**STATE OF NEW JERSEY**

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| In the Matter of Latera Griffin<br>Hudson County, Department of<br>Corrections<br><br>CSC DKT. NO. 2019-1831<br>OAL DKT. NO. CSR 01373-19 | :<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>: | **FINAL ADMINISTRATIVE ACTION<br>OF THE<br>CIVIL SERVICE COMMISSION** |

**ISSUED: SEPTEMBER 22, 2021 BW**

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The appeal of Latera Griffin, County Correctional Police Officer, Hudson County, Department of Corrections, removal effective September 12, 2018, on charges, was heard by Administrative Law Judge Danielle Pasquale (ALJ), who rendered her initial decision on July 29, 2021. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, including a thorough review of the submissions of the parties, the Civil Service Commission (Commission), at its meeting of September 22, 2021, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision. In this regard, the Commission notes that most of the issues presented in the appellant's exceptions are thoroughly and appropriately addressed by the ALJ in the initial decision and the Commission does not have any further comments other than the following. In the appellant's previous request for interlocutory review, the Commission declined to take review as it did not find any of the arguments presented persuasive. As such, the Commission finds no further comment is necessary regarding the appellant's renewed arguments pertaining to the issues presented in the interlocutory review request. Further, the Commission rejects the argument that the ALJ should have been recused as the speculative and tangential claims of bias are wholly unsupported. Regardless, the Commission has independently reviewed the entire record and finds that the ALJ's determinations were through and comprehensive and are not based on anything other than her appropriate assessment of the credible evidence in the record. Accordingly, the Commission

adopts those determinations.

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 Latera Griffin.

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 22ND DAY OF SEPTEMBER, 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
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

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

**INITIAL DECISION**

OAL DKT. NO. CSR 01373-19

AGENCY DKT. NO. N/A
2019-1831

**IN THE MATTER OF LATERA GRIFFIN, HUDSON COUNTY DEPARTMENT OF CORRECTIONS.**

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**Stuart Alterman**, Esq. and **Timothy Prol**, Esq., for appellant Latera Griffin (Alterman & Associates, LLC, attorneys)

**John J. Collins**, Esq., for respondent Hudson County Department of Corrections (Hudson County Counsel's Office, attorneys)

Record Closed: June 14, 2021 Decided: July 29, 2021

BEFORE **DANIELLE PASQUALE**, ALJ:

## STATEMENT OF THE CASE

Latera Griffin ("Griffin" or "appellant") was removed from her position as a corrections officer with respondent Hudson County Department of Corrections ("HCDOC") because she failed a random drug test. Griffin asserts that random drug test conducted at the HCDOC by the Hudson County Prosecutor's Office ("HCPO") and then collected by New Jersey State Toxicology Laboratory ("NJSTL") was flawed and that the

corresponding results are not reliable. Griffin relies almost exclusively on the failure of HCDOC to mandate a second or split sample noting it as a procedural failure and against Attorney General Guidelines arguing it is invalid as a matter of law.

## ISSUES PRESENTED

Should the disciplinary charges outlined below against Officer Griffin be upheld and if so, is removal the appropriate penalty. In short, whether the failure to require a "split" also known as a "second sample" pursuant to the then New Attorney General Guidelines regarding its Drug Testing Policy amounted to a fatal flaw in August of 2018 at the time the test was administered thereby making the test invalid and denying Griffin her due process rights.

## PROCEDURAL HISTORY

On September 20, 2018, appellant was served with an Amended Preliminary Notice of Disciplinary Action (PNDA) and was immediately suspended without pay effective September 12, 2018 (J-1). Appellant was charged with violating the New Jersey Administrative Code as follows:

1. Conduct Unbecoming a Public Employee (N.J.A.C. 4A:2-2.3(6))
2. Neglect of Duty (N.J.A.C. 4A:2-2.3(7))
3. Other Sufficient Cause (N.J.A.C. 4A:2-2.3(9))

A departmental hearing was conducted on November 16, 2018. The Hearing Officer rendered a decision to terminate Officer Griffin on November 26, 2018, removing appellant from her position as a corrections officer. The incident that gave rise to the removal was appellant's positive random drug test administered on August 16, 2018. On February 20, 2018, the County issued a Final Notice of Disciplinary Action ("FNDA"). The FNDA sustained all of the charges within the Amended PNDA and removed Griffin from

employment.[1]

The matter was transmitted to the Office of Administrative Law (OAL) as a contested case on January 14, 2019. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Shortly after being assigned the file, I conferenced it with the parties. I continued to remind the parties that the OAL policy was to have it heard and written within 180 days of the date the filing was perfected at the OAL which would have been June of 2019. Shortly thereafter, Mr. Collins requested an adjournment on this matter and thus the issue of back pay was not waived by Griffin. [2] The reason for the adjournment was due to the then recent Attorney General's (AG's) Directive 2018-2 mandating a protective order prior to State Toxicology witnesses would be produced. In this regard, there was no undue delay on the part of this Tribunal or any party in this matter.

To that end, the AG's Directive 2018-2 which was somewhat new at the time, disallowed a witness from the State lab to appear without this new order. As such, I researched the issue and we discussed it telephonically on April 1, 2019, with all counsel for and Deputy Attorney General Baker, a liaison who confirmed that was, in fact, the case. As such, we adjourned the case with consent of both parties, until the proper order was drafted reviewed, and agreed upon by both parties before being signed and entered accordingly. Subsequently, I issued a Pre-hearing Order on March 7, 2019. After many counsel revisions and discussions, the Discovery Confidentiality and Protective Order was entered on or about April 5, 2019.

Next, Appellant filed a Motion for Summary Decision based upon the aforementioned lack of a second or split sample of the random urine test, noting I could and should rule on the case as a matter of law. At that point, I did not give counsel leave

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[1] The FNDA was sent to and acknowledged by Counsel for Appellant in their Exhibit A on correspondence dated April 17, 2019 in dispute over when pay status was to begin for Griffin.

[2] Due to the COVID-19 Public Health Emergency and the State of Emergency, Governor Murphy issued Executive Order 127 which relaxed deadlines. That was utilized for some of the submissions and exhibits that the parties had to gather as noted above and leave taken by one of the parties. However, since the record closed upon my request after the parties responded to my peremptory hearing date and continuation of the hearing after the extensive motion practice; E.O. 127 is not necessary for the timing of this Initial Decision.

to file the motion in keeping with my pre-hearing order as I was aware this was a fact-sensitive matter and not disposable as a matter of law as argued, notably what date the new AG Guideline went into effect, allegedly making the second sample procedurally required, and furthermore, whether Griffin received due process during her test. As a result, I heard this matter in person on May 30, 2019, July 19, 2019, September 25, 2019, and held a peremptory hearing date of June 14, 2021 via Zoom.

Appellant represented throughout the case that she was going to obtain an expert (and listed two (2) different potential experts) to test the frozen sample at the lab and determine who if anyone would testify. Instead, the record remained open as Griffin renewed her request to obtain leave to file a Motion for Summary Decision previously disallowed. After the COVID-19 health crisis hit; I allowed counsel, even after days of hearing in-person testimony to revisit the motion as I thought it prudent for completeness and because Mr. Alterman emphatically renewed his request. I conducted the oral argument over Zoom on May 12, 2020 and denied the motion via written Order dated June 2, 2020. As a result, Griffin filed an Interlocutory Motion of that Order which was declined to be heard by the Civil Service Commission Chairperson Deidre L. Webster Cobb on June 16, 2020. On that same day, June 16, 2020, Griffin filed a Motion for my Recusal which I heard and denied via Order dated July 1, 2020. Next, counsel for Griffin filed a Motion for Reconsideration of my Order of non-recusal on July 6, 2020, which I similarly denied in a written Order dated August 28, 2020. I held conferences on subsequent dates, since after that final Order, Mr. Alterman then wrote a letter asking that I reconsider again my decision not to recuse myself. Mr. Collins never responded to that letter for some time. As I had already thoroughly addressed my reasons in all the previous orders; I also did not respond to this last repetitive request. Again, this Tribunal continued to push for this case to be heard and could not complete it as expeditiously as I hoped early after hearing many motions were filed and heard and encountered numerous adjournments/delays even prior to the COVID public health crisis.

