STATE OF NEW JERSEY

In the Matter of Sam Williams
City of Hoboken, Police Department

CSC DKT. NO. 2020-2353
OAL DKT. NO. CSR 07198-20

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 22, 2021 BW

The appeal of Sam Williams, Police Officer, City of Hoboken, Police Department, removal effective September 18, 2019, on charges, was heard by Administrative Law Judge Gail M. Cookson, who rendered her initial decision on August 23, 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 Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting of September 22, 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 Sam Williams.

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
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Allison Chris Myers
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 07198-20

AGENCY REF. NO. N/A

2020-2353

IN THE MATTER OF SAM WILLIAMS,
CITY OF HOBOKEN POLICE DEPARTMENT.

Debra Simon, Esq., for appellant Sam Williams (Cammarata, Nulty & Garrigan, attorney)

Patricia C. Melia, Esq., for respondent City of Hoboken Police Department (Weiner Law Group, attorney)

Record Closed: July 8, 2021 Decided: August 23, 2021

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE

This matter was initiated by a Major Discipline Appeal Form filed by appellant Sam Williams (appellant) simultaneously with the Civil Service Commission (CSC) and the Office of Administrative Law (OAL) under cover of March 11, 2020, from the decision of the City of Hoboken (City or Respondent), Hoboken Police Department (HPD) to terminate him from his position as a police officer after testing positive for 11-carboxy-tetrahydrocannabinol (THC), a metabolite of marijuana, following a random drug urine screening on August 23, 2019. Appellant was charged with violations of: (1) conduct unbecoming a public employee pursuant to N.J.A.C. 4A:2-2.3(a)(6); (2) other sufficient cause pursuant to N.J.A.C. 4A:2-2.3(a)(12); (3) conduct unbecoming an employee in the

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public service pursuant to Departmental Rules and Regulations Section 6:1.6k; (4) failure to comply with the Chief's orders pursuant to Departmental Rules and Regulations Section 6:2.27; and (5) Departmental Substance Abuse Policy pursuant to General Order 18-19. The appellant denies the allegations and states he was using legal over-the-counter (OTC) cannabinoid (CBD) products for a work-related shoulder injury and that such would account for the positive THC results.

PROCEDURAL HISTORY

On September 18, 2019, respondent issued two Preliminary Notices of Disciplinary Action (PNDA) setting forth the charges and specifications made against the appellant. Appellant ultimately waived a departmental hearing. On March 10, 2020, the respondent issued Final Notices[1] of Disciplinary Action (FNDA) sustaining the charges in the Preliminary Notice and removing appellant from employment, effective September 18, 2019. Appellant filed a direct removal appeal on March 11, 2020, to the Office of Administrative Law (OAL) where it was filed[2] as a contested case pursuant to N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52: 14F-1 to 13.

On August 17, 2020, the matter was assigned to the undersigned. On September 2, 2020, a telephonic case management conference was convened at which time hearing dates and pretrial motions were discussed. The plenary hearings were originally scheduled to take place on November 5, 9 and 10, 2020. Motions to quash a subpoena, motions in limine, interlocutory appeals to both the Commission and the Appellate Division of Superior Court, and subsequent additional motion practice delayed these proceedings. Plenary hearing dates were established finally for May 3, 4, 5, 10, 12 and 14, 2021. The record closed on July 8, 2021, with the receipt of post-trial briefs and replies.

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[1] The first two FNDAs relate to appellant's positive drug screen for THC and his immediate suspension, relating back to PNDAs that were issued on or about September 18, 2019 (Exhibit J-1 and J-2); while the third FNDA relates back to a PNDA issued on or about January 7, 2020, which charged appellant with the same violations and also the implied standard of good behavior expected of sworn law enforcement officers due to his knowing failure to disclose the use of CBD products (Exhibit J-5).

[2] The Emergency shutdown of the State of New Jersey because of the coronavirus pandemic delayed the perfection of the filing of this appeal and its assignment to the undersigned.

FACTUAL DISCUSSION[3]

On August 23, 2019, appellant was randomly selected for drug testing, along with other officers (10% of the force) through the City's random drug testing computer program. [Exhibit R-7; 1T32-33.] The City presented Lieutenant Steven Aguiar, Sergeant Richard Torres, and Sergeant Alex Gonzalez as fact witnesses on the random drug test undertaken that day. Their testimony will be individualized only to the extent that is needed.

Aguiar testified to the general procedures for drawing the random names of officers using the Drug PAK random computer generator program, the forms utilized, and the Attorney General and City drug testing policies. [Exhibit R-1; Exhibit J-4.] At approximately 12:05 p.m., appellant entered the Internal Affairs (IA) Office and was notified of the random drug test. Present in the IA Office were Aguiar, Torres and Gonzalez. Torres and Gonzalez both served as Monitors that day and worked as a team. Immediately upon being informed of the random drug test, appellant became very nervous and refused to sign the Acknowledgment and Consent Form, and refused to do so even after he was cautioned about the consequences of a refusal to submit to a drug test. [Exhibit R-7; T1:37, 150; T2:8, 61.]

In an effort to help appellant, Aguiar contacted a PBA union representative, Det. Marc Marsi, to speak with appellant before he officially refused to submit to the drug test. When Aguiar returned from seeking out Marsi, appellant spontaneously uttered that he was going to fail the drug test. Id. [T1:151-152; T2:64-65.] Appellant testified that he stated he would fail the test because he was using the deer antler supplement which he listed on the Drug Testing Medication Information Form (MIF) and that he was worried that the deer antler supplement would test positive for steroids. [T2:65-66, 73.]

When Marsi arrived, Aguiar reiterated that the test pool was randomly selected and that both Marsi and the PSOA President witnessed the selection process. [T1:39.]

[3] References to the plenary hearing transcripts shall be as follows: 1T: May 3, 2021; 2T: May 4, 2021; 3T: May 5, 2021; 4T: May 10, 2021; 5T: May 12, 2021 and 6T: May 14, 2021.

Appellant, however, again refused to consent. Marsi and appellant left the IA Office to have a private discussion. [T1:39, 153; T2:63, 70-71.] When they returned, appellant was presented with the Consent Form and appellant again stated that the drug test would come back positive. Ultimately, appellant signed the Consent Form. [Exhibit R-7; T1:41, 42; T2:62, 75.] Appellant also personally completed the MIF, wherein the only substance he disclosed having ingested/used was "Deer Antler Supplement" last taken August 21, 2019. [Exhibits R-3 and R-4.] The MIF was witnessed and countersigned by Gonzalez.

With respect to the physical collection of the urine sample. Aguiar described the collection kits consisting of sealed specimen containers, which each officer must select and label in pencil with their Social Security number. When it was time for appellant to produce the urine sample and prior to even attempting to urinate, appellant stated he was unable to produce a specimen and asked for water, which he was given. [Exhibit R-7; T1:49, 158.] During this time period, appellant began to continuously tremble and claimed it was due to anxiety. [T1:49-50, 159; T2:81.] Appellant spontaneously stated, without any prompting, that he could not afford to lose his job and he would not know what to do if he lost his job. [Exhibit R-7; T1:50, 164; T2:84-85.] Escorted to the men's bathroom facility being used for the testing, appellant was still unable to pass any urine. He was provided another small cup of water. Id.

