Dr. Balogun, as the MRO is required to investigate a report, such as his, further, to cross every "T" and dot every "I". Therefore, it was her obligation to contact the specialist, the primary care doctor, etc. It is the MRO's responsibility to make the ultimate determination. He went on to state that a "cancelled" test under the federal model is a big deal which is why the MRO goes through great lengths to verify everything. As the MRO, he too would have contacted the individual patient and informed them of the examining physician's findings and would have also wanted to speak to the individual's primary care physician. He did not recall speaking to Dr. Balogun about his report.

On cross-examination, Dr. Caddell was questioned whether Lau ever informed him that he suffered from prostatitis at the time of evaluation to which he said no. Dr. Caddell went on to state that prostatitis is a physical condition. Paruresis – or shy bladder on the other hand, is a psychological condition.

In going through his report, Dr. Caddell was asked about the notation "will await additional information from the primary care physician" – specifically what information was he waiting for. In response he stated that he wanted to see legitimate medical documentation from Dr. Davis that Lau had an underlying anxiety depression disorder which would have precluded him from providing a sample on April 2, 2019, and April 3, 2019. He believed that the note from Dr. Davis on the prescription pad sufficed. He agreed, as the MRO, he would have liked to have seen more complete medical records. As the referring physician, he was under time restrictions to examine Lau and get his report out. However, the MRO is not under the same time constraints and has more time to verify the information provided.

**Dr. Howard Hammer, Psy.D. (Dr. Hammer)**, a licensed clinical psychologist was qualified and testified as an expert in psychology. (P-17.) According to Dr. Hammer, he, over the course of his career, has treated approximately a dozen patients who suffered from shy bladder which was usually due to a GAD. While not licensed to prescribe medication, he interacts frequently with his patient's primary care physicians as it relates to medications being prescribed as part of the treatment regimen.

He first started treating Lau on April 4, 2019, when he came to him and reported, among other things, anxiety, depression, fatigue, irritability, and anxiety. His primary care physician, Dr. Davis, had prescribed Lexapro for him. After interviewing him, he realized that Lau also suffered from autonomic arousal – which includes muscle tension, increased blood pressure and vascular constriction – all of which is a product of anxiety. He felt that anxiety was more of an issue with Lau than his depressed mood and he diagnosed Lau with GAD and specific phobia. An example of specific phobia would be unrealistic fears in specific situations.

In discussing the similarities between anxiety and depressed mood, Dr. Hammer stated that both can present with sleep disturbance, worrying, rumination, difficulty concentrating, fatigue to name a few. According to Dr. Hammer, it was not uncommon for primary care physicians to confuse depression with anxiety because of their similarities.

As part of his initial evaluation process, he had Lau fill out a Biographical Information Form. One of the main reasons cited by Lau for seeking treatment was because he "can't urinate in public place". (P-18, Bate Stamp 000033.) He also had Lau sign a record release so that he could review his prior medical records which included his evaluation by Dr. Caddell and Dr. Davis's treatment records.

When Lau came to see him on his second visit, April 15, 2019, he disclosed that he had historically had difficulty urinating in public. Recently, this caused an issue at work when he was required to provide an observed urine sample and he could not. Lau explained to him that his failure to provide a sample would be considered a second offense, because he had failed the drug test the year prior after testing positive for cocaine. (P-18, Bate Stamp 000028.) According to Dr. Hammer, he did not find this belated disclosure by Lau significant. What he found significant was that Lau was self-medicating with alcohol to deal with his anxiety disorder. The cocaine usage was secondary and used by Lau to counteract the effect of the alcohol.

In review of Dr. Davis records, he found that Dr. Davis's findings were consistent with his. In one of his treatment notes, he saw that Dr. Davis started treating Lau in 2016 for anxiety and depression and put him on Lexapro. Dr. Davis's records also showed that Lau was referred to a urologist at some point in time for an enlarged prostate which could also make urinating difficult. Dr. Hammer went on to state, however, that putting aside an enlarged prostate, GAD alone could have prevented Lau from providing a urine sample.

He reviewed Dr. Balogun's report and disagreed with her determination that Lau did not have a preexisting condition which impeded his ability to provide a sample. He was also aware that another physician, the referring physician Dr. Caddell had concluded

otherwise. Dr. Caddell had concluded that Lau's inability to provide a sample was due to his pre-existing condition of GAD – a determination that he agreed with.

On cross-examination Dr. Hammer acknowledged that his January 13, 2020, report was prepared in contemplation of litigation. He also acknowledged that among the records reviewed to prepare the report were Dr. Davis's medical records on Lau.

In review of Dr. Davis's evaluation records, dated December 11, 2019, Dr. Hammer was questioned about Lau's "Active Problems" identified in the records. Specifically, whether any of the active problems (Pure Hypercholesterolemia, Peptic Reflux Disease, Apnea and Dysthymic Disorder) were associated with and/or related to GAD or shy bladder syndrome. In response he stated that Peptic Reflux could possibly be related to GAD. He did not believe that Lau suffered from Dysthymic Disorder believing that Dr. Davis's findings in that regard may have been erroneous and the symptoms observed were really related to GAD. He acknowledged that nowhere on the December 11, 2019, report under "Active Problems", was there a finding of GAD, phobia or shy bladder syndrome.

Next reviewed were Lau's records from Dr. Davis, dated April 3, 2019, the day after Lau had failed to submit a urine sample and the day before he (Dr. Hammer) initially saw him. He acknowledged that the assessment by Dr. Davis of "Anxiety Disorder – unspecified" and "Other Bipolar Disorder" were not referenced in the December 11, 2019, record yet the prior year's evaluation, dated December 10, 2018, it was.