Months later, on May 4, 2021, the parties received an email from Mr. Collins asking that the case "resume". I immediately replied, as Mr. Collins was aware that the case has been active ongoing during COVID (with his participation) that we were now waiting on

his scheduling of the matter since upon information and belief he had been on leave. At that point, I directed the parties to confer with each other for further hearing dates. As of May 6th, 2021, I never received an answer from the parties on when, how or if the parties were ready to proceed. On May 10th, 2021, my chambers sent a letter offering at least five (5) dates that the undersigned was available to hear and finish the case, noting that if one (1) was not agreed upon that I would choose a peremptory date. The parties had until May 11, 2021 at 5:00 p.m. to respond. Mr. Collins responded he was available two (2) of the dates, and Mr. Alterman indicated that he would not be available until late July or August (weeks and/or months after the dates I offered). In response, I chose June 14, 2021 as the peremptory hearing date, reminding the parties that my chambers was consistently attempting to complete the matter since the inception of the case, especially considering that Officer Griffin was on pay status since June of 2019 and that I was ready to finish the hearing and issue a decision as is my obligation.

Finally, I heard the last day of testimony via Zoom on June 14, 2021. I allowed only verbal closing arguments in keeping with my pre-hearing Order as no written request for same was made prior to the hearing date. This was especially relevant considering the date was a peremptory one. Instead, a week prior to the peremptory date, subpoenas were issued by Appellant's Counsel. In addition, most issues were previously briefed or/or argued either orally or by written submission numerous times. In keeping with all of these facts, I denied the subpoenas, allowed the testimony, verbal summations and then closed the record accordingly in order to prevent further delay.

## FACTS

### Undisputed Facts:

The following facts are undisputed. I therefore **FIND** them as facts of this case.

Appellant was employed as a corrections officer for the HCDOC in 2018. The HCDOC has a random-drug testing policy for all law-enforcement officers that was in effect in 2018 and that Officer Griffin admitted she signed for and knew she was

responsible for following. (J-4) Appellant was selected to submit to a random drug test on August 16, 2018. Appellant had been tested via a random drug test twice before the test in question as per her own testimony. (Once in the Academy and once during her employment prior to the instant random test). Appellant provided a urine sample that was analyzed at the State Lab. A second sample, known as a "split" sample, was not taken. The test results provided by the State Lab indicate that the appellant urine sample tested positive for Benzoylecgonine which is the major metabolite for cocaine.

The test results provided by the State lab indicate that Officer Griffin's sample tested positive for cocaine. The reserve frozen sample at the lab was never requested by or tested by Appellant.

**Additional Facts:**

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

**A. Summary of Testimony**

**Testimony for Respondent :**

**Deputy Director Michael Conrad:**

Michael Conrad is the Deputy Director at the HCDOC. Conrad's civil service title is Captain and oversaw Appellant's discipline after the random drug test in the present matter. Conrad began his career in the Hudson County Jail in 2002, where he was a Sergeant until 2012. As Sergeant, Conrad acted as the housing supervisor, worked the intake desk and record room, oversaw the disciplinary unit of inmates and detainees, oversaw restrictive housing, and sometimes the medical infirmary.

Conrad testified that when he became a lieutenant, he acted as unit commander, which required him to oversee the intake area, commissary, property room, and record room for about three (3) years. Conrad later became Administrative Captain. In this position, he was in charge of buildings and grounds, oversaw the courts, scheduled court appearances for the jail's visual court system, and handled bails and the processing of the same.

With regard to the case at bar, Conrad had been Deputy Director for about two (2) years when the random drug test in question was administered. His duties included day-to- day operations like scheduling shifts and vacations for officers and staff, scheduling work assignments, and handling discipline. Tour commanders reported directly to Conrad, and he had four (4) or five (5) administrative lieutenants under his command. Conrad also had corrections officers under his command; as all of the above is largely uncontested and Conrad testified directly and credibly, I **FIND** it as **FACT** in this case.

In discussing his random drug policy experience overall as Deputy Director, Conrad testified accurately that the actual drug test was conducted by the Internal Affairs Unit and as the Deputy Director that his involvement triggered during the discipline stage. Conrad testified that once a positive random drug test is reported to him, it is his duty to decide what the discipline should be. The random drug tests conducted on August 16, 2018, including appellant's, were his first experiences with the drug testing in his role as Deputy Director.

On direct examination, Conrad identified J-1 as the Amended Preliminary Notice of Disciplinary Action (PNDA) for appellant, dated September 20, 2018, noting that he authorized this document to be issued after he received the toxicology report from Lieutenant Patterson that Appellant failed the urinalysis. Conrad testified that he learned that the State Lab found Benzoylecgonine in the urine specimen, which he understood to indicate the use of cocaine.

Next, Conrad identified J-1(a) as the Notice of Immediate Suspension of appellant, which he authorized and signed after receiving the toxicology report and Lt. Patterson's

report to the Director that appellant failed the urinalysis. Conrad identified J-2 as the random drug test screening advisory, with the purpose of notifying and advising an officer of their rights during the drug test, with appellant's signature. As he testified credibly as supported by the documentary evidence, I **FIND** his testimony as **FACT**.

Conrad further testified that each employee is given the HCDOC alcohol and drug testing policy, which they must sign (J-4). He then identified the electronic receipt containing a history of signatures for the document management system that appellant signed off on (J-5). Conrad explained that along with the AG Guidelines, the HCDOC has county guidelines that are drafted by the training and compliance bureau who place the documents in a document management system so that each officer may sign upon receipt. He testified that no one within the HCDOC, not even Director Ronald Edwards, is above the policies. He testified dispassionately and credibly in this regard, as thus I so **FIND.**

Referencing the HCDOC alcohol and drug testing policy (J-4), Conrad explained the process of the drug testing to the best of his knowledge. He explained that each officer is given the option of submitting two (2) samples to be collected at the same time, and if they choose not to submit a split sample, they sign a waiver. Conrad testified that he was not given a waiver signed by appellant in the instant matter, and further testified that he never questioned if appellant was given the form. He first became aware that there was no waiver in Appellant's packet during the departmental hearing. He testified that he had only reviewed a letter between Director Edwards and Lt. Patterson, the initial toxicology report, the PNDA, and the notice of immediate suspension before the departmental hearing. Conrad explained that since he was not personally involved in any of the drug testing, he did not inquire as to whether Appellant sought a second sample or to the absence of a waiver before or after the departmental hearing. He testified that since he was not present at the test, he could not say whether appellant was offered a waiver or whether she asked for one. He was unaware of who was tasked with distributing waivers to the officers.

Conrad's testimony was straightforward and did not boast expertise where he did not have it. This added to his credibility as did his admission that he was unaware that there was no waiver included in the packets during the random urine test in question. As such, I found his testimony to be highly credible and **FIND** his testimony as **FACT** in this matter.