When appellant actually attempted to produce a sample, he was unable to do so. He was provided more water and was monitored. [Exhibit R-7.] Torres testified that appellant was provided approximately 4 to 5 10-oz. cups of water (not filled to the rim). Appellant later testified that he drank 5 to 6 10-oz. cups of water within a one-hour time period.[4] [T2:81, 122.] The officers present testified that they became quite concerned as appellant continued to tremble. He was asked if he needed medical attention, which he declined. [T1:52-52.] They turned off the air conditioner to make him more comfortable and when asked, gave appellant a waste basket to vomit in. [T1:53; T2:86.] For a second time, appellant was unable to produce a urine specimen. After he vomited a third time, an ambulance was called. Appellant, along with Torres, was transported to Hoboken University Medical Center by ambulance. [T1:53-55, 166; T2:87.] There, he was able to

[4] I note mathematically that an average of 40-50 ounces would equate to approximately three pints.

give the required specimens, which Torres took possession of after appellant sealed the containers. [Exhibit R-7; T1:170.] Appellant received no treatment or medication while at the hospital. After discharge, appellant was immediately placed on paid administrative leave because of his erratic behavior that day.

The specimens were transported back to HPD by Torres and were placed in a controlled-access refrigeration unit in the secure IA Office. The specimens were ultimately transported to the New Jersey State Toxicology Lab (NJSTL) on August 26, 2019. [Exhibit R-5; T1:57, 172.] While Torres was the actual monitor of appellant's urine collection, the chain of custody document reflects Gonzalez's initials in the monitor column of the form. [Exhibit R-5; Exhibit J-4 at 50-53; 1T180:15-182:1; 1T181:14-17.] These officers were subjected to cross-examination by appellant, especially with respect to the chain of custody paperwork.

On or about September 18, 2019, the City received notification from the NJSTL that appellant tested positive for 11-Carboxy-THC (THC). [Exhibit R-6; T1:60-61.] Thereafter, appellant was issued the two PNDAs, and was immediately suspended and relieved of his duties. Exhibit J-1 and Exhibit J-2.]

The City also presented the testimony of JoAnn Shaughnessy and Dr. Robert Havier, both from the NJSTL, on its testing protocols and results. The urinalysis was conducted by Shaughnessy, one of the two lab technicians at the NJSTL. Her work is overseen by the Acting Director of the Lab, Dr. Robert Havier. Shaughnessy has worked as a Forensic Toxicologist at the NJSTL for approximately 32 years, specifically conducting law enforcement drug testing. [Exhibit J-6; 4T5.] Shaughnessy explained that approximately 18,000 law enforcement drug tests are performed at the lab each year and the NJSTL is the only lab authorized to conduct law enforcement drug testing in New Jersey. The NJSTL screens for amphetamines, barbiturates, benzodiazepines, cocaine, cannabinoids, methadone, opiates, phencyclidine, oxycodone, and creatinine for validity (i.e., to make sure the urine is human). [4T7.] The NJSTL does not test for steroids, so a sample must be sent to Redwood Technologies Laboratory (Redwood). [4T15.]

Initially, the urine samples are visually inspected by the receiving individual from the local agency courier for compliance with established parameters and then issued a lab identification number.[5] Shaughnessy described the lab's two-stage procedure for analyzing specimens. In the first stage, all specimens undergo an initial screening (immunoassay) to determine whether any of the nine listed substances and/or their metabolites are present at or above the designated cut-off level. All presumptive positive specimens are subjected to confirmation testing through a gas chromatograph mass spectrometer (GC-MS) instrument for the definitive identification and quantitation of drugs and/or metabolites. When a specimen tests positive at both the initial stage and second stage, a medical review officer, in this case Dr. Havier, will review the test results in comparison with the MIF submitted with the specimen, and then produce the written results to the local law enforcement agency. [Exhibit J-4.]

The NJSTL received the HPD specimens on August 26, 2019, and appellant's specimens were assigned toxicology number 19LO12591. [Exhibit J-6; T4:20, 34, 42, 45.] After the samples are received and accepted for testing, they are collected by an analyst from the law enforcement drug testing section and placed in a secured refrigerator in that unit. [4T12.] Shaughnessy also explained how the instruments that are used for the screening and confirmation testing are tested and checked in advance (daily maintenance and tuning) to ensure they are functioning properly before the tests are run that day. [4T54-55.] After quality controls are run and the instrument is calibrated, a sample will be subjected to a first screening procedure, an immunoassay procedure using an antibody antigen reaction to identify drugs or classes of drugs that may be present in the sample. If the sample is screened positive, that is, it contains one or more of the drugs on the schedule of substances, an aliquot[6] from the original specimen will be tested by a confirmation method completely different from the screening method. The NJSTL uses a GC-MS instrument for confirmation testing. [T4:12-17.]

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[5] The NJSTL receiving personnel for this matter was Melinda Udvarine. The parameters reviewed are to ensure that the sealed container has not been opened or tampered with in any way; visually check the volume and appearance of the sample; check the social security on the label inside of the container and compare it to the submission form; and enter the relevant information into the computer which generates a toxicology number. [4T10-11.]

[6] An aliquot is a small portion of the original sample for testing.

Shaughnessy testified that after Batch 1 (#93290) failed, the GC-MS instrument was recalibrated and a column inside the equipment was replaced. [T4:31-32, 35, 65.] Shaughnessy testified that Batch 2 (#93322) was successfully GC-MS tested. Shaughnessy also testified that in her running of the GC-MS testing and her collection of the data for Batch 2, she did not encounter any errors or anomalies that would cause her to question the accuracy of the GC-MS report. [4T35.]

The result of the immunoassay drug screening test on appellant's sample was positive for THC. His creatinine level was low at 12.75 mg/dl and was flagged for additional testing to determine whether it was a valid urine sample. Shaughnessy testified that the GC-MS drug confirmation test on appellant's urine sample identified the metabolite of marijuana in the amount of 100.5 ng/ml. [Exhibit J-6; 4T18, 22, 37, 41.] An aliquot of his urine was sent to Redwood for steroid testing, which came back negative. [Joint 6: 68-69; 4T62:6-14; 6T14:21-15:2; 6T46:9-12; 6T48:17-24]. Redwood also conducted additional creatinine testing including testing for pH and specific gravity levels. [4T63:4-20]. The pH and specific gravity test results were within but on the low side of the reference range, meaning on the more diluted end of the range, and thus his urine specimen was valid for substantive testing. [6T49:18-51:6.]