In questioning him about Dr. Davis's report, dated December 10, 2018, Dr. Hammer agreed that Lau did not disclose any issue with "feeling down, depressed, or hopeless" – however, he noted that that section addressed depression not anxiety. He also agreed that under the assessment section of the report, the active problems listed Hypercholesterolemia and Dysthymic Disorder. (P-16, Bate Stamp 126 – 127.)

Dr. Davis's evaluation, dated June 8, 2018, was also reviewed. (P-16 – Bate Stamp 128 – 129.) Dr. Hammer again agreed that Lau did not report "feeling down, depressed or hopeless" on the depression screening. He also acknowledged that Dr.

Davis assessed Lau with having "pure hypercholesterolemia – unspecified" and "Major depressive disorder, single episode, unspecified" but that it was not noted on the Continuity of Care evaluation, dated December 11, 2019. Along this same vein, Dr. Hammer agreed that the Continuity of Care evaluation, dated December 11, 2019, failed to report multiple evaluation dates ranging from October 2013 through to December 2017.

Regarding his testimony that Lau was self-medicating with alcohol and that the cocaine was being used to counterbalance the effects of alcohol, Dr. Hammer acquiesced that such usage would impact an individual's mental health as it relates to anxiety and depression as well as other physiological effects. He went on to state that he saw alcohol as a response to anxiety and an effort to self- medicate. He did believe that the usage of cocaine was due to dependency or an addiction.

Dr. Hammer was also questioned about the diagnosis that he had arrived at based solely on his initial appointment with Lau. Specifically, whether he had sufficient information at the time to make the diagnosis's that he had, and his conclusion that the Lexapro was prescribed for anxiety. In response he stated that he indeed felt that he had sufficient information to formulate his conclusions and had been in the business long enough to know when someone is lying to him. He was aware that Lau sought treatment with him after he was unable to provide the mandatory urine specimen that was required under his job. However, he believed that the incident was the trigger not the reason that Lau sought treatment. Dr. Hammer went on to state that he continues to see Lau every four weeks and that he is doing well.[6]

**Brian Davis, D.O. (Dr. Davis)**, a physician with the Cumberland Family Medicine group, testified that he started seeing Lau as a patient in or around July 2013. In review of his medical records, Dr. Davis stated that when a patient comes in for a visit, they are first interviewed by the nurse who then reports what the patient informed them in the

[6] At the close of cross-examination, the testimony of Dr. Hammer was not captured on tape and the record had to be recreated. The Tribunal provided proposed re-creation of the record based upon hearing notes that were created simultaneous with the hearing and presented the same to the parties for review. The parties were provided the option to edit the re-creation or have Dr. Hammer return for additional testimony. Both parties agreed to utilize the Tribunal's recreation with the caveat by petitioner's counsel that on redirect, Dr. Hammer in going through Dr. Davis's December 11, 2019, Continuity of Care Report did in fact identify multiple entries of anxiety and depression. (Tribunal Exhibit – 1.)

"nurse note" section of the report. The doctor reviews what the nurse has reported and after consulting with the patient, either contemporaneously adds his/her findings to the report while the patient is still in the room or shortly thereafter. He always tries to capture significant findings/concerns of the patient in the report. After he adds his findings/concerns and/or assessment, he electronically signs the report.

According to Dr. Davis, when he saw Lau on July 26, 2013, he required a check-up and a refill of his cholesterol and heartburn medication. While he did not recall the visit itself, Lau's chart did not reflect any issues with anxiety, depression, drugs, alcohol or problems with urinating. (P-14, Page 47.) This was the case with the next series of visits (10/28/13; 4/28/14; 3/3/15; 4/6/16).[7]

On Lau's next appointment on August 31, 2016, one of the complaints that he presented with was anxiety. According to Dr. Davis's notes Lau reported that he had had a similar episode twenty years prior. Dr. Davis noted that this appeared to be a single episode of anxiety which Lau reported to be aggravated by lack of sleep and issues at home. Dr. Davis's notes from the visit did not reflect any concern about urinary issues or alcohol dependency. His assessment of Lau at the time of evaluation was Major Depressive Disorder, single episode, unspecified. (P-14, Page 62.) He also prescribed Lau Xanax for the anxiety. There was nothing reflected in his office notes that indicated that Lau had a concern about testing positive if a drug screen was required for work.

On Lau's next visit, dated October 5, 2016, the "nurse note" commented that the patient (Lau) expressed concern with depression and had stopped taking the Xanax. (P-14, Page 63.) His assessment of Lau at the time of evaluation was Major Depressive Disorder, single episode, unspecified. He prescribed Lexapro, which does not typically show up on a drug screening and recommended to Lau that he see a therapist. According to Dr. Davis, he does not know if Lau followed up on his recommendation. Even if he had, therapist do not always provide the referring doctor their reports. According to his

[7] Lau's visit on October 6, 2015 was significant for the complaint of a urinary tract infection. At the time, Lau was taking the antibiotic Cipro - a broad based antibiotic. Dr. Davis diagnosed Lau with acute prostatitis and prescribed a twenty-day treatment of Cipro. If no relief at the end of the Cipro regime, Lau was recommended to go see a urologist. Dr. Davis did not know if Lau went to see a urologist however the Cipro prescription was not renewed.

chart notes, Lau did not report at the time of his visit, any concerns with alcohol dependency, or issues with urinating in public.