**Dr. Robert Havier, Ph.D.**

Dr. Robert Havier (Dr. Havier) is a forensic toxicologist and the acting director of the New Jersey State Toxicology Laboratory ("NJSTL" or "State Lab"). He was qualified and testified as an expert in toxicology and law enforcement drug testing and recalled that he has testified as in expert on behalf of the State Lab approximately thirty (30) times as of the time of his testimony. Dr. Havier has been acting director for eight (8) years, and previously was an employee of the State Lab for thirty-two (32) years. He testified in this case on May 30, July 19 and September 25, 2019.

His duties as director include supervising the post-mortem and law enforcement drug testing services within the lab and issuing a final report to the agencies. During testing, Dr. Havier supervises one (1) State Lab employee screening the specimen and another employee performing the confirmation analysis. Dr. Havier performs the confirmation screening for law enforcement drug testing and certifies the data from the analysis to finalize reports for the agencies. Dr. Havier oversaw the screening of the urine sample appellant provided in August 2018.

Dr. Havier relayed that the State Lab received the sample in question within a group of samples submitted by the HCDOC in August 2018 in the normal course. He first described the general procedure regarding receiving, identifying, and processing an individual urine sample. He testified that when the specimen is received from the agencies, the State Lab uses the donor's social security number (SSN) to identify the sample. The State Lab employees ensure that the SSN from the label inside the specimen matches that of the submission form, and a toxicology number is generated by the State Lab to reference the sample going forward. A medical information sheet is

submitted along with each sample, also identified by SSN, to assist the medical review officer if necessary. He testified that if a specimen tests positive for a drug, the medication form is submitted to the medical review officer to determine whether any of the donor's medications can account for the positive test result. In the instant matter, these policies were followed as Dr. Havier corroborated same as he combed over the report with corresponding proofs. Appellant's medical information sheet listed one (1) medication, birth control pills. As he testified expertly and credibly, and most of these facts were largely uncontested, thus I **FIND** them as **FACT** in this case.

Next, Dr. Havier testified extensively to the report and supporting documentation that the State Lab submitted to the HCDOC in the present matter (C-1). The report detailed the testing process, which Dr. Havier outlined clearly and at length about the instrument used to screen specimens for the presence of drugs. He testified that an immunoassay screen is employed by the State Lab, which uses antibodies for eight (8) different classes of drugs to test for the presence of drugs. He noted that the screening instrument is thoroughly tested before it is given actual samples to confirm its functionality and the documents confirmed same. In the instant matter, Dr. Havier testified that the screening instrument was tested and confirmed to be working properly before it was given Appellant's sample to screen as confirmed by the documentary evidence. Dr. Havier stated that once a urine sample is screened by the functional instrument and evidence of a drug exists in the urine, the urine sample is transferred to a secure law-enforcement-testing portion of the lab for analysis and testing known as a confirmation test. Dr. Havier testified forthrightly for hours, over the course of three (3) days and was extremely professional, experienced, and a highly credible witness driven by science and procedures, as such I gave his testimony immense weight and **FIND** his testimony as **FACT** in this matter.

Next, Dr. Havier described the confirmation test as a chemical extraction and analysis, the procedure used by most labs performing this type of drug testing on urine samples. The confirmation test will identify the specific drug and provide the amount of drug present in the sample based on mass fragmentation. The Lab screens samples by immunoassay to determine if they contain any substances similar to the antibody of a

particular drug, even if it may not be a drug. They use the benchmark procedure for determining the identity and concentration of a drug. In this case it was **benzoylecgonine** a metabolite of **cocaine**.

He continued that the process involves a container with a sample of urine, a portion of which is put into a reaction vessel and tested. A second test takes part of a sample used for the initial testing to test for the presence of specific drugs, utilizing gas chromatographic mass spectrometry, or GC/MS testing. If there is a positive result in the second test, then a sample is taken again for purposes of confirmation. The confirmation test is a chemical extraction and analysis performed using GC/MS. The process indicates what drug is present and provides the amount of the drug present based upon the principal of mass fragmentation. To confirm the identity of the drug, the instruments are calibrated with known concentrations of the drugs they are looking for. Negative urine is prepared with a known concentration of a drug and put into the calibrating instrument to verify a linear relationship. The testing is determined to be accurate by the GC/MS procedure being properly calibrated. Calibrators that are not producing a linear relationship are eliminated. When they analyze the specimen and get a response, the calibration curve enables establishment of a linear relationship between the response of the instrument and the concentration of a drug in a sample. One (1) instrument is used with five (5) or six (6) calibrators to determine instrument accuracy. In this case, the testing was negative with the exception of a positive test for benzoylecgonine above the 100 ng/ml cutoff.

On cross-examination Dr. Havier indicated that his staff did the testing, and also that the Lab report confirmed the level of benzoylecgonine present in the sample. He also indicated that anything below the 100 ng/ml would be considered a negative result, and that the cutoff number is set by the Lab. He repeated that the second, confirming test, the GC/MS, is a more refined test. The first test uses a small portion of the sample and that portion is not reused. In other words, the second test is done with another portion of the sample. He continued that the amount of the drug present in the sample is used to determine the "cut-off level." The cut-off level refers to the amount of a drug present in a given sample and whether that amount is enough for the sample to be considered

positive. The cut-off level is established by federal guidelines. In the instant matter, Dr. Havier testified that anything above 100 ng/ml tests positive and Appellant's sample identified a concentration of 6,007 ng/ml which he opined was "very high". He noted with confidence that nothing on her current medication form could account for the benzoylecgonine result and thus there is no question thus that Griffin's sample tested positive for benzoylecgonine and thus tested positive for cocaine. He was, professional, unwavering, and the lab's documentation lined up with his trial testimony over three (3) days; as such he was imminently qualified and credible and thus **I FIND** his testimony as **FACT**.

On cross examination, Dr. Havier explained that samples that come up negative are discarded and samples that are positive have the GC/MS testing done. Most of the cross examination surrounded the issue of the lack of a split sample and which AG Guidelines were in effect at the time of the test in question. Dr. Havier noted directly that they would not be in effect until September of 2018, a few weeks after the test in question. He also indicated that the positives keep a frozen reserve that remain in the lab until litigation is over. He also noted the AG Guidelines changes were made due to the "preferred collection procedure". He indicated that these results were never in question regardless of Officer Griffin's lack of a split sample. In short, he repeated credibly, that the frozen sample kept at the lab would be sealed and thus have the same integrity as a split sample and was not compromised in any way if it were to be tested. I **FIND** that again, with regard to the timing of the new guidelines noting a "preferred collection procedure" to be highly credible, in that he had an independent recollection as he was integral in promulgating these new guidelines. In addition, I **FIND** it as fact and give it much weight that the sample frozen as the lab would have been as viable as the original and/or split sample.

Dr. Havier also testified that urine is purchased from known vendors and referred to as "controls" or control samples. Some have a known concentration of a drug so that when they test the machine, it gives a reading with the amount of the concentration of the drug present, and if these amounts match they know the machine is working properly and is properly calibrated. He stated that when a machine is tested with the control samples,

it should accurately report the controlled amount. The machine is tested with the controls before a sample is tested, and if the results are as expected, then the machine is working properly. Dr. Havier testified that the control tests were done right before appellant's sample was tested and a blank sample was tested between each other sample tested. He testified clearly that the lab does a black and a control in every batch (10-12 batches daily) to do a test of the instruments before a positive and make sure they get a negative control in each batch. All of the documentary evidence supports Dr. Havier's testimony; and thus I **FIND** it as **FACT**.