On cross-examination, Shaughnessy was questioned on each step of the two batch runs of the GC-MS. She clarified that there was not a failure of the machine but a column inside the machine that needed to be replaced during the first run batch. [4T30.][7] Shaughnessy was also asked why and how appellant's urine sample could be tested on September 3, 2019, after sitting unrefrigerated in the GC-MS equipment for so many days. Shaughnessy explained that all of the aliquots for that batch are in the machine with a rubber seal that does not allow for an opening to the urine sample. [4T33.] Notwithstanding the above, the second batch run started with a new aliquot, this time diluted in a 4:1 ratio because they knew the presence of some THC made it out of range for testing without dilution. [4T38-39.]

[7] Further clarification was not provided but, in my mind, I analogize the column to the toner cartridge in a printer.

On further questioning, Shaughnessy acknowledged that two control samples did not run properly in the second batch but that such did not impact the accuracy of the result for appellant's sample of 100.51 ng/ml. It would then be up to Dr. Havier to decide if the batch run was valid. [4T77:9-78:6.]

Dr. Robert Havier was qualified as an expert in the field of Forensic Toxicology. Prior to his retirement at the end of 2020, Dr. Havier worked at the NJSTL for a total of forty-one years. He was the Director of the lab from 2011 through 2019, and then named Acting Director. Dr. Havier testified that he reviewed all of the screening and confirmation data, including the report from the medical review officer. He concluded that all testing was properly conducted from which he generated a final report for this case. [Exhibit J-6 at 98; 6T7-10, 22.]

Dr. Havier testified on some of the basic chemical parameters applicable to the testing of urine for the listed drugs. He explained that the cutoff level of 15 ng/ml is used because it is the industry accepted level for THC, below which one can reasonably assume any presence of THC would be simply from passive inhalation or casual exposure. [6T12.] Dr. Havier also explained the scientific significance of the creatinine level in a urine test. The level of creatinine detected is used to determine whether the sample was excreted from a person rather than being synthetic or from an animal. The cut-off level for creatinine is 20 mg/dl. Here, although the urine sample was valid, the creatinine level indicated that the sample had more than a normal level of dilution. [6T14-15.] Dr. Havier stated that if a person drank a lot of fluids, the creatinine level excreted would be affected and further affect the amount of THC detected. The NJSTL, however, does not normalize the THC amount to determine what the concentration would be if the sample had a normal creatinine level. [6T17.]

Dr. Havier reiterated what Shaughnessy stated, that all of the instruments that are used for the screening and confirmation testing are tested and checked in advance to make sure they are functioning properly and calibrated properly before the tests are run that day. Dr. Havier considered all of the information from the confirmation analysis and all of the criteria for identification and quantification of the metabolite, and concluded that appellant's urine specimen contained THC at the level of 100.5 ng/ml. More specifically,

Dr. Havier testified that for Batch 2, there were no anomalies or unacceptable criteria results. Dr. Havier further commended the work of Shaughnessy stating, "The analysis of the second sample doesn't get much better than that." [6T11, 22.]

Dr. Havier testified that he did not agree with any of Conrad's opinions and questioned Conrad's experience with extractions and GC-MS analysis of biological specimens. [6T26, 38.] More specifically, Dr. Havier testified that there were no "co-eluting peaks," "ghost peaks", or other evidence of contamination. Dr. Havier explained that a "co-eluting peak" occurs at the same retention time as the target ion being examined. As evidenced by the chromatographs in the Litigation Packet, the peaks that Conrad considered to be co-eluting were completely separate and thus, could not be considered co-eluting. [6T23, 25-30.] Dr. Havier also disagreed with Conrad's opinion that there were peaks in the negative urine sample that did not belong there. [6T78.] Dr. Havier explained that the areas of peaks that Conrad claims should not be present were actually peaks of the THC metabolite. [6T82, 94.]

While Dr. Havier thought the break in the computer assigned number sequence was unusual, it did not signify an error, nor did it impact the testing in any manner. [6T41.] Dr. Havier further explained that Batch 2 was diluted with a 1 to 4 dilution because for Batch 1, the urine concentration was beyond the range of sensitivity of the method. In other words, the 90.4 ng/ml result from the Batch 1 reading was beyond the calibration curve which only goes up to 75. The final 100.5 ng/ml was a more accurate number. [6T88, 90.]

On cross-examination, Dr. Havier was confronted with similar chromatograph failings in both Batch 1 (#93290) and Batch 2 (#93322) with respect to Controls 1 and 2 [6T85:2-86:5], as well as with appellant's sample. [6T93:3-94:11]. Yet, Dr. Havier opined that the Batch 2 results were nonetheless valid.

Appellant testified on his own behalf. Appellant had been employed by the City since in or around May of 2015, or a little over four years as of August 23, 2019. On the day of the random testing, he was 24 years old, 6'4" tall and weighed around 180 to 185 lbs. [2T18-19.] He has been employed by the City as police officer since May of 2015.

[2T20.] Appellant described the injury he received in the line of duty while effectuating an arrest on May 29, 2019. Appellant was transported to Hoboken University Medical Center where he was treated for what was then deemed to be a dislocated shoulder. [2T28:14-15, 29:3-5]. Appellant continued to experience shoulder pain after the injury. Being aware of the opioid addiction crisis in the United States at that time, he declined prescription painkillers. [2T31:18-20, 32:3-17].

A few weeks after the injury, appellant stated that he accepted the recommendation of his mother, who had been using CBD products to alleviate pain associated with arthritis in her hips and hands, to try a partially used bottle of CBD tincture oil she gave him. [2T36:8-14; 3T39:17-18, 23-25]. He also tried deer antler supplement. Without much specificity at this hearing, appellant said that he used CBD products two to three times per day up until he received the NJSTL results. [2T40:1-8; 2T40:18-22]. He also testified that he occasionally used hemp-flower cigarettes/rolls and used a topical CBD cream on the shoulder area. [2T38-39.] Appellant stated that he liked the topical cream and the tincture product the best. [2T41.] He testified that at the time he allegedly used CBD products, he did not know whether CBD products could affect a random drug test. [2T74.]

In early July 2019, appellant returned to work and resumed his assignment in the patrol division. He was again assigned to the command of Sergeant Burke. [2T52:8-53:2.] Appellant testified that he was still experiencing shoulder pain and continued using the various CBD products upon his return to work.[8] [2T52:3-7]. At the beginning of August 2019, Officer Williams was transferred to the Bureau of Identification for a one-month training assignment. [2T25:23-25].

Appellant also reviewed his recollection of the actual day he was selected to be screened. Torres was the officer who retrieved him from his office. After being advised that he had been randomly selected for a drug screen, he stated that he did not believe it

[8] Appellant eventually did require surgery and physical therapy on the shoulder, which has shown signs of healing since then. [2T54:5-18.] He feels he is at about 85% functionality in the shoulder and could qualify for firearm certification if returned to the HPD.

was random because officers and even the Chief had been commenting on his weight loss since the injury. Appellant had lost fifty pounds because he could not work out and had no appetite. Detective Marsi advised that he had witnessed the random draw as the union representative. Appellant admitted at this hearing that he did comment at the time that he thought he would fail the test. He was worried with respect to the deer antler spray that it would test positive for steroids, even though he also thought it was okay to use as a publicly available supplement. [2T73, 100-101.]