When he next saw Lau in November 2016, Lau reported that he was doing well on the Lexapro. He did not report any issue with alcohol dependency or problems with urinating in public. His assessment at the time of the visit was "Major depressive disorder, single episode, unspecified, doing better, having some sexual side effects." (P-14, Page 65.)

Over the next couple of visits - June 2, 2017, December 8, 2017, Lau reported that he felt good with regard to the depression and anxiety and did not express any concerns with urinating in public. (P-14, Pages 67 – 70.)

On Lau's next appointment on June 8, 2018, he reported that he was currently attending out-patient services at Seabrook and that he had tested positive for cocaine for urine. (P-14, Page 71.) Dr. Davis stated that he did not recall if he had the Seabrook records at the time of the appointment, but he acknowledged receiving them and reviewing them at some point in time. (P-14, Pages 39 – 46.) At no time prior to Lau's June 2018, appointment, was he made aware that Lau had an issue with dependency. According to Dr. Davis, the notes of the appointment did not mention any issues with difficulty in urinating in public.

Lau's next appointment was on December 10, 2018. Nothing was reported in the file notes that Lau reported difficulties with urinating in public nor did Dr. Davis recall having a conversation on the issue. At the time of the December 2018, visit, he diagnosed Lau with Dysthymic Disorder. (P-14, Page 74.) The same with the following visits of March 7, 2019, and April 3, 2019, in that there was no reference in the chart notes of Lau having difficulty urinating in public. (P-14, Page 75 and P-15, Page 152.) As with the other visits, Dr. Davis reiterated that he did not recall any specific conversations from Lau's prior appointments. If something of significance was discussed at the appointment, it was captured in the file notes. On April 3, 2019, the concerns raised by Lau were depression. He did not recall any conversation about failing a drug test at work, having

difficulty urinating in public, or a request for an assessment for shy bladder – which Dr. Davis stated he was unfamiliar with.

In discussing the prescription note that he wrote on April 3, 2019, wherein he stated that Lau had a long standing struggle with anxiety and depression and that he had difficulty urinating in public, Dr. Davis stated that at the appointment, Lau must have asked him to write the prescription note on his behalf so he did. (P-13.) He did not recall the conversation surrounding the basis for writing it. According to Dr. Davis, writing notes such as the one that he did for Lau, was not something that he regularly did.

When he next saw Lau on May 3, 2019, he was there for a follow-up visit. (P-14, Page 77.) There was nothing reflected in the file notes as it relates to Lau having difficulty with urinating in public. The same with the following visit on June 14, 2019. (P-14, Page 79.) Notably, during the last visit, the assessment dealt with right knee pain, nothing as it related to anxiety or depression. According to Dr. Davis, since June 2019, he has seen Lau a couple of times, however, he did not recall during any of those visits having a discussion with Lau about urinating in public. Nor does he know whether Lau saw a urologist or a therapist for that matter.

On cross-examination, Dr. Davis was asked if that was his handwriting on the April 3, 2019, prescription, and if he would write a prescription note that was inaccurate. In response he stated that, yes, it was his handwriting and "no", he would not write something that was inaccurate. When asked if Lau over the years had mentioned that he had issues with urinating in public, he responded by stating that it was possible, but it was not in his progress notes.

**Discussion:**

It is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. Credibility is the value a fact finder assigns to the testimony of a witness, and it contemplates an overall assessment of the witness's story considering its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); See In re Polk, 90 N.J. 550 (1982). 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 (1999). A fact finder is expected to base decisions on credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837 (1973). A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super 282, 287 (App. Div. 1958).

I found all of the medical testimony to be credible, however, give great weight to the testimony of Dr. Balogun and Dr. Cadell.

Dr. Balogun was knowledgeable in her field of expertise and testing protocols. She was methodical in her review and analysis of Lau's inability to provide a specimen and consistent in her testimony of the steps she took to determine whether a valid medical basis existed which precluded Lau from providing a specimen.

I also found Dr. Cadell to be both candid and credible as it relates to his evaluation of Lau. Dr. Cadell testified that under a shy bladder protocol, time was of the essence to get the employee into the office and evaluated. He was candid in his testimony that he believed that Lau truly tried to provide a sample and was frustrated and upset that he could not. He was equally as forthright when he stated that if he were the MRO instead of the evaluating doctor, he would have required more complete medical records. This was not possible to him as the evaluating doctor due to the time constraints under the guidelines. However, as the MRO, the time constraints were not as stringent.

Dr. Davis was also credible in his testimony. He testified that when a patient comes in, he tries to capture significant findings in his report which is completed if not on the date of the examination, within a day or so after. He was candid in his response that when he saw Lau on April 3, 2019, the concerns raised by Lau were depression – not about failing a drug test at work or difficulty urinating in public. Dr. Davis also acknowledged that none of Lau's prior records reflected such an issue.

Dr. Hammer also testified in this matter. I found him to be credible in his testimony but cannot give significant weight to his findings. When Dr. Hammer first evaluated Lau, he did not have the benefit of reviewing Lau's prior medical records. Despite this fact, he diagnosed Lau with GAD and specific phobia. According to Dr. Hammer, his findings were based upon his years of experience and ability to determine when an individual is being untruthful. While he subsequently reviewed Dr. Davis records prior to writing his report in anticipation of the hearing, he continued to maintain the position that Lau had a pre-existing condition of GAD which in turn prevented him from providing a urine sample. This finding does not appear to be consistent with Dr. Davis's records that pre-date April 2019.

With the above in mind, after consideration of the testimony and documentary evidence presented in this matter, I **FIND** the following as **FACT**:

Lau was hired by the City in June 2004, as a seasonal worker, however, in November 2004, was hired as a full-time worker.