Dr. Havier testified professionally and dispassionately that Appellant's urine sample tested positive for benzoylecgonine, a metabolite of cocaine and that this conclusion was made within a reasonable degree of scientific certainty. He testified that nothing contained on the medical information sheet could account for the positive result. Dr. Havier testified on direct and cross examination that the AG Law Enforcement Policy requiring the second sample as a state lab requirement was to be in effect as of September 1, 2018. He noted that the second sample was the "preferred" collection procedure for urine drug testing; but rightly never drew a legal conclusion about whether it was "required".

Dr. Havier admitted that the usual way for a donor to challenge the analysis from the state lab is to have the second specimen tested by another independent lab. However, he explained that if there was no second sample: "we maintain the custody of a single sample and if the donor wanted to challenge our result they could do that. We would send an aliquot of that container that we have to another lab for testing." Dr. Havier testified clearly and based upon his decades of experience. He added that the reserve sample at the lab would be completely reliable. In fact, he noted that the "leftover sample" of the single sample is not only as reliable as a split but "it's preferred" as it is frozen at the time it is given and there is no chance something could be done to it as it is sealed in one container and thus it is "ensured to be identical to the first sample because nothing was done to that specimen." Dr. Havier testified to this each day of the hearing where he was called.

As for the requirement of a split sample, he replied under heavy cross examination that he was quite familiar with J-6. He noted that the "the revision was created in April. The requirement for the second specimen submission started on September 1st of last year". (2018). Furthermore, Dr. Havier testified unwaveringly on cross and on re-direct that the sample given in question was frozen, untouched, was an adequate amount and totally viable and highly reliable for testing in another facility to question the results. He noted several times there was never a request to have that remainder tested. He was extremely credible, noted the effective date of the new Guidelines being *after* the test in question, was patient, professional and I **FIND** that his testimony is **FACT** and I give it enormous weight.

In summary, Dr. Havier was fully familiar with his voluminous report and consistent upon reviewing same. His testimony was direct, and his expertise clear as he testified in this matter three (3) times over the course of several months, presenting as the consummate professional one might expect with someone with over forty (40) years plus experience. Again, as his testimony was unwavering, direct, informed and candid; as such I gave it immense weight and **FIND** it as **FACT**. His results are completely reliable and uncontested by any other expert; and thus I so **FIND.**

**Detective Gabriel Diaz**

Detective Gabriel Diaz is a detective from the Hudson County Prosecutor's Office ("HCPO") "on-loan" from the HCPO to the HCDOC at the time of the appellant's drug test. Diaz earned a bachelor's degree in Criminal Justice from Saint Peter's University in Jersey City, NJ. He then worked in retail at Lowe's for about three (3) years before moving on to become a member of the New York Police Department, where he spent about a year. Diaz then moved to the HCPO, completed a condensed waiver program and graduated from the Division of Criminal Justice Academy in Sea Girt, New Jersey, and eventually became a detective. Upon his "on loan" transfer from the HCPO to the Internal Affairs Unit in the HCDOC, Diaz was given multiple trainings within his first two (2) months regarding how to conduct internal affairs investigations and gained two (2) certifications from this process. (J12)

While working in Internal Affairs at the HCDOC, Diaz ran investigations, conducted random drug testing, and facilitated applicant hiring. Diaz performed the random employee drug tests on August 16, 2018, the date of appellant's drug test. Diaz recalled Appellant being at the test that day, and that she came in with three (3) other female officers with whom he went over the paperwork and process of the drug test. He testified clearly, and believably that he explained to each of those officers that they were being given two (2) sealed bottles to place a urine specimen in and explained that it was his recommendation to submit a urine sample in both bottles in case of any issues going forward. Diaz testified credibly that Appellant chose to give one (1) sample, while the rest of the officers submitted two (2) samples. He testified convincingly that he remembers speaking to Appellant directly and did not know her prior to the test. Diaz's testimony was direct, professional, and unbiased and thus was highly credible. In fact, it added to his credibility that he freely admitted that the waiver form for the second sample was missing. As he was highly credible, I **FIND** his testimony as FACT, specifically with regard to offering Griffin a second sample, her choice not to split her sample, filling out forms with her to that effect and giving her the instructions along with the other officers in her group.

Detailing the process of the random drug test further, Diaz testified consistently that the employees who were randomly selected were called at different times depending on their schedules, given two (2) sealed bottles for the urine specimen, and a writing utensil to fill out the corresponding packet of forms. The forms given to employees included an acknowledgement of participation in the exam, an internal form that noted the date and time the sample was taken, and an indication on that form of whether a split sample was provided. As these were largely uncontested and as his testimony highly reliable for the reasons stated above, and as corroborated by the documentary and testimonial evidence in this case, I **FIND** this testimony as **FACT**.

Diaz explained directly that he handled the forms and explanation of the process to employees, and a female sergeant monitored the employees, including appellant, during the sample collection itself due to the private nature of it, and according to the HCDOC policy (J-4). After the test was complete, Diaz testified that he locked the samples in a refrigerator, which only he, Lt. Patterson, and Investigator Keith McMillan

had access to. Diaz identified the date and time Appellant's specimen was removed from this refrigerator as the time it was removed by Lt. Patterson to go to the State Toxicology Lab in Newark, at 325 Norfolk Street. This testimony is consistent with there being no chain of custody issue at bar, and evidences the HCDOC random drug policy (J-4) was followed, and thus I so **FIND.**

Diaz identified J-2 as Griffin's acknowledgement of the random drug testing, and identified her form by her signature. Diaz then identified J-8 as the internal affairs unit form for the chain of custody log for Griffin's sample, stating that the purpose of the form is for the department. Within the form, Diaz identified a social security number matching Griffin's on J-2. This form also specified where the exam was conducted, the time of the exam, and identified Diaz as the monitor of the exam. Within the form, the area where it asks if a split sample was provided was checked no, which Diaz testified meant that Griffin did not provide a split sample. He convincingly and credibly recalled that he gave her the opportunity to provide a split sample, but she chose not to, so he checked "no" based upon her choice. Diaz thoroughly explained the process, he was professional and prepared but unrehearsed, thereby adding to his credibility and **FIND** it as **FACT**.

Next, Diaz identified J-9 as another form from the date of the test with the social security numbers of the officers tested on that date, and the signature of his lieutenant reviewing the samples upon submission that day. Diaz testified that this form acts as another chain of custody form for submission to the State Lab. He identified that it was received by Jean Smith, an administrative worker for the lab in the normal course, whose initials were identified by Dr. Havier. Again, as this chain of custody is undisputed, I include it for completeness, and I **FIND** his testimony as **FACT**.

On cross-examination, Diaz identified the Hudson County Policy for drug testing, by order of Director Ronald Edwards (J-4). Within the form, Diaz identified that it indicates that a donor shall have the option to submit two (2) urine samples, and that the donor shall sign a waiver of this option. Again, I **FIND** that he utilized J-4 and gave her the option for a second sample in accordance with that policy.

Diaz candidly admitted that he and Lt. Patterson, who were in charge of the testing, failed to use the waiver form mentioned in the Hudson County Policy (J-4), in which a donor shall sign a waiver of the option to submit two (2) samples. He testified that none of the individuals who were tested on August 16, 2018, had the waiver form within their packet. He testified that only the internal chain of custody form (J-8), which he filled out alongside each officer, addressed whether the officers provided two (2) samples or "split sample". Diaz testified that he and Lt. Patterson recognized after the fact that the form was missing from the packets previously distributed to officers on that testing date. He explained that Appellant's packet was not different than that of any other officers as all the set ups were the same.