Appellant and Marsi were given the opportunity to speak privately after he refused to sign the forms. Appellant told Marsi that he wanted to speak with his private attorney before consenting to the drug test. He did not know whether he should disclose his CBD use. [2T72, 106, 121.] Appellant testified that Marsi called the union attorney instead on his behalf. [2T72.] Although he had questions in his own mind about the CBD products and whether being legal meant they contained no THC, he acknowledged that he failed to disclose the alleged CBD products to Marsi who then did not raise it with the union attorney. Ultimately, Appellant did not list the substances on the MIF. [2T73; 114.]

Appellant described his attempts thereafter to urinate for the test. Both Torres and Aguiar accompanied him to the men's bathroom. He was told to use the urinal but he also admitted that he did not ask for the privacy of a stall. Torres was behind him and on an angle to monitor but appellant could not urinate sufficient quantity to fill a cup. Appellant was given water but he could not recall if he asked for it or they just suggested it. He was feeling nervous and anxious during this entire procedure. Appellant used to be able to control his anxiety with exercise but had not been able to do that since his injury. He had been given a prescription for it but never filled it. Appellant also testified that it had never happened on the job until this occasion. He then described the couple of times he vomited clear contents of his stomach which he believed was from drinking the water too fast and his nerves. [2T80-84.] When he got cold and started trembling, the monitors first turned down the air conditioner and then called an ambulance. Appellant was able to provide the required urine specimens at the hospital. He admitted that he knew he could get the second sample independently tested. [2T91-92.]

Appellant testified that he knew that the consequences for a sworn law enforcement officer testing positive for drugs could be termination. [2T95.] He also admitted that as a law enforcement officer he is responsible for knowing the specific contents of substances he puts into his body. [2T97-98.] Yet, appellant also stated during the testing period that he could not afford to lose his job and that it was the only thing he knew how to do and that he was good at. [2T84-85.]

On cross-examination, appellant was confronted with his prior statements in the pre-hearing discovery as to the type and amount of CBD products he claimed to have used. The primary description was set forth in a letter from his counsel and then cross-referenced in answers to interrogatories:

> Please be advised that Officer William does not recall the specifics with references to dosages and which product(s) he used on which days. However, he indicates that he mostly used the Healing Nation Full Spectrum Cream as he found it the most effective in dealing with the severe shoulder pain he was experiencing...He further indicated that he only used the TKO by Hemp Nation CBD Caviar, TKO by Hemp Nation CBD Hemp Flower and the FX CBD Oil Tincture a couple of times.
>
> [Exhibit R-8.]

Appellant's testimony also encompassed the record of his employment with the City. Appellant had received two major disciplinary actions including a 5-day suspension in 2016 and a 50-day suspension in 2017. [Exhibit R-10; 1T65-66.] There were also minor infractions resulting in two counseling notices in 2016 for tardiness, and an oral reprimand in 2019 for losing his assigned Narcan equipment. [Exhibit R-10; 1T64:13-66:13.] Appellant also received several commendations and positive media coverage, however, in his four-year career as a Hoboken Police Officer. [Exhibit A-6 at 142-155; 2T22:5-25:15.]

Appellant also presented several character witnesses. William James is a retired Hoboken Police Officer who worked with appellant's father. He has never worked with appellant but occasionally runs into him around town. [3T7-8, 11.] Sergeant Nicholas Burke currently works for the HPD as a uniform patrol supervisor/desk sergeant. Both Burke and James testified that appellant had a reputation for honesty and truthfulness.

[3T9:16-21; 3T23:19-24:6]. They have both known appellant for most of his life. [3T7:7; 3T18:15-16]. James is a long-standing friend of appellant's father and was active in appellant's childhood as a basketball coach and in family gatherings. [3T7:13-25; 3T8:5-10; 3T8:22-9:2]. James also testified that he wished he had had the opportunity to work with appellant, but he retired before appellant joined the Department. [3T7:11-12].

Burke had daily interactions with Officer Williams on the job [3T19:2-18] and even socialized with him off duty. [3T23:7-18; 3T29:19-31:17]. He testified that as appellant's supervisor, he never observed him to be under the influence of any drugs, particularly marijuana, either on duty or off duty. [3T24:7-11]. This opinion was predicated on Burke's training and experience in various narcotics related assignments. [3T24:12-25:12]. He testified that he was aware that he has an on-going duty to report any officer suspected of being under the influence. [3T25:14-26:1; 3T28:18-24]. On cross-examination, although Burke testified that he thought appellant was a truthful person, he admitted that he does not know what appellant does or how he conducts himself in his personal life. [3T29.]

Lorraine Fred, appellant's mother, testified on his behalf. According to Fred, in early June of 2019, she suggested that appellant try some CBD oil. Later, appellant told her he tried the tincture "once or twice." [3T39-41.] Fred could not identify the specific CBD products, ingredients, dosages, or frequency that appellant allegedly used in or around August of 2019. It was noted that Appellant did not live with her at the time. [3T44-45.]

Appellant presented the testimony of Frank J. Conrad as an expert witness in Analytical Chemistry. Conrad co-founded Colorado Green Labs in 2014 and was its first Lab Director. He now serves as its Chief Technology Officer with responsibility for development of its patent portfolios, as well as managing projects for outside clients. He received a B.S. in Molecular Biology from the University of Denver in 2000, followed by an M.B.A. there in 2002, and then another graduate degree in Biomedical Sciences from University of Colorado in 2010. Conrad holds no forensic toxicology licenses. Colorado Green Labs started out doing chemical analyses of marijuana and hemp products, including potency and contaminants, some of which utilized GC-MS instrumentation. It is

now undertaking to develop clinical trials related to jurisdictions that have legalized marijuana use in order to determine the level at which THC consumption could cause impairment, analogous to blood alcohol and DUIs.

Conrad has prepared expert reports in ten cases prior to the present one, and none of those involved any independent testing on his part but rather just review of the discovery materials. He testified in only two of those: one case involved a hair analysis in a child custody dispute, and the other a random urine screen on an employee of the Department of Homeland Security. Over respondent's objections, I qualified Conrad in the field of Analytical Chemistry.

In preparation of his three reports for this hearing, Conrad reviewed the NJSTL Litigation Packet, Dr. Lage's report, and appellant's statement of CBD product usage, although not the specific types, brands, or amounts. He did not interview appellant. Conrad testified to his opinion in his first report that there were flaws in the NJSTL procedures utilized here. Specifically, (1) break in number sequencing of the incoming specimens; (2) chain of custody issues with the MIF; (3) lack of records for the NJSTL creatinine testing; (4) presence of co-eluting peaks, contaminants, carry-over and poor separation in the GC-MS chromatographs; (5) issues with the control samples; (6) evidence of "carry over;" (7) length of time appellant's aliquot was left in the testing instrument; (8) unusually high results for other specimens; and (9) violations of the College of American Pathologists testing protocols. [Exhibit A-2.]