While employed with the City, Lau held the title of Truck Driver and possessed CDL.

Under DOT's guidelines and the City's policies and procedures, all employees holding a CDL are required to submit to random drug and alcohol testing. Lau was provided a copy of the City's handbook as it related to the zero-tolerance policy for drug and alcohol in the workplace and the requirement for drug/alcohol testing.

On April 12, 2018, Lau was randomly selected to submit to drug and alcohol testing. The test was conducted by Inspira – the facility that the City had, for several years, contracted for Occupational Health. Prior to that, the City utilized Med Express for its testing site.

The drug screening tested for nine drugs – marijuana, cocaine, amphetamines, opiates, 6-monoacetylomorphine, hydrocod/hydromorph, oxycod/oxymorph, PCP and

ecstasy. (P-6.) The test was not a rapid test and followed stringent chain of custody procedures.

Lau tested positive for cocaine. The tests results were conveyed to the City as well as Lau's union representative. Upon notification of the results, Lau was immediately suspended. Lau, upon hearing the results, voluntarily enrolled himself in the Seabrook House IOP.

On or about April 18, 2018, a PNDA was levied against Lau alleging violations of N.J.A.C . 4A:2-2.3(A)(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, and violation of City Policy 46-21 – Alcohol and Drugs.

On May 22, 2018, in lieu of termination, Lau and the City entered into a "LCA". Through this agreement, among other things, Lau was required to enroll in, and continue in a drug treatment program until he successfully completed the same. Upon completion of his drug treatment program, he was to submit to monthly drug testing for a period of one year that would be scheduled in his employer's sole discretion. Failure to submit to the testing would result in his immediate termination. The agreement further stated that Lau would be subject to the drug testing policies and procedures that were already in place by the City for the length of his employment.

In June 2019, Lau successfully completed the Seabrook House IOP. Before he was allowed to return to work, however, he was required to take a urine test. Lau was aware, prior to the test, that it would be an "observed" test.

On June 13, 2018, Lau went to the testing site and provided a sample. While it took him almost the entire time allotted, he was able to provide a sufficient specimen amount to be tested. The test came back negative, and Lau returned to work. Notably, the test, as with all the tests conducted by Occupational Health, were not rapid tests. All tests were done in a controlled environment, with stringent chain of custody protocol in place. All tests were ten panel.

Despite having difficulty providing a sample, Lau did not disclose the issue to his primary care doctor – Dr. Davis or seek medical attention for the issue. Over the ensuing months, Lau was required to submit several random drug tests. Due to miscommunication/oversight on the part of the City, none of the tests were "observed". All tests came back negative.

On April 2, 2019, Lau was told to report for a random test to Occupational Health. He left work mid-afternoon and reported to the facility. Upon arrival, he was informed that the test would be an observed test. Dr. Cadell was the Occupational Health doctor who oversaw the test. While he was given three hours within which to provide a sample, Lau was unable to do so, and left the facility.

When Lau left the facility without providing a specimen, Occupational Health immediately notified Shapiro and Dr. Balogun of what had occurred. Later that same day Lau's union representative, Finch, sent Shapiro an email advising her that Lau had previously had difficulty providing a sample during his return-to-work test which was also observed.

When Lau left Occupational Health, he went to Quest diagnostics to get a private test. Unable to get tested at that facility, he went to Med Express where he obtained a five-panel rapid test. The test came back negative. Lau provided a copy of the test results to Finch, who, the following day, provided a copy to Shapiro.

Med Express is not an authorized facility to conduct drug/alcohol testing for the City. The test that was done was a five panel rapid test. It did not have the stringent chain of custody controls in place that were required under the DOT guidelines and the City's requirements.

On April 3, 2019, Shapiro and the Business Administrator spoke with Dr. Balogun who advised that Lau was to reach out to Dr. Cadell to undergo an analysis for shy bladder.

Under DOT protocol, a donor is provided three hours within which to submit a urine sample. Failure to do so within that time period automatically triggers the shy bladder syndrome protocol. Under the protocol, the donor is required to undergo an evaluation to determine if there is a medical condition which precludes the donor from providing a sample. The donor can go to their own provider for an evaluation, or a doctor provided by Occupational Health. If there is a valid medical reason why a sufficient sample cannot be provided, the test would be cancelled. If not, then the test is deemed a refusal to test.

It is the MRO (Dr. Balogun), who ultimately determines if the medical condition "has not, or with a high degree of probability could not, have precluded him from providing a sufficient amount of urine, the test will be declared a refusal to test." (R-9.) Lau was provided a copy of the protocol and informed that he was required to be evaluated. Lau chose to be evaluated by Dr. Cadell.

Prior to seeing Dr. Cadell on April 3, 2019, Lau was seen by his primary care physician - Dr. Davis. Dr. Davis diagnosis/assessment on that date was: "Anxiety disorder, unspecified". Under "comments", Dr. Davis noted: "double dose of Lexapro, to consider adding mood stabilizer like Abilify." There were no comments and/or notation about difficulty providing a urine sample or shy bladder.

At the time of the visit, Dr. Davis provided Lau with a note from a prescription pad which stated: "Philip has a long standing struggle with anxiety and depression. He is currently on medicine. Philip has difficulty urinating in public."

While Lau has been seeing Dr. Davis for several years, none of the records reflect that Lau had difficulty urinating in public or suffered from shy bladder syndrome. Nor did the records reflect a referral for treatment of the issue. I do not **FIND** that Lau was ever evaluated for or treated for shy bladder syndrome prior to April 2, 2019.