Diaz was professional, consistent, and direct. In fact, he took responsibility and admitted that one (1) document was missing in the test packet, and it added to his credibility that he did not make any excuses for it. Also, he convinced me that he did, in fact, have the conversation about the right to a split/second sample with the officers along with Officer Griffin, and they all chose to do the two (2) samples, except Griffin. He also credibly described that that her testing set up was like everyone else's that day; and while it was missing the waiver, it did include two (2) urine collection cups. This is consistent with his testimony that even if the form was missing, the instructions were clear as he ran her through them with her as the documents reflect, and she was clearly given the option of giving two (2) samples and she knowingly opted out, as per her other signed documents. As his testimony was highly credible for all the reasons stated above, I **FIND** it as **FACT** in this matter and give it much weight.

**Lieutenant Erika Patterson:**

Lt. Patterson noted that she was retired from the HCPO at the time of her testimony on September 25, 2019. She was at the HCPO for eighteen (18) years when she was asked "to do their 'on loan'" assignment to the HCDOC Internal Affairs in April of 2016 to be in charge of the random drug testing.

She explained directly and in keeping with her report (J-7) that when the Director wanted a random test as they were required to provide, she would meet in his office at the Hudson County Jail. In this case it was she, Diaz, Inv. McMillan and the Police Benevolent Association (PBA) President for Police Officers and Superiors. Those individuals were Derrick James and Rene Felix respectively. On the morning of the test in question, April 16, 2018, she noted that ten (10) percent of the officers or thirty three (33) members were to be tested. They were directed to use the Juneau Center to utilize first floor bathrooms and the cafeteria during the testing process. There was a slip of paper with an officer's name on it. They took a bag to put all the officer's names in it cut from an Excel spread sheet. She testified credibly that the Supervisors, Director, Deputy Director cut up the names and put them in the plastic bag. In the meantime, she and Inv. McMillan, Diaz, PBA Presidents James and Felix were all present during the drawing of the names at 7:00 a.m. If upon going down the list, someone was on medical leave, they would draw extra names as alternates if they could not reach ten (10) percent. As Lt. Patterson testified directly and professionally, and this process was largely undisputed, corroborated by the PBA President present for the test as well as the other witnesses, I found her testimony to be highly credible, as thus I so **FIND.**

There was an employee schedule system utilized by the HCDOC, known as the "COSS" system that was used in order to determine who was on duty when the test was ordered. The selected list of random officers was divided into three (3) lists based upon their schedule. The officers selected that were on duty were called first as it was still early in the morning (the 6:00 a.m. to 2:00 p.m. shift). President James made a lot of the calls for the officers selected who were on the 2:00 p.m. to 10:00 p.m. shift. The officers called from the night before 10:00 p.m. to 6:00 a.m. shift were called to come back to the jail for their tests if their names were selected. As this procedure is uncontested, and supported by the documentary evidence I **FIND** it as **FACT**.

Lt. Patterson testified consistent with Diaz and President James with regard to how the room was set up for the testing. There were four (4) tables in the cafeteria with ten (10) chairs on each side. People would trickle in and on every other chair there was the testing package (set up) which included the paperwork, two (2) specimen bottles, pencils

and an envelope. The officers were told that they were there for a random drug test and given the option for a split sample and explained why they would need one. She testified convincingly, in accordance with Diaz that that explanation was given to every donor as a matter of course and on that day. She convinced me that all were offered the split samples and most gave split samples. Her credibility was bolstered when she noted that she could not confirm hearing Officer Griffin being given the instructions, but just that all were given instructions as a matter of course in keeping with how all of her and Diaz's prior tests were administered.

As per her training, and in keeping with the policy, she sat at the head table with the specimens with the sheet that was to go to the State Toxicology lab. She authenticated J-8 as the internal chain of custody forms filled out by Diaz and J-9 the Chain of Custody forms which were her responsibility for the specimens and paperwork for the toxicology lab. Her report to the Director (J-7) noted the time that the samples were collected, and Diaz took them to the HCPO refrigerator in the normal course to hold the samples at Internal Affairs. She explained as Diaz did that the area was secure and locked and only she, Diaz and McMillan had access to the refrigerator. She noted her report of J-10 noting that there were three (3) positive results, one (1) being Officer Griffin's, noting in J-11 that her social security numbers matched up and J-3 represented the corresponding results received by the lab for Griffin as corroborated with the expert testimony of Dr. Havier regarding the required documentation. As this is largely uncontested and Lt. Patterson was professional, experienced, direct, and conducted the test in the normal course I **FIND** her testimony to be highly credible and **FACT** in this matter.

On Cross Examination she testified that she complied with the AG Guidelines that were in effect as noted in J-4 reflected in the HCDOC guidelines. She used this to conduct the test in question and supervised the entire thing as she usually did. That day, she confirmed that her role was not to perform individual testing on anyone. She added to her credibility that she admitted she did not hear Griffin's conversation with Diaz. She candidly added that she does not know first-hand if Officer Griffin asked for a second sample or was offered one. She did note that she had no information or documentation

noting that Griffin refused the test and admitted freely that the required waiver forms were missing in the random testing package. She also convinced me that she received a letter at the Internal Affairs office from the State Toxicology lab that second samples would be required for future random urine tests starting in September of 2018, and only learned of this change after the test in question. This testimony is consistent with Dr. Havier who testified prior (not in the presence of this witness), that he was instrumental in promulgating the new AG Guidelines with the AG Drug Testing Policy to be effective September of 2018, where Lt. Patterson understood that the second sample would be required; and thus I so **FIND**.

She noted that there were no other documents in the package regarding the officers' rights to split the sample. She was candid that since the testing went on all day that she only heard Detective Diaz give the initial instructions about the testing procedure to the first six (6) people at around 10:00 a.m. and not specifically whether she heard instructions given to the Appellant. Her candor added to her credibility as she was operating in the normal course and her job was to monitor the samples and help set up the room. She was positive that two (2) specimen collection containers were given in every packet. She added that it was easy for her to recall this, as this was the procedure and when the tests were given at the HCPO it was customary for everyone tested to give two (2) samples; and thus I **FIND** that the set ups for all the tested individuals would have had two (2) specimen containers including Appellant's.

**Testimony for Appellant:**

**PBA President Derrick James:**

PBA President Derrick James, a Corporal of the HCDOC testified on behalf of the Appellant. He noted he was the President of the Officers PBA for ten (10) years and is familiar with the policies and procedures of the jail. He confirmed being present for the random selection of the names and corroborated the procedure as outlined by Diaz and Patterson above. He also noted there were other people present, notably Sgt. Candelaria and other monitors during the test. He did not act as monitor of the test himself but was

there all day and did not object to any procedures after overseeing the pulling of the names with PBA President Felix as well as Diaz, Patterson and Conrad. He testified consistent with Lt. Patterson that he was not aware that a new policy was in place; he also was under the impression that J-4 was the one at issue for the test in question.

He noted that he saw Officer Griffin enter, described the scene as "chaotic", and said he did not hear Diaz give Griffin the option for a second sample but was candid that he did not hear anyone else get the instruction either. He explained that he was speaking to Lt. Patterson when Griffin was likely speaking to Diaz. He admitted that his attention was focused on saying hello to people, joking, looking at the paperwork set out on the tables, the layout of the room and "acted like everyone else." He never discussed with Patterson the use of split tests or the lack of waiver forms as he was under the assumption that all the paperwork was laid out as Patterson described. Notably, he testified there were no complaints from Griffin or anyone about the test itself until the positive results came back. In fact, he was not aware of the lack of waiver forms until that time. He also explained, and it is uncontested, that his presence at the test was to observe and to be there if anyone had a problem so they could report it to him. Based upon his testimony, I **FIND** that nothing including the instructions, forms, set ups, were reported as an issue on the day of the test, nor did he notice or see any problems himself.

