



STATE OF NEW JERSEY

**DECISION OF THE
CIVIL SERVICE COMMISSION**

In the Matter of Steven Jones, Union
County

CSC Docket No. 2021-343
OAL Docket No. CSR 10180-20

Remand to the
Office of Administrative Law

ISSUED: MARCH 29, 2022 (ABR)

The appeal of Steven Jones, County Police Officer, Union County, Department of Public Safety, of his removal, effective January 14, 2020, on charges, was heard by Administrative Law Judge Kelly J. Kirk (ALJ), who rendered her initial decision on February 2, 2022. 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, the Civil Service Commission (Commission), at its meeting on March 23, 2022, ordered that the matter be remanded to the Office of Administrative Law (OAL).

DISCUSSION

The appellant was charged with incompetency, inefficiency, or failure to perform duties; insubordination; conduct unbecoming a public employee; and neglect of duty. Specifically, the charges stemmed from the appellant testing positive for benzodiazepines in a random drug test. Upon the appellant's appeal to the Commission, the matter was transmitted to the OAL as a contested case.

The parties stipulated that the appellant submitted to random drug testing on November 21, 2019, in accordance with guidelines from the State Attorney General. The appellant's toxicology report indicated that his specimen tested positive for benzodiazepines, specifically for oxazepam. The appellant denied having a valid

prescription for oxazepam or any other controlled substance. On November 21, 2019, the appellant acknowledged that he took over-the-counter medicines, including “advil, ibuprofen, [and] aleve,” stating that he had last taken them on November 20, 2019.

At the OAL, five witnesses testified: the appellant; James Debbie, County Police Chief; Gary Lage, Ph.D., a senior toxicologist and professor of toxicology retained by the appellant; Andrew Klein, County Police Lieutenant; and George Jackson, Ph.D., Executive Director, Department of Health, Office of the Chief State Medical Examiner, from the laboratory which tested the appellant’s random drug sample.

Dr. Jackson testified, in relevant part, as to the chain of custody and procedures utilized by the New Jersey State Toxicology Lab, which tested one of the two urine samples taken from the appellant on November 21, 2019. Dr. Jackson testified that it was “possible” that rubbing benzodiazepine powder on the fingers could lead to oxazepam being detected at the level found in the appellant’s sample. However, he indicated that it was dependent on several factors, including how much benzodiazepine dust was on a pill being handled and that it would be diluted by the body. As such, Dr. Jackson maintained that benzodiazepine detected from this type of exposure should not exceed the screening cutoff, which is designed to rule out