When Lau met with Dr. Cadell later that same day, he was again unable to provide a sample despite being given three hours within which to do so. At no time did Lau inform Dr. Cadell that he went to Med Express the night before and was tested; provide him a copy of the test; or provide Dr. Cadell a copy of the note from Dr. Davis. Dr. Cadell

examined Lau and found no abnormal findings. In his report, he noted that Lau informed him that "he would discuss this matter further with Dr. Davis and provide the necessary "shy bladder" documentation.

Five days after he was evaluated by Dr. Cadell, Lau returned to Dr. Cadell's office and presented him with Dr. Davis's note - the same note that he had in his possession on April 3, 2019. Lau also gave Dr. Cadell a business card from Dr. Hammer. Lau did not provide any "additional documentation" from Dr. Davis as he had told Dr. Cadell. Nor did he go back to see Dr. Davis until the following month. Lau did not request Dr. Cadell to reach out to either doctor, sign a waiver for release of information, or provide his medical records to either Dr. Cadell or Dr. Balogun.

Based upon his observations, examination, and Dr. Davis's note, Dr. Cadell determined that Lau had a pre-existing condition – anxiety disorder, which reasonably contributed to his inability to provide a sample.

Dr. Balogun reviewed Dr. Cadell's report and spoke to him about his findings. As the MRO, she was required to establish that Lau's condition was a chronic condition which is backed up with supporting documentation. When she reached out to Lau to discuss DOT guidelines and obtain additional information, one of the things he told her was that he had had lifelong issues with urinating in public but had never spoken to his doctor about it or sought treatment. This statement was inconsistent with Dr. Davis's note which stated that Lau had a life- long difficulty urinating in public – the inference being that Dr. Davis was aware of the issue. To reconcile the inconsistencies, she requested to speak to Dr. Davis for a peer-to-peer review and to also verify that Dr. Davis had in fact authored the note. Lau refused her request.

With no supporting documentation to demonstrate that Lau had a medical condition which precluded him from providing a sufficient specimen, on December 23, 2019, determined that the test was a refusal.

Under the LCA, Section 7(b) failure to submit to testing will result in immediate termination. Under Section 8, if the employee (Lau) tests positive for illegal drugs or is found to have violated the City's drug and alcohol policies, he shall be terminated.

## LEGAL ANALYSIS AND CONCLUSION

Public employees' rights and duties are governed and protected by the provisions of the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, and the regulations promulgated pursuant thereunder. N.J.A.C. 4A:1-1.1 et seq. However, public employees may be disciplined for a variety of offenses involving their employment, including the general causes for discipline as set forth in N.J.A.C. 4A:2-2.3(a). An appointing authority may discipline an employee for sufficient cause, including failure to obey laws, rules and regulations of the appointing authority. N.J.A.C. 4A:2-2.3(a)(12). If sufficient cause is established, then a determination must be made on what is a reasonable penalty.

In an appeal concerning major disciplinary action, the burden of proof is on the appointing authority to show that the action taken was justified. N.J.S.A. 11:2-21 and N.J.AC. 4A:2-14(a). The burden is to establish by a preponderance of the competent, relevant, and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk License Revocation, 90 N.J. 550 (1982).

Here, respondent sustained charges against the petitioner for violation of N.J.A.C. 4A:2-2.3(a)(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); City of Millville Personnel Policies, § 46-21- Article IV (Alcohol and Drugs); and violation of the Last Chance Agreement (LCA). The Incident(s) giving rise to the charges stated: "On April 2, 2019, Lau was randomly selected to provide specimen testing in accordance with DOT regulations. On said date, Lau failed to submit to testing while at the facility."

Per DOT guidelines and the respondent's policy, all CDL holders are required to undergo random drug testing. Additionally, under the LCA, in addition to adherence to the normal drug testing policies and procedures of the City, for a period of one year from

the date of his successful completion of a drug treatment program, was required to undergo monthly drug testing.

Given the fact that the testing was supposed to be follow-up testing, all of petitioner's test when he returned to work for a period of one year should have been "observed" tests. See 49 CFR 40.67. However, due to miscommunications between Shapiro and Occupational Health, that did not occur. As such, only the April 2, 2019, test was observed. It was during this test, that petitioner was unable to provide a sufficient sample.

When an employee is unable to provide an insufficient amount of urine, there are protocols that are implemented in accordance with 49 CFR 40.193 In pertinent part, § 40.193 states:

> b. As the collector you must:
>
> > (2) Urge the employee to drink up to 40 ounces of fluid, distributed reasonably through a period of up to three hours, or until the individual has provided a sufficient urine specimen, whichever occurs first. It is not a refusal to test if the employee declines to drink, and inform the employee of, the time at which the three-hour period begins and ends...
> >
> > (4) If the employee has not provided a sufficient specimen within three hours of the first unsuccessful attempt to provide the specimen, you must discontinue the collection, note the fact...and immediately notify the DER.
>
> c. As the DER, when the collector informs you that the employee has not provided a sufficient amount of urine, you must, after consulting with the MRO, direct the employee to obtain, within five days, an evaluation from a licensed physician, acceptable to the MRO, who has expertise in the medical issues raised by the employee's failure to provide a sufficient specimen.
>
> > (1) As the MRO, if another physician will perform the evaluation, you must provide the other physician with the following information and instructions:

(i) That the employee was required to take a DOT drug test, but was unable to provide a sufficient amount of urine to complete the test;

(ii) The consequences of the appropriate DOT agency regulation for refusing to take the required drug test;

(iii) That the referral physician must agree to follow the requirements of paragraphs (d) through (g) of this section.

d. *As the referral physician conducting this evaluation, you must recommend that the MRO make one of the following determinations:*

*(1) A medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of urine. As the MRO, if you accept this recommendation, you must:*

(i) Check "Test Cancelled" (Step 6) on the CCF; and
(ii) Sign and date the CCF.