On Cross examination he repeated honestly that in the room he described as "chaotic" he was conversing with people, "cracking jokes" and stated there was "a lot going on". He noted he never looked at any of the testing set ups, so he was not sure how many cups were there. He repeated that he had no problem with the selection of the names, and he confirmed that once the names were pulled, the calls started to report for testing. He confirmed on cross that there were no complaints about the testing procedure from the monitors, participants, or anyone until after the drug tests came back positive. He admitted that it was his job to know what policy was in place and he admitted he was not sure when the new policy (J6) would replace the one they used (J4). His testimony was honest but did not add anything to Officer Griffin's version of the test. He admitted that it was loud, his attention was diverted, and no one complained. He drew P-1, a diagram of the room which ultimately supported the fact that there was almost no

way he could have heard Diaz's instructions to Griffin by virtue of the volume and how far away he was positioned in the room. I **FIND** that President James was earnestly trying to advocate for his officer, and that he did not lie; but he could not say whether any procedure was or was not followed for Officer Griffin as he could not hear and was not paying attention. I **FIND** that he was not aware of when the new drug policy was to go into effect or if the kits were complete.

**Officer Latera Griffin:**

Officer Griffin was sworn in and testified on her own behalf on the peremptory hearing date of June 14, 2021. On direct examination, she recalled being randomly drug screened on the date and time in question. She denied ever being offered the option of a split sample and went as far as to say that her packet of materials was missing the second urine collection container. She said she was never asked to give a second sample and was not ordered to. She recalled Diaz's testimony and she denied his version of events where he said she refused the second sample. In fact, when asked if she opted to give only one sample, she replied unconvincingly "absolutely not."

She noted that she was employed at the HCDOC at the time of the test between twelve (12) and thirteen (13) years. She admitted that she was randomly screened for drugs twice before (once at the academy and once during her tenure at the HCDOC) prior to the test in question. Recalling those earlier tests, she demonstrated with her hands that she would have to pour one sample into the other urine collection container and "remember not to spill it." This indicated to me that she was fully aware of the procedure, and her right to a second sample prior to the date in question. I do believe her when she says she was never ordered to give a second sample, as that is consistent with the other trial testimony and documentary evidence and the procedures followed in J-4. She denied ever using cocaine or any illicit drugs, which I did not believe.

On cross examination, Griffin voluntarily demonstrated the process another time of how to give a split sample, again showing her knowledge of how you give what she stated was "the initial urine" and then she showed us how she would pour it into the other

cup. She maintained that she took (2) random urine tests prior to the one (1) in question and denied ever being offered to give that second sample. Additionally, it struck me that she denied *even* being given the second cup at the time of the test in question as during the long pendency of the case, that is the first time I remember that being an alleged procedural failure in the testing. Griffin did acknowledge having received, read and signed J4, which was the HCDOC Drug Free Workplace policy in effect. Her familiarity with the process coupled with her clear self interest in the matter; severely diminished her credibility. In short, I do not believe that she only received one (1) sample container and I do not believe that she was not given her rights with regard to the option of a second/split sample, nor do I believe that she did not use cocaine; and thus I so **FIND**.

In short, Ms. Griffin obviously has a self interest in the outcome of this case as it directly affects her employment and service in law enforcement going forward. She was pleasant and kind throughout the pendency of the proceedings, but her kind demeanor could not make her version of the facts believable. In addition to her self-interest, her credibility was further damaged by her testimony being the first mention of the alleged lack of a second cup in her testing packet. Further, her due process rights were not infringed upon as she was clearly familiar with the process, demonstrating the process accurately about how careful one (she) would have to be pouring the urine from one cup to the other. As such, I cannot give her testimony about the lack of a second cup and the lack of instruction of her option for a second sample any weight. Further, she could give no testimony regarding the effective date of the Attorney General policy making the second sample mandatory which is what Appellant has primarily put at issue here; and thus I so **FIND.**

## FACTUAL DISCUSSION AND FINDINGS OF FACT

Appellant testified and obviously has a self-interest in this matter. I **FIND** that she feigned ignorance of her right to give a split sample. As noted previously, she actually did the test twice before and physically demonstrated several times to this Tribunal that she was familiar with what a split sample would entail. She was wholly unbelievable in any assertion that she was unaware or that she was given one (1) cup rather than two (2)

when all the other female officers and all the officers that day were given two (2) sample cups. It is clear that her version is unbelievable as even the PBA President who was present, noted that there were no noted issues during her test as she did not express any displeasure with the testing until her sample came back positive. Her direct testimony was brief and cross examination even briefer. In short, what was clear in her testimony was that she was fully familiar with the random urine drug testing procedure; and thus I so **FIND.**

In contrast, two (2) witnesses, Diaz and Lt. Patterson who already admitted a missing waiver form in the packets set up for testing, note that every officer got the same offer for a second sample and two (2) specimen cups each. They admitted they did not order officers to give a second sample and they noted that at the HCPO, it was commonplace that everyone gave two (2) samples and two (2) samples were not required. Both Diaz and Lt. Patterson were direct, and their testimony held up under cross examination in keeping with their supporting documentary evidence.

Again, two (2) PBA Presidents observed the test, never noted an issue with the procedures nor received any complaints. Further, Dr. Havier's testimony was clear, uncontested and highly credible in that the AG policy found at J6 requiring two (2) samples was not to go into effect until September 1, 2018, as corroborated by the other trial testimony and documentary evidence. Furthermore, and not trivial is the fact that the lack of a second sample would not have made the test invalid or unreliable as there was never a request to test the second sample. Dr. Havier relayed clearly and credibly that it was the State Lab's practice to hold positive drug results until the litigation is over to ensure there was an aliquot to send to another lab if so requested. Dr. Havier's testimony in this regard was unwavering over the course of months and undisputed. Lacking evidence that the sample was not tested properly, that something was wrong in the chain of custody, or that the result was rendered acceptable by some medical reason, the Appellant's self-serving testimony is overborne by the otherwise unrefuted laboratory report, coupled with the credible testimony of the officers, PBA Presidents, Dr. Havier's expert testimony and corresponding documents which show a valid, uncontested positive result. Therefore, I **FIND** as **FACT** that that Officer Griffin's test produced a result of over 6000 ng/ml for

benzoylecgonine, the major metabolite of cocaine, which is well above the acceptable limit.

## LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act and its associated regulations govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1, et seq. A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. Among the causes for major discipline are incompetency, inefficiency or failure to perform duties; inability to perform duties; and conduct unbecoming a public employee. N.J.A.C. 4A:2-2.3(a)(1), (3), (6).

The issues to be determined at the de novo hearing are whether the employee is guilty of the charges brought against him/her and, if so, the appropriate penalty, if any, that should be imposed. Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

This case is particularly sensitive because it involves law-enforcement officials.

> [A] police officer is a special kind of public employee. His primary duty is to enforce and uphold the law. He carries a service revolver on his person and is constantly called upon to exercise tact, restraint and good judgment in his relationship with the public. He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public.
>
> [Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966).]

Even more troubling is the fact that illicit drugs may be involved. "Every police officer understands that an officer who uses or sells drugs is a threat to the public." Rawlings v. Police Dept of Jersey City, 133 N.J. 182, 189 (1993).

In this matter, the HCDOC bears the burden of proving the charges against appellant by a preponderance of the credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). Thus, it is my duty to decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth. Jackson v. Delaware, Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958).