Conrad's first report was from January 2020, in which he laid out the above errors he alleged invalidated the NJSTL results. In his testimony, he elaborated on the co-eluding peaks that he determined invalidated the results of both batch runs because they could demonstrate contamination or a problem with the GC-MS machine. [5T95-96.] He also went into greater detail on his assertion of the NJSTL's errors and failings under CAP protocols.

Conrad's second report, dated September 25, 2020, set forth his opinion that appellant's 100.5 ng/ml THC test result was consistent with CBD usage on a daily basis for several months. [5T58:16-20]. He based his opinion on data from the SAMHSA

website, article references and a LabCorp study[9]. [Exhibit A-3 at 102-124; 5T52:11-54:2; 5T115:1-23]. His testimony at the hearing also elaborated on the fact that the federal and state legislation permits up to 0.3% THC in CBD products. [5T39:16-19.] He acknowledged, however, that there is no regulatory testing by any agency as to the THC content or the accuracy of THC labeling on CBD products. [5T41:11-19]. Conrad also looked up some of the products said to have been used by appellant on the websites, including a CBD flower. The product would have been below the .3% THC level as the maximum allowed for legal hemp products.

Conrad's third report indicates that extrapolation of the creatinine levels based on Officer Williams' ethnicity, gender and age is inappropriate, unnecessary and irrelevant. [5T122:7-123:19]. His report indicates that the creation of reference ranges for test results are anonymized. Furthermore, the final 100.5 ng/ml test result certified by the NJSTL did not contain a disclaimer or red flag about the creatinine issue. [5T73:6-14]. Conrad opined to a reasonable degree of scientific certainty that twice daily use of CBD products for two and half months accounted for the THC levels detected in appellant's urine, assuming those results are even accepted by this forum. [5T51:12-53:2].

On cross-examination, Conrad admitted that he does not have much experience with testing biological samples and has mostly tested marijuana products. [5T5, 8.] It was also clear that he did not perform a urinalysis or any independent scientific testing for this case.[10] [5T27-28.] Nor did he test any of the products used by appellant or list any of their ingredients, or even indicate in his report that he reviewed product websites. In general, he acknowledged that there is as much likelihood of fake CBD products being on the market with no THC in them as some products being above the federal limit. As stated, he did not interview appellant and is of the opinion that his focus on the NJSTL testing processes was the most objective course of action. Conrad concurred with the City's conclusion that the 100.5 ng/ml of THC was not consistent with topical application

[9] The LabCorp presentation relied upon by Conrad was a "poster presentation." https://files.labcorp.com/labcorp-d8/publications/Secured%20Posters%201-28-2020/83-Janis-SOFT-2019-ChallengesOfCBD%20secure.pdf

[10] Although Conrad was contacted by Appellant's legal team on or about October 17, 2019, he acknowledged that he did not request that the second specimen be confirmation tested.

of CBD product because "THC is not absorbed in any reasonable degree into the blood stream through the dermis." [5T143-144.]

With respect to the LabCorp Study, Conrad was queried on whether it was ever peer reviewed in the scientific community, which he agreed it had not been. Cross-examination also highlighted that the specifics of the study were incongruous to this matter because it was based on six months of usage, which was twice as long as appellant's use. Moreover, only one individual out of the hundreds of study subjects, using an unknown product at an unknown frequency, tested at the approximate level of 100 ng/ml. [5T115, 117, 124-126.] With regard to the alleged CBD use by appellant, Conrad could not elaborate on how much and how often he would have to have used certain CBD products to achieve the 100.5 ng/ml rate in dilute urine, especially if the products were mostly topical.

Lastly, the City presented Dr. Gary Lage, an independent expert who was qualified without objection in the field of Forensic Toxicology and Pharmacology, as a rebuttal expert witness as permitted under my prior Order. Dr. Lage reviewed, among other relevant documents, the NJSTL testing data and results in this case. He authored an expert report on February 10, 2021. [Exhibit R-12.] With regard to his review of the NJSTL testing data, Dr. Lage testified that he did not see any errors or anomalies in the data contained in the Litigation Package and he opined that the tests results were all within the acceptable range. The immunoassay and Batch 2 of the GC-MS testing were properly and competently performed by the NJSTL. [6T123.]

Dr. Lage also opined that the 100.5 ng/ml of THC detected in appellant's urine sample was more consistent with the use of marijuana than use of a CBD product. [6T99, 101, 124). Dr. Lage further explained that a person's gender, age, height, weight, and ethnicity play a part in the variance of creatinine levels. [6T108.] With regard to appellant's test results, Dr. Lage opined that had his urine not been diluted, his creatinine level (13.7 mg/dl) would have been much closer to normal (214.7 mg/dl) and the level of THC would have been much higher than the reported 100.5 ng/ml. [Exhibit R-12 at 152; 6T:106.] He stated that THC metabolite levels can be normalized to the level of creatinine through a scientifically accepted equation. [Exhibit R-12 at 153; 6T110-116.] Dr. Lage

explained that use of the scientific normalization calculation was appropriate and based on the dilute urine, appellant's THC level would have been six to seven times higher than 100.5 ng/ml.

Dr. Lage testified that inhaling CBD products causes rapid absorption; absorption is not as rapid if the CBD product is swallowed/ingested, and topical creams will result in at most a 50-60% absorption of what is applied to the skin. He analogized the absorption of topical CBD creams to nicotine and fentanyl patches. [6T120:20-121:5]. He explained that some CBD products, particularly CBD oil products can legally contain small amounts of THC. However, the difference is in the quantity of the metabolite and the reason why labs set cut-off values to avoid false positives. [6T103-104.] Dr. Lage also disagreed with Conrad's opinion that accumulation in the body could have resulted in the 100 ng/ml of THC. Although the metabolite can accumulate in body fat, Dr. Lage stated that because appellant was a very fit (low body fat) individual, THC would not accumulate as much in him as it would in an obese individual. [6T122-123.]

On cross-examination, Dr. Lage acknowledged that he predicated his mathematic calculations on erroneous information about appellant's age and race/ethnicity and did not factor in his height and weight. [6T122:11-13; 6T132:24-134:10]. Dr. Lage also concurred that appellant's urine sample was valid for testing since the additional pH and specific gravity testing levels were found to be within range, albeit on the edge. [6T128:7-24]. Dr. Lage reiterated, nevertheless, that the equation was scientifically appropriate to normalize the amount of metabolite in a dilute urine specimen, relying on a 2005 study entitled, "Urinary Creatinine Concentrations in the U.S. Population; Implications for Urinary Biologic Monitoring Measurements." [Exhibit R-12; 6T114, 134.]

FINDINGS OF FACT

At this juncture, I must make findings on several material contested facts:

Common sense dictates that purposeful vomiting would be counterproductive to intentional overconsumption of water in the hopes of "beating" a drug screen urine test; yet, I **DO NOT FIND** that appellant was intentionally vomiting. He credibly testified to his nerves and anxiety, the basis of which could be multifold. On the other hand, I do **FIND**

that he was stalling to some extent and attempting to allow additional hydration to enter his system.