(2) There is not an adequate basis for determining that a medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of urine. As the MRO, if you accept this recommendation, you must:

(i) Check the "Refusal to Test" box and "Other" box in Step 6 on Copy 2 of the CCF and note the reason next to the "Other" box and on the "Remarks" lines, as needed.
(ii) Sign and date the CCF.

e. *For purposes of this paragraph, a medical condition includes an ascertainable physiological condition (e.g., a urinary system dysfunction) or a medically documented pre-existing psychological disorder, but does not include unsupported assertions of "situational anxiety" or dehydration.*

f. *As the referral physician making the evaluation, after completing your evaluation, you must provide a written statement of your recommendations and the basis for them to the MRO. You must not include in this statement detailed information on the employee's medical condition beyond*

what is necessary to explain your conclusion.

g. If, as the referral physician making this evaluation in the case of a pre-employment test, you determine that the employee's medical condition is a serious and permanent or long-term disability that is highly likely to prevent the employee from providing a sufficient amount of urine for a very long or indefinite period of time, you must set forth your determination and the reasons for it in your written statement to the MRO. As the MRO, upon receiving such a report, you must follow the requirements of § 40.195, where applicable.

h. As the MRO, you must seriously consider and assess the referral physician's recommendations in making your determination about whether the employee has a medical condition that has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of urine. You must report your determination to the DER in writing as soon as you make it....

[emphasis added]

Failure to provide a sufficient amount of urine when directed without an adequate medical explanation is deemed a refusal. See 49 CFR 40.191(a)

Petitioner asserts that he did not violate N.J.A.C. 4A:2-2.3(a)(10) by violating 49 C.F.R. § 40.193 and that the respondent lacked just cause to discharge him. It is his position that the MRO erred in concluding that his inability to produce a sufficient specimen was a "refusal to test". Petitioner relies upon Dr. Cadell findings as the referring physician, the Med Express results, Dr. Hammer's findings, and Dr. Davis's note in support of this position. Petitioner further asserts that Dr. Balogun's actions, throughout this matter, were, for lack of a better term, evasive and obstructive, and her testimony lacked credibility.

Petitioner also contends that the testimony and evidence presented in this matter do not establish a violation of the LCA. He cooperated in the drug testing requirement and had a valid medical basis for his inability to provide a sufficient specimen. When he could not provide a specimen at Inspira, he immediately went to Quest Diagnostics and Med Express to get a test done. Additionally, there were no discussions between the

parties when the LCA was drafted, as to how the random testing was to occur (i.e. observed vs unobserved), and the City's policy is silent in that regard. As such, Lau had no reason to seek treatment for his anxiety associated with providing a specimen under observation.

Even if a violation is found, petitioner contends that under both the federal regulations and the City's policy, discharge is not automatic – rather in the discretion of the employer. While the LCA calls for immediate termination if he failed to submit to testing, it is petitioner's belief that he did submit to testing, did cooperate and had a medical reason for his inability to provide a sufficient sample.

The respondent argues that the issues are clear and straightforward and that they have met their burden. Under both the state and federal regulations, when a donor fails to provide a sufficient amount of urine during a test, and after a medical examination has taken place and no adequate medical explanation exists for the failure, the test is deemed a "refusal".

It is respondent's position that Dr. Balogun, as the MRO, took into consideration Dr. Cadell recommendation and the basis for the same. As required in the position of MRO, she properly investigated the matter to determine whether "a medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of urine". 49 C.F.R. 193(d)(1). Based upon the information/documentation before her at that time, Dr. Balogun determined that there was no adequate basis to determine, with a high degree of probably, that petitioner had a medical condition that precluded petitioner from providing a sample.

Respondent also asserts that petitioner was subject to the LCA. His failure to submit a sufficient sample was a "refusal" under the guidelines and therefore violated the terms of the agreement. Relying upon Kinneary v. City of New York, 601 F. 3d 151 (2nd Cir. 2010), respondent asserts that even if petitioner suffered shy bladder syndrome on the testing date, there is no evidence in the form of medical documentation or testimony, that such condition was pre-existing.

While not binding, Kinneary is instructive to the Tribunal. In Kinneary, a sludge boat captain with the New York City Department of Environmental Protection, claimed that he was discriminated against under the ADA, NYSHRL and NYCHRL. He contended that he suffered from paruresis or "shy bladder syndrome", which qualified him as disabled and that he was terminated because of his disability. As a boat captain, he was subject to random drug testing. Over the years, Kinneary reported that he had at times, difficulty providing a sufficient quantity of urine when he was tested. In 2001, during a random test, he could not provide a sample within the three hour time period. When he spoke to his supervisor and told him of his troubles over the years, he was told to get a doctor's notes and provided with the instructions (Information and Instructions to Examining Physician) for his doctor to follow.[8]

The next day, Kinneary returned with a doctor's note which stated: "This man has 'shy bladder syndrome' – this is a chronic condition that can be helped by using an [alpha] blocker...which I have given him. He is not a substance abuser". Kinneary was informed that the note was unacceptable, however, an appointment was set up for him to see the MRO the following day. When he met with the MRO, he presented the note. The MRO determined that there was no medical reason to explain Kinneary's inability to void. The day after that, Kinneary was served with misconduct charges for refusing to take a drug test.