In the case at bar, appellant provided a urine sample, was given the option for a split sample, and chose to give only one (1) sample and that one (1) sample tested positive for cocaine.

Appellant has vehemently argued the fact that a mandatory second sample was not taken and thus the results should not be considered. During cross examination there were vague attacks of the general testing procedures of the State Lab. However, most of this came in the form of questions to Dr. Havier about his understanding of the effective date of the new AG Drug Testing Policy/Guideline in question requiring the second sample. Appellant's arguments fail, for all the reasons noted above, J-6 was not to go into effect until September 1, 2018. In fact, there was no proof to the contrary. To that end, this Tribunal was not persuaded by Appellant's arguments of a mandatory second sample. In addition to J-4 being the appropriate test, there was no question as to the chain of custody, and no expert opinion to question the test results, nor any credible testimony that Appellant's due process rights were infringed upon in any way. Furthermore, the Appellant indicated after Dr. Havier testified that there was a valid reserve sample from the initial sample frozen at the lab, it would be tested by an expert which was never done even after representing that after one expert became unavailable, another would be called. Thus, the appropriate procedure was followed and the validity of the uncontested result was credibly supported by Dr. Havier in over three (3) days of testimony, he opined within a reasonable degree of forensic scientific certainty that Officer Griffin's sample was positive for Cocaine, which remains uncontested. Thus, I

**CONCLUDE** the preponderance of the credible evidence weighs in favor of the respondent the HCDOC.

In terms of the Appellant's argument that this Tribunal and the law enforcement agencies of New Jersey are governed by the Attorney General Guidelines and Directives, this Tribunal fully agrees. However, what the Appellant ignores is that there was credible testimony by Dr. Havier who was instrumental in promulgating J6 with regard to specimen collection procedures, and all the witnesses for Respondent testified that the new guidelines requiring two (2) samples did not go in effect until the following month. This testimony remains undisputed.

To be clear, this Tribunal acknowledges the Attorney General's Authority. In this case the Law Enforcement Drug Testing Policy, found at J-6 provides that was to go into effect September 1, of 2018 states, in pertinent part:

> 1. A donor whose specimen tested positive may *only* challenge the positive test result by having the second specimen independently tested. The first specimen will not be retested.
>
> 2. The second specimen will be maintained at the State Toxicology Laboratory for 60 days following the receipt of a positive drug test result from the laboratory by the submitting agency.
>
> 3. The second specimen will be released by the NJSTL under the following circumstances:
>
>    a. The agency is notified by the State Toxicology Laboratory that the first specimen tested positive for a controlled substance;
>
>    b. The agency notifies the donor that the first specimen tested positive for a controlled substance; and
>
>    c. The agency is informed by the donor whose specimen tested positive that he/she wishes to challenge the positive test result.
>
> 6. Following testing of the second specimen, the independent laboratory will report the result of the second specimen drug test to the donor, to the submitting agency, and to the medical review officer.

See J6-AG Law Enforcement Drug Testing Policy (only bearing a revised date of April 2018, no effective date).

At the time of the test on August 18, of 2018, I **CONCLUDE** based upon the credible trial testimony and supporting documentary evidence found above, that The Attorney Generals' Drug Testing Policy found at J6 was not to be in effect until September 1, 2018, weeks after the test in question.[3] Furthermore, all the credible evidence noted by Dr. Havier, Diaz, Lt, Patterson, Director Conrad, and the other witnesses, indicated that J-4 was the policy in effect as of the time of the test in question and there was no testimony to the contrary.

While irrelevant under the facts in this case, for completeness I agree that any test done after September of 2018 when reviewed by the courts will likely be scrutinized for due process under the Guidelines found at J-6. In short, J-6 should have the force and effect of law on law enforcement officers and law enforcement agencies in New Jersey. See O'Shea v. Twp. Of W. Milford, 410 N.J. Super. 371, 382 (App. Div. 2009). As stated in O'Shea,

> Under the Criminal Justice Act of 1970, N.J.S.A. 52:17B-97 to -117, the Attorney General (AG), as the "chief law enforcement officer of [this] State," see N.J.S.A. 52:17B-98, is charged with adopting guidelines, directives and policies that bind local police departments in the day-to-day administration of the law enforcement process. See In re Gen. Disciplinary Hearing of Carberry, 114 N.J. 574, 577-78, 556 A.2d 314 (1989), the articulated design is to promote the "uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the State." N.J.S.A. 52:17B-98. Such provisions "shall be liberally construed." Ibid.
>
> Accordingly, consistent with statutory authority, the AG issues guidelines, directives and policies concerning appropriate application of the State's criminal laws. See In re Carroll, 339 N.J. Super. 429, 439, 772 A.2d 45 (App. Div.), *certif. denied*, 170 N.J. 85, 784 A.2d 718 (2001). Indeed, our courts have

[3] It notes a revised dated of April 2018, but unlike the HCDOC policy at J4, it does not note an effective date.

> "acknowledged the validity of various guidelines issued by the Attorney General," such as the plea offer guidelines, the sex offender registration guidelines, the drug screening guidelines, and the guidelines assisting prosecutors in rendering uniform decisions concerning drug testing. Ibid.
>
> [O'Shea v. Twp. of W. Milford, 410 N.J. Super. 371, 382 (App. Div. 2009).]

Law enforcement departments consist of individual law enforcement officers who bind themselves upon swearing to uphold the law and those local departments are mandated to draft and implement local departmental rules and regulations consistent with the AG policies. N.J.S.A. 40A:14-181. In keeping with this sentiment, it follows that if this was, in fact, the policy Griffin relies upon in this case that she too would have been bound by the sixty (60) day time limit to have her sample tested. As is undisputed, the sample was never tested even though it was represented to this Tribunal numerous times that it would be tested and testified to by an expert, and that did not happen, thus I **CONCLUDE** Griffin's results are valid. Again, J-6 and its requirements were not in effect at the time of the test in question, thus I cannot conjecture which test violations would be considered fatal flaws to invalidate positive test results in the future, nor will I address that issue as it is not before me.

Accordingly, it is clear, and I **CONCLUDE** that in this case, under J4 Appellant was allowed to claim or present a different urinalysis result at any time during the pendency of this case and did not. Nevertheless, I **CONCLUDE** that the new AG Policy (J-6) was not to be in effect until September 1, 2018 which is after the date of the test in question. As a result, the HCDOC was not mandated to order a second sample as part of its random urine testing. But the policy in effect did not extinguish her right to have one taken, or to probe on proper cross-examination or rebuttal testimony whether the State Lab followed its own protocols or best scientific practices in testing appellant's urine sample. Cross-examination is at the heart of an officer's due process rights, even in an administrative forum, where his profession and livelihood have been threatened. Such cross examination took place in the case at bar.

> The law holds high the value to and right of a defendant in a criminal case of full cross-examination of the witnesses

> arrayed by the State against him. State v. Curcio, 23 N.J. 521 (1957); cf. State v. Orecchio, 16 N.J. 125, 129 (1954). Cross-examination should be allowed to extend to anything which is relevant to show the improbability of the direct evidence. 3 Wharton, *op. cit.*, § 861, *p.* 242."
>
> [State v. Bulna, 46 N.J. Super. 313, 322 (App. Div. 1957).]

However, that thorough cross examination did not provide this Tribunal with any question that the test was done properly, that Griffin was given two (2) specimen containers, that she was advised of her rights to a second sample, knew her rights and chose not to give a second sample. As she explained she was aware of how to pour her initial sample into the second specimen container and showed this Tribunal how she had done so in the past. Further, I am convinced that she was provided with a clear statement of her rights as outlined in detail by Diaz who was a highly credible witness; and thus I so **CONCLUDE**. Again, there is no credible testimony to dispute this other than Griffin's self-interested testimony, nor any test results to the contrary.