With respect to that behavior, I also **FIND** that appellant had the CBD products he had been using in the forefront of his mind equally with the deer antler supplement when it came time to complete the MIF. He sought union and legal counsel on that issue, was talked out of speaking with counsel, and ultimately chose not to list it. Appellant might very well have had some off-duty recreational marijuana use on his mind, which we cannot discern definitely from this record, but I **FIND** that it would be a reasonable and logical assumption in light of his utterances, behavior and positive test result.

Moreover, appellant clearly stated that he mostly used the topical cream and only used the smokable flower products and tincture a couple of times. [Exhibit R-8 and Exhibit R-9; 2T110, 118-119.] Equally compelling and credible is the expert opinion of Dr. Lage that appellant would have had to practically bathe in CBD lotion every day to achieve the subject THC result because of the much reduced blood absorption rate from topical products. Coupled with both appellant and Conrad glossing over the specifics of his CBD usage as just generic references to "CBD products" and their failure to specifically identify the labeled ingredients, I **FIND** that appellant's predominant use of CBD salve cannot be the cause of his THC result of 100.5 ng/ml.

The federal and state legislation permits up to 0.3% THC in CBD products [5T39:16-19]; however, there is no regulatory testing by any agency as to the THC content or the accuracy of THC labeling on CBD products. [5T41:11-19]. Conrad testified that neither the immunoassay initial screening nor the GC-MS confirmatory testing can ascertain the source of THC detected in urine. [5T55:17-20; 5T56:24-57:3]. The lab testing process cannot distinguish between THC from marijuana and that from CBD/industrial hemp. [5T55:21-23]. The City's expert witnesses also testified to the inability of the NJSTL or any lab to determine the source of THC in a urine sample. [6T42:1-4]. I **FIND** that the fact of the level of THC in appellant's specimen is all that is required of the NJSTL and that such is acceptable.

Both Conrad and Dr. Havier agreed that the additional testing of the pH and specific gravity levels by Redwood, and finding same to be within range, rendered appellant's sample valid for testing. [6T50:11-51:6]. However, that fact does not negate the additional fact that appellant's urine was barely valid for dilution, and I **FIND** that it is fair to say his THC result, therefore, was a conservative value.

Appellant raises numerous violations of both the Policy and the NJSTL protocols on this appeal as a basis for overturning or ignoring the finding of a positive drug screen. As I determined on the earlier motion, he forfeited the right to present a different result from the value of 100.5 ng/ml because he did not avail himself of an independent laboratory analysis of the second sample. Nevertheless, I ruled that he could attempt to invalidate that result through confrontation of chain of custody issues or the procedures undertaken by the NJSTL.

With respect to the alleged errors in the computer assignment of the LEDT toxicology numbers, we know that these are computer generated. I **FIND** that Shaughnessy adequately explained how the computer can skip over numbers and that there was nothing untoward about it in this case. [4T45:3-22.] Accordingly, I **FIND** this was harmless error with no impact on the accuracy of the NJSTL testing of appellant's sample. Similarly, I **FIND** that the additional signature line for the monitor on the MIF is a minor deviation as there has been no evidence or even argument that the information Appellant chose to put down or not to put down on it was manipulated or modified by anyone. It did not impact the actual testing of his specimen or the medical review of his results.

There were also debate amongst the expert witnesses about the scientific protocols utilized by the NJSTL and whether those undermined the result of the GC-MS analysis of appellant's urine sample. On the basis of the factual record and the expert opinions presented, I **FIND** that the expert opinions of Dr. Havier and Dr. Lage to be entitled to greater weight in these proceedings than that of Conrad. Dr. Havier has forty years of experience at the NJSTL and his explanations regarding the absence of co-eluding peaks or errors in the controlled sample runs was detailed and well-supported.

Specifically, he explained that the only known flaw occurred in Batch 1 and was rectified when a column in the instrument as replaced. [4T31-32, 35, 65.] In addition, even if the aliquots sat too long in the GC-MS, that circumstance relates only to the first batch run from which no results were reported. Batch 2 was successfully, reliably, and validly tested. In Batch 2, the "qualifying ratios for the controls were out of range." [6T85.] The results from Batch 2, however, were valid. Dr. Havier explained, "the ratio of those controls (Con1 and Con 2) are used to identify the drug. We know what the drug was in Control 1 and 2 because we put the drug in there, so its identification is not a factor in determining whether those controls pass acceptance criteria. The only thing we're concerned with is the concentration and they fell within the 20 percent target range." [6T95-96.]

Further, I **FIND** that Conrad's primary reliance on the LabCorp study to be misplaced. Generally, a scientific study is admissible only if found to be scientifically reliable. Reliability stems from general acceptance in the relevant scientific community. General acceptance, however, does not require complete agreement over the accuracy of the test or the exclusion of the possibility of error. <u>See</u> Richard J. Biunno, <u>N.J. Rules of Evidence</u>, Comment 4 to N.J.R.E. 702; <u>State v. Johnson</u>, 42 N.J. 146, 171 (1964).

Applying these legal standards to the LabCorp poster presentation, I **FIND** that Conrad failed to prove that the study has been "derived from a sound and well-founded methodology that is supported by some expert consensus in the appropriate field." <u>Kemp v. State</u>, 174 N.J. 412 (2002). Accordingly, I determine that the LabCorp study is inadmissible to support the suggestion that appellant, like only one individual in that study, might get a THC result of 100 ng/ml after six months of ingested or inhaled CBD use.

In addition, and as set forth just above, I also **FIND** that the weight of the opinion of Conrad in this matter must be discounted because he failed to rely upon the actual topical CBD products Appellant was using and instead produced generalized and overbroad statements about CBD use which were incongruous with the facts in this record.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

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

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

The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, I must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) (citation omitted). Preponderance may also be described as the greater weight of credible

evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Credibility, or, more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954).

"Conduct unbecoming a public employee" has been described as any conduct which adversely affects the morale or efficiency of a department; conduct which has a tendency to destroy respect for public employees and their departments; or conduct which destroys confidence in public service. See In re Emmons, 63 N.J. Super. 136, 140-42 (App. Div. 1960); cf. Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). In this matter, appellant is charged with conduct unbecoming a police officer because he failed his random urine test required under the Attorney General's Law Enforcement Drug Testing Policy (Attorney General Policy), as well as other charges derivative therefrom.

The Attorney General Policy requires that all local law enforcement agencies conduct random drug testing of their sworn police officers. The Attorney General Policy also requires that appropriate local authorities adopt their own random drug testing rules, regulations and procedures. [Exhibit J-4.] See also N.J.S.A. 40A:14-118. The Attorney General's Drug Enforcement Policy has not been reviewed by the courts yet, but I **CONCLUDE** that it will have the force and effect of law on law enforcement officers in New Jersey. See O'Shea v. Twp. Of W. Milford, 410 N.J. Super. 371, 382 (App. Div. 2009).