After he was served with the disciplinary action, Kinneary took a number of proactive steps. He took a blood test and a hair test. He also went to see a neuropsychiatrist and a urologist both of whom submitted medical notes relating to Kinneary's having shy-bladder syndrome.

Without going into the underlying procedural history, on appeal, in discussing the basis for the termination which centered on the sufficiency of the doctor's note, the Court, citing to 49 C.F.R. §40.193, found that the note provided by Kinneary's physician did not

[8] The instructions stated that: 1) Kinneary had to obtain an evaluation from a physician within five working days, 2) the physician had to make a determination of whether or not a medical condition had or with a high probability could have, precluded Kinneary from providing a sufficient amount of urine for the test, and 3) the physician had to provide a written statement of recommendations and a basis for review by the city's Medical Review Officer (MRO)

constitute a basis for the test to be cancelled. The note did not say that Kinneary had a medical condition that did, or with a high probability could have, precluded him from providing a sufficient amount of urine for the test. Kinneary at 156 The Court went on to note that when the MRO sought additional documentation from Kinneary's doctor to support the diagnosis of shy bladder syndrome, none was available.

Such is the case here. There is no question that petitioner attempted to give a sample on both April 2, 2019, and was unable to do so. It is also undisputed that he went to Med Express where he provided a sample which was negative. However, Med Express is not an authorized facility and more importantly, no credible evidence was submitted that Med Express followed DOC protocol and chain of custody requirements.

It is also undisputed that petitioner went to see Dr. Davis the following morning and obtained a note. The note simply stated that petitioner had long standing struggle with anxiety and depression and that he had difficulty urinating in public. It did not state that petitioner had a medical condition that has, or with a high degree of probability could have, precluded petitioner from providing a sufficient amount of urine. Indeed, even Dr. Davis's April 30, 2019, letter failed to provide such a determination. (R-18 – Bate Stamp 000002.)

When petitioner went to see Dr. Cadell later that same date, he did not share either the note or the test results from Med Express with him. Instead, petitioner left Dr. Cadel with the impression that he would be providing additional documentation which supported the fact that he had a history of difficulty urinating in public. Notably, the same note that he had in his pocket on April 3, 2019, was the same note provided to Dr. Cadell five days later as "additional documentation".

When Dr. Cadell sent Dr. Balogun his findings, as the MRO, it was her responsibility to seriously consider and assess the referring physician's recommendations in making her decision whether petitioner had a medical condition that precluded him from providing a sufficient specimen amount. 49 C.F.R. § 193(e) and § 193(h). Dr. Cadell's determination was based upon his examination and observation of petitioner, Dr. Davis's note and a business card for Dr. Hammer. In an effort to make a determination,

Dr. Balogun reached out to petitioner to discuss the DOC protocols and also seek permission to speak to his treating physician. The takeaway from that conversation was petitioner informing Dr. Balogun that he had never spoken to Dr. Davis about his problem – which was inconsistent with the note that Dr. Davis had provided; never sought treatment for the issue; and a refusal of her request to speak to Dr. Davis peer-to-peer.

Given this, I **CONCLUDE** that Dr. Balogun appropriately determined at the time of her review, that there was no adequate basis for determining that a medical condition has, or with a high degree of probability, could have, precluded petitioner from providing a sufficient amount of urine. I further **CONCLUDE** that Dr. Balogun appropriately determined that the test was a "refusal" in accordance with 49 C.F.R. § 40.191(a)(5) and §193(d)(2).

I further note that in review of Dr. Davis medical records over the course of years, there is no mention, record or referral for the issue of shy bladder syndrome. While testimony was presented that over the years, petitioner has been treated for anxiety and depression, no credible evidence was presented, that with a high degree of probably, these issues could have precluded the petitioner from providing a sufficient amount of urine when undergoing an observed test.

In turning to the sustained charges, petitioner was charged with violation of § 4A:2-2.3(a)(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.

For the reasons cited above, I **CONCLUDE** that respondent has met its burden of proof and the charge of violation of § 4A:2-2.3(a)(1) is **SUSTAINED**.

Petitioner was also charged with violation of the City's Employee Handbook, § 46-21 – Article IV – Alcohol and Drugs.

Respondent asserts that a refusal is deemed a "positive" test result. I have found no basis in the handbook or the DOT regulations which support such an interpretation.

However, it is clear, under the handbook, Article IV(H), that petitioner "Refused to Cooperate" as defined under the handbook.

Article IV(H), in relevant part states: "REFUSE TO COOPERATE: ...fail to promptly provide specimen(s) for testing when directed to do so, without a valid medical basis for the failure.

No valid medical basis was provided in this matter. As such, I **CONCLUDE**, that the respondent has met its burden of proof and the charge of violation of the City's Employee Handbook, § 46-21 – Article IV, is **SUSTAINED**.

Petitioner was also subject to a LCA. The agreement required petitioner to undergo monthly testing for a period of one year upon successful completion of his drug treatment program. Under Paragraph 7(b) failure to submit to testing would result in his immediate termination.

Petitioner has been found to have failed to submit to testing under § 46-21 – Article IV. Therefore, I **CONCLUDE** that the respondent has met its burden of proof that petitioner is in violation of the LCA.