In addition, there was ample opportunity (years) for the Appellant to argue that some matters undermine the weight of Dr. Havier's expert opinion; that was never presented. Further, both PBA Presidents were present during the random drug examination and President James testified credibly that there were no noted problems or issues with Officer Griffin's test set up or her test. There is no credible testimony that she was missing a second specimen cup, or that she was not given the opportunity to split her sample as she had done twice in the past, thus I **CONCLUDE** that even though the waiver form of the second sample was missing, there was an entire packet of paperwork, much signed by Appellant, and credible evidence of all who testified at hearing that Griffin was the only one in her group who chose to give only one (1) sample.

Given her time in the HCDOC and this being her third random urine test, based upon my findings above, that she knew that a second sample was the way to question the validity of a test, Appellant's due process rights remained intact throughout, and thus I so **CONLCLUDE.**

As there is no procedural reason to bar the uncontested results of the positive urine sample; nor is there any case law to support that the lack of a mandatory second sample would be a fatal flaw in and of itself. In short, I **CONCLUDE** that the highly credible testimony of the witnesses of the HCDOC coupled with the expert testimony of Dr. Havier ensured Appellant's due process in the test in question.

It should be noted, that the Civil Service Commission has upheld cases where the failure to collect a split sample was found not to be a fatal flaw as no evidence was presented that the results of the appellant's drug test were inaccurate. See In the Matter of Michael Larino, CSC Final dated May 4, 2011 and In the Matter of John W. Kelly (MSB, decided May 24, 2006). In fact, in cases like the one at bar, where the record did not demonstrate an irregularity or breach in the chain of custody of the appellant's urine sample, an error in the testing process, or discrepancy in the results of the drug test, the Civil Service Commission noted that "it is well established that the failure to offer the opportunity to provide a second urine sample is not fatal, where there is absolutely no evidence that the results of the Appelllant's drug test were inaccurate." See In the Matter of Dean Schwaner, Dept. of Corrections, CSC 2014-2120, September 2014, which was affirmed at In re Schwaner, No. A-0748-14T2, 2016 N.J. Super. Unpub. Lexis 2624 (App. Div., Dec. 9, 2016), and the New Jersey Supreme Court denied cert at In re Schwaner, 230 N.J. 220, 221 (2017). The courts confirmed the CSC's conclusions in this regard, finding that not every technical deviation from a drug testing process warrants the nullification of the results of that test. Id. Specifically, the Schwaner Court affirmed the CSC's final decision that even if there was a failure to advise him of the option of providing a second urine sample for subsequent testing, this failure would not deny him of his constitutional right to due process. Id. Further, they noted that such an omission would not result in any fundamental unfairness because the officer was not deprived of his right to challenge the drug test results as the lab preserved the unused portion. Identical to the instant case, Schwaner undertook no effort to test the remaining portion of the sample which the court relied on to determine that his due process rights were intact. See also, George v. City of Newark, 384 N.J. Super. 232, 235, 894 A.2d 690 (App Div. 2006) (where the court found that even if the frozen sample was lost that without the presence of "bad faith" the sample was only considered "potentially useful evidence" and not "exculpatory

evidence" as such in the absence of bad faith, "relief should be granted only where there is a showing of manifest prejudice or harm arising from the failure to preserve evidence.")

As the policy in effect did not mandate a second sample, I **CONCLUDE** that there was no deviation of the drug testing process, other than the absence of the waiver form that supported her verbal choice to forego the second sample and other documents indicating no second sample was given.

## PENALTY

In short, this Tribunal fully acknowledges the import of both the Attorney General Guidelines and Directives as noted above, and as evidenced by the undersigned going to great lengths to obtain the Protective Order in the beginning of the hearing, not previously required. To that end, in terms of discipline i must also follow the Attorney General Guidelines. Thus, it is not necessary for me to determine if progressive discipline is at issue here to note termination as a proper form of discipline. As this Tribunal has found that Officer Griffin's random urine sample was positive for cocaine, I have only one (1) option as the HCDOC drug testing policy found at J-4 which was controlling at the time of the test in question comports with the New Jersey Attorney General Guidelines. In fact, it notes a revised date of 11/19/11 and an effective date of April 11, 2018 noting the "Authority" as AG Directive 2018-2. To that end, the AG Guidelines note as does the HCDOC corresponding drug policy found at J-4, that the officer *shall* be terminated and removed after a positive drug test. It further states that the officer *shall* be reported to the Central Drug Registry and be disallowed from further employment in law enforcement.

I therefore **CONCLUDE** that removal is the only discipline available for a law-enforcement officer who used illegal drugs. For purposes of this administrative disciplinary proceeding alleging Conduct Unbecoming a Public Employee N.J.A.C. 4A:2-2.3(6), Neglect of Duty N.J.A.C. 4A:2-2.3(7) and Other Sufficient Cause N.J.A.C. 4A:2-2.3(9); I **CONCLUDE** that the Hudson County Department of Corrections has proven by a preponderance of the credible evidence that its determination to remove appellant was proper.

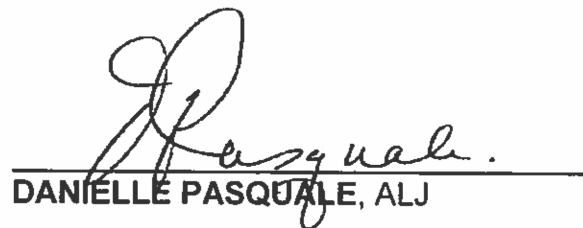
## ORDER

Accordingly, it is hereby **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action of the Hudson County Department of Corrections against appellant Latera Griffin is hereby **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. 40A:14-204.

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



July 29, 2021
DATE

**DANIELLE PASQUALE**, ALJ

Date Received at Agency: July 29, 2021

Date E-Mailed to Parties: July 29, 2021

lr

## JOINT EXHIBIT AND WITNESS LIST

## WITNESSES

For Appellant:

PBA President (for uniform officers), Derrick James

Officer Latera Griffin, Appellant

For Respondent:

Deputy Director Michael Conrad

Dr. Robert Havier, Ph.D.

Detective Gabriel Diaz

Lieutenant Erika Patterson

## EXHIBITS

**For Appellant**:

P-1 Diagram of Testing Room as per PBA witness Derrick James

**For Respondent**:

C-1 Hudson County Report by the State Toxicology Lab

J-1 Amended Preliminary Notice of Disciplinary Action (PNDA) (9/20/18)

J-1(a) Immediate Suspension Notice

J-2 Griffin's Acknowledgement of Random Drug Screening (8/16/18)

J-3 Initial Toxicology Report

J-4 Hudson County Department of Corrections Drug Policy

J-5 Electronic Receipt of Drug Policy by Officer Latera Griffin

J-6 AG Guidelines (revised April 2018)

J-7 Report from Lieutenant Patterson to Director Edwards regarding random drug testing (8/20/19)

J-8 Internal Chain of Custody Form for the Sample (Hudson County DOC)

J-9 Chain of Custody with the State Lab

J-10 Memo from Lieutenant Patterson to Director Edwards regarding drug testing (9/12/18)

J-11 Memo from Lieutenant Patterson to Internal Affairs File for Officer Latera Griffin (9/12/18)

J-12 Credentials for Detective Gabriel Diaz

J-13 CV for Dr. Robert Havier, Ph.D.