As an initial matter, appellant argues that over-the-counter lawful CDB products, which are derived from hemp, should not be a basis for failing a urine screen. Appellant complains that neither the Attorney General Law Enforcement Drug Testing Policy nor the Hoboken Police Department Substance Abuse Policy have been updated to reflect the legalization of CBD/industrial hemp products. Hoboken argues that the NJSTL was testing for THC unidentified by source and not hemp per se. Of course, as of August 2019, marijuana was still illegal in New Jersey and federally.

I **CONCLUDE** that I am not at liberty to unilaterally adjust the chemical parameters tested for by the NJSTL in the law enforcement program nor to impose societal standards of my own choosing. Changes to our society's views on hemp and marijuana evolve slowly even as they seem to progress forward. Dr. Lage explained that decades of illegality have meant that no laboratory study has been able to conduct objective surveys and tests that might result in an understanding of the chemical level at which impairment begins from the ingestion or inhalation of products containing THC, unlike blood alcohol. Whether applied to driving while impaired or reporting to a law enforcement job, it appears that we do not yet have the tools to discern that impairment level or how to differentiate between residual THC in the system and current use.

Moreover, legality of hemp or marijuana does not necessarily demand a corresponding adjustment to the strict, zero-tolerance standards to which law enforcement personnel are held. It might seem unfair that alcohol is tolerated in circumstances when marijuana might not be, but we have more data on how long alcohol stays in the system at impairment levels. Furthermore, a police officer who showed up drunk to work would obviously be subject to discipline.

As the testimony made unmistakably clear, THC is a component in both hemp and marijuana products, albeit to a significantly different degree. The NJSTL simply tested for THC. It is also undisputed that the lab cannot determine the underlying source of the chemical in the urine. While this case may turn on whether I determine that CBD products could account for the positive reading in appellant's urine, that will be irrespective of the fact that the urinalysis found 100.5 ng/ml of THC in appellant's sample. I reiterate, unless and until the Attorney General removes THC from the schedule of substances that must be tested in law enforcement urine samples, it will be a consideration in these cases.

That said, the Attorney General's Policy provides that prior to the submission of a urine specimen, an officer is required to execute a Consent Form advising him/her that a negative result is a condition of employment and that a positive result will result in: (a) the immediate suspension from all duties; (b) administrative charges, and upon final disciplinary action, termination from employment as a law enforcement officer; (c) an official report to the Central Drug Registry maintained by the Division of State Police; and,

(d) a permanent bar from future employment as a law enforcement officer in New Jersey. The Consent Form also advises the officer that his/her refusal to participate in the test process carries the same penalties as testing positive. [Exhibit J-4.] Sworn officers are further required to complete a Drug Testing Medication Information Form listing all prescription medication, non-prescription OTC medication, dietary supplements, and nutritional supplements that were ingested by the officer fourteen (14) days prior to the drug test. [Id. 1T26.] In accordance with the Attorney General Policy, the City adopted its own Substance Abuse Policy that mirrors the requirements of the Attorney General Policy, requiring random drug testing with a zero tolerance for drug use policy. [Exhibit J-5.]

Appellant would have this forum conclude that lawful use of CBD products as a result of a work-related injury does not raise public safety, personal integrity, or neglect of duty concerns, as CBD products do not produce a psychoactive effect. This conclusion would be sound if it was not for the Attorney General Policy, discussed just above, and the fact that I cannot conclude that his urine test can be attributed to those CBD products. Based on the preponderance of the credible and expert evidence as found in the factual discussion above, I **CONCLUDE** that the City has established that appellant tested well over the limit for THC, that the NJSTL conducted the test properly, that his use of mostly topical cream products cannot account for same, and that it is reasonable to infer that he imbibed in some recreational marijuana while off-duty but within the body's retention window for its chemical component.

Appellant raises various other challenges to my ability to uphold these charges. One issue was whether the City testing on August 23, 2019, was undertaken in violation of the "Shy Bladder" provisions of either the Attorney General Law Enforcement Drug Testing Policy or the Hoboken Police Department Substance Abuse Policy. I reject this claim. I **CONCLUDE** that the preponderance of the credible evidence establishes that appellant requested water to aid in the voiding of his bladder and that he was provided small quantities of water several times but one at a time, consistent with proper procedure. The fact that appellant was very anxious and vomited some clear liquid a couple of times makes this particular situation unique, and certainly should not form the basis of avoiding the consequences of a urine sample only eventually produced at the hospital.

Furthermore, as found above, his urine sample was on the higher side of an acceptable level of dilution.

Appellant also argues that his rights were violated because the MIF used by the Hoboken Police Department provides for the signature of the monitor, which violates principles of confidentiality, while the one authorized by the Attorney General does not. The MIF should be a confidential medical document. There are no cases that have been presented that would support throwing out a positive drug test because of this signature line issue, and I **CONCLUDE** that same was harmless error.

Having concluded that the random urine test for appellant on August 23, 2019, resulted in a positive finding for THC at 100.51 ng/ml, I must next address the issue of the appropriate disciplinary action to be imposed. Progressive discipline is the touchstone of our civil services laws, even with respect to para-military organizations. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is considered to be an appropriate analysis for determining the reasonableness of the penalty. See Bock, supra, 38 N.J. at 523-24. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

In addition to considering an employee's prior disciplinary history when imposing a penalty under the Act, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Ibid. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline may include removal, disciplinary demotion, or a suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

Nevertheless, "[t]he welfare of the people, and not exclusively the welfare of the civil servant, is the basic policy underlining [the] statutory scheme." State-Operated School Dist. of City of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). "The overriding concern in assessing the propriety of the penalty is the public good." George v. N. Princeton Developmental Ctr., 96 N.J.A.R. 2d (CSV) 463, 465. Further, while progressive levels of discipline are usually the preferred and measured response, when an employee's conduct is so egregious as to render the employee unfit for continued service, the principle of progressive discipline must give way to the public need. Robinson v. East Jersey State Prison, Department of Corrections, 96 N.J.A.R. 2d 134 (CSV) 1996). Thus, the theory of progressive discipline is not "a fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. See Carter v. Bordentown, 191 N.J. 474 (2007).

The City would have me focus, inter alia, on appellant's suspicious and dishonest behavior on August 23, 2019; his refusal to consent to the random drug test; his unsolicited statements admitting that he would fail the random drug test; his failure to list any CBD product on the MIF; the creatinine normalization equation result of approximately 1,400 ng/ml THC; and appellant's history of progressive discipline.

Appellant counters with his positive reputation and commendations; the City's violations of his privacy rights during both the form and physical completion of the urine collection process; the denial of his request to speak with counsel regarding the MIF; the City's contribution to the closing of the sixty-day retesting window; and the errors and failings of the NJSTL. He also argues that since NJSTL does not conduct mathematical dilution calculations in its testing process, appellant should not be subjected to a mathematical calculation to which no other law enforcement officer has been subjected.

On this latter point, I concur; however, that also means that the 15 ng/ml limit is a harder limit than appellant would like. With respect to his lack of procuring an independent test of the split sample, asserted by both parties for different propositions, I am of the opinion that this fact helps neither party. As previously ruled, appellant's decision not to use the second sample will not be held against him but it does mean the NJSTL's results

stand without opposition, unless there were fatal lab errors, which I have found did not occur. However, I also do not fault the City for appellant's decision not to get the sample tested. The sixty-day rule was known, his expert had been retained, and the test could have been obtained in order to preserve an independent result ahead of the receipt of the discovery or litigation packet.