## DISCIPLINARY ACTION

Principles of progressive discipline should be considered in the removal actions of civil service employees. West New York v. Bock, 38 N.J. 500 (1962). The determination of whether a specific act supports removal requires an evaluation of the conduct in terms of its relationship to the nature of the position itself and an evaluation of the actual or potential impairment of the public interest that may be expected to result from the conduct in question. Golaine v. Cardinale, 142 N.J. Super. 385, 397 (Law Div. 1976). The frequency, number and continuity of the employer's warnings indicate the progression of the discipline. Id. On appeals from disciplinary action, the Civil Service Commission (Commission) may redetermine guilt or modify a penalty originally imposed. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980). The Commission is empowered to substitute its own judgment on the appropriate penalty, even if the local

appointing authority has not clearly abused its discretion. Id. at 579. The Commission must consider an employee's past record, including both mitigating factors and prior discipline when determining the appropriate penalty to be imposed. Bock at 523. The frequency, number and continuity of the employer's warnings, previous discipline and other measures indicate the progression of the discipline.

Petitioner in this case has one prior disciplinary action for testing positive during a random drug test. The disciplinary action was resolved when the parties entered into a LCA. The agreement was clear and unequivocable that any violation of the agreement as it related to monthly drug testing and/or the City's handbook, § 46-21 – Article VI (Alcohol and Drugs), would result in his immediate termination.

It is undisputed that petitioner did not provide a sufficient amount of a specimen at the time of testing or even the following day when he was evaluated by Dr. Cadell. After his first test, the protocol for shy bladder syndrome was immediately implemented to determine whether there was a medical basis for petitioner's inability to provide a sufficient sample. While petitioner may argue otherwise, based upon the information available to Dr. Balogun at the time of her review, Dr. Balogun appropriately determined that there was no "adequate medical basis for determining that petitioner had a medical condition that had, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of urine". 49 CFR § 40. 193. Under the guidelines, once such a determination is made, the employee is deemed to have "refused" to take the test. 49 CFR § 40:191.

There is no question that once petitioner left the testing site on April 2, 2019, he sought out another facility to get tested. Unfortunately, that was not an approved testing site and the test itself did not meet DOT guidelines. It is also undisputed that he also sought additional treatment with a psychologist and went to see a urologist, to work through his condition after he had been suspended. While meritorious and hopefully going forward beneficial to his health and wellbeing, such actions cannot be used to circumvent not only the terms of the LCA but the City's policy of zero tolerance in the workplace.

Based upon the totality of the record, I **CONCLUDE** that removal is the appropriate penalty. The sustained charges against the petitioner are serious in nature and major disciplinary action is warranted.

## ORDER

For the reasons set forth above, it is **ORDERED** the charges of violation of N.J.A.C. 4A:2-2.3(a)(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), City of Millville Personnel Policies, § 46-21- Article IV (Alcohol and Drugs), and violation of the Last Chance Agreement (LCA), are hereby **SUSTAINED**.

It is further **ORDERED** that the action of the appointing authority removing petitioner from his position as a Truck Driver for the City of Millville, is **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 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. 52:14B-10.

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.

June 30, 2021
DATE

**TAMA B. HUGHES**, ALJ

Date Received at Agency:

Date Mailed to Parties:

TBH/dm

## APPENDIX

## WITNESS LIST

**For petitioner:**

Phillip Lau
Matthew Caddell, D.O MPH, MBA
Howard Hammer, PSY, D., P.A.
Brian Davis, D.O.

**For respondent:**

Evelyn Balogun, M.D.
Pamela Shapiro

## EXHIBIT LIST

**For petitioner:**

P-1 City of Millville Employee Handbook
P-2 Collective Negotiations Agreement – Millville/Council 18
P-3 Last Chance Agreement
P-4 Not in Evidence
P-5 Not in Evidence
P-6 April 12, 2018, Inspira Drug Screen Results
P-7 June 13, 2018, Inspira Drug Screen Results
P-8 July 23, 2018, Inspira Drug Screen Results
P-9 September 4, 2018, Inspira Drug Screen Results
P-10 November 30, 2018, Inspira Drug Screen Results
P-11 April 2, 2019, Inspira Drug Screen Results
P-12 April 2, 2019, Med Express Drug Screen Results
P-13 April 3, 2019, Note from Dr. Brian Davis, D.O

P-14 Seabrook/Dr. Davis Medical Records for Lau
P-15 Cumberland Family Medicine Records for Lau
P-16 December 23, 2019, Report of MRO Dr. Evelyn K. Balogun
P-17 January 13, 2020, Report & CV of Dr. Howard Hammer
P-18 Petitioner's December 4, 2019, Discovery Responses
P-19 Inspira Records
P-20 CV of Dr. Matthew Caddell

**For respondent:**

R-1 Not in Evidence
R-2 Lau Personnel File – Page 13 only
R-3 Not in Evidence
R-4 Not in Evidence
R-5 Not in Evidence
R-6 Last Chance Agreement
R-7 April 3, 2019, 31-A (PNDA)
R-8 June 11, 2019, 31-B (FNDA)
R-9 April 3, 2019, documents from Dr. Balogun
R-10 April 2, 2019, Med Express Documents
R-11 April 3, 2019, Physician Note – Dr. Davis
R-12 DOT Rule 49 – Drug Testing
R-13 Previous Drug Screening Results
R-14 City of Millville Handbook
R-15 CBA Council 18
R-16 December 23, 2019, Dr. Balogun Expert Report and CV
R-17 Not in Evidence
R-18 January 13, 2020, Dr. Hammer Expert Report and CV
R-19 Not in Evidence
R-20 Dr. Davis Records
R-21 Cumberland Family Medicine Records

**Tribunal exhibit:**

Record recreation