Appellant further stated that his failure to list the CBD products he was using on the MIF was not an additional violation of the City's Police Department Substance Abuse Policy because he did not think they fell within the definition of "medication" as used in the examples listed on the MIF. The City argues that appellant's belief that CBD products were not medication and did not need to be listed on the MIF is not credible in light of his listing of deer antler spray on the MIF. The credible evidence establishes that appellant was internally debating whether to list CBD products on the MIF, discussed it with the union representative, wanted to confer with counsel, but was not given that opportunity. It also seems clear that appellant listed the deer antler spray <u>because</u> he thought it might cause a positive steroid result. His (perhaps fuzzy) calculus on whether he might get a positive THC result clearly informed his decision not to list CBD products ultimately, and likely, fueled his emotional anxiety that day. **I CONCLUDE** that his decision on what to list on the MIF was a knowing one, but I will not ascribe further hyperbolic adjectives to it except to say that he was not truthful during this process, a quality needed in a law enforcement profession.

The City asserts that a random urine test failure must be met with an automatic termination under both the Attorney General Policy and its own. For the reasons that follow, I need not reach that legal question. I have given serious consideration to reducing the sanction from termination to a six-month suspension with a last-chance requirement and bi-monthly urine screening. <u>In re Shorter</u>, 2020 N.J. Super. Unpub. LEXIS 821 (May 4, 2020), aff'g OAL Dkt. CSR 17546-17, Final Decision (June 22, 2018), mod'g penalty only, Initial Decision (May 8, 2018) <<u>http://lawlibrary.rutgers.edu/oal/search.html</u>>. Mitigating in his favor are that appellant has a passion for law enforcement work having been raised in a HPD household with his father and father's colleagues as mentors; appellant was never impaired on duty or received any for-cause urine screens; he admirably (and credibly) chose to avoid opiates and use natural supplements for his work-

related shoulder injury; he has received commendations for his performance and there is no record of complaints against him; and his prior discipline, apparently for a discrete personal situation, leaves room for progressive discipline.

I have also considered several aggravating factors in coming to an appropriate balance on the discipline to impose. These are comprised of the erratic behavior of appellant during the testing; the fact that he has not been on the City police force for very long; and he has received already two minor and two major disciplinary sanctions in those four years. Furthermore, I concur with the City that this case is distinguishable in several critical ways from Shorter. First, the level of THC detected in appellant's dilute[11] urine sample was 100.5 ng/ml, which is approximately six times the 15 ng/ml cut-off level and almost five times the 23 ng/ml in Shorter. As I found above, this is significant because he mostly used CBD topical cream and only used the tincture a few times. Second, Shorter had a prescription for the CBD product which the parties agreed likely caused the THC result.

Illegal drug use by someone in a safety sensitive position is a serious offense and the penalty should reflect the same. Indeed, refusal to even take a single drug test has resulted in an employee's termination from employment. See In re McGee, 2011 N.J. CSC LEXIS 110, 6-7 (February 16, 2011) (upholding termination where policy did not provide for a lesser penalty when employee refused to comply with an order to submit to a drug test.) Accordingly, I **CONCLUDE** that termination of appellant from his position as a police officer in the City of Hoboken because of the result of his urine screen of 100.51 ng/ml 11-carboxy-THC must be upheld.

ORDER

Accordingly, and for the reasons set forth herein, it is hereby **ORDERED** that the appeal of Sam Williams is **DENIED** . It is further **ORDERED** that the termination of his employment is **UPHELD**.

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[11] As discussed above, the degree of dilution of appellant's urine was not so high as to invalidate its testing by the NJSTL, but it may nevertheless be considered as indicative of at least a conservative result.

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.

August 23, 2021
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency: 8/23/21

Mailed to Parties: 8/23/21
id

APPENDIX

LIST OF WITNESSES

For Appellant:

Sam Williams

William James

Sergeant Nicholas Burke

Lorraine Fred

Frank J. Conrad

For Respondent:

Lieutenant Steven Aguiar

Sergeant Richard Torres

Sergeant Alex Gonzalez

Joan Shaughnessy

Dr. Robert Havier

Dr. Gary L. Lage

LIST OF EXHIBITS IN EVIDENCE

Joint Exhibits:

J-1 Final Notice of Disciplinary Action dated March 10, 2020 (Joint 0001-0004)

J-2 Final Notice of Disciplinary Action dated March 10, 2020 (Joint 0005- 0008)

J-3 Final Notice of Disciplinary Action dated March 10, 2020 (Joint 0009-0012)

J-4 New Jersey Attorney General's Law Enforcement Drug Testing Policy (Revised April 2018) (Joint 0013-0035)

J-5 City of Hoboken Police Department General Order 18-19, Substance Abuse Policy, issued on October 30, 2018 (Joint 0036-0066)

J-6 Toxicology Report and Litigation Package from the New Jersey State Toxicology Laboratory (Joint 0067-0126)

Appellant's Exhibits

A-1 P.L. 2019 c. 238 (A 0001-0016)

A-2 Expert Report of Frank Conrad, dated January 27, 2020 (A 0017-0101)

A-3 Expert Report of Frank Conrad, dated September 25, 2020 (A 0102-0124)

A-4 Expert Report (Rebuttal) Frank Conrad, dated March 15, 2021 (A 0125-0136)

A-5 Wells Fargo Receipt and 4 photographs (A 0137-0141)

A-6 Commendations and Newspaper articles (A 0142-0156)

Respondent's Exhibits

R-1 Hoboken Police Department Manual of Rules and Regulations, dated August 5, 2015 (R 001-090)

R-2 Acknowledgement and Consent Random Screening, dated August 23, 2019 (R 0091)

R-3 Drug Testing Medication Information Form, dated August 23, 2019 (R 0092)

R-4 Drug Testing Medication Information Form, dated August 23, 2019 (R 0093)

R-5 Law Enforcement Drug Testing Chain of Custody Form (R 0094-0098 with clearer copies provided under separate cover)

R-6 Toxicology Report from the Law Enforcement Drug Testing of the New Jersey State Toxicology Laboratory, dated September 11, 2019 (R 0099-0101)

R-7 Internal Affairs Report (R 0102-0103)

R-8 February 12, 2020 Correspondence from D. Simon, Esq. (R 0104-0105)

R-9 October 9, 2020 Williams' Answers to Interrogatories (R 0106-0115)

R-10 Prior Disciplinary History for Police Officer Sam Williams (R 0116-0125 with R 0125 substitution made for FNDA)

R-11 Curriculum Vitae of Gary L. Lage, PhD. (R 0126-0148)

R-12 Expert Report from Dr. Gary Lage (R 0149-0154)

R-13 Curriculum Vitae of Dr. Robert Havier (R 0321-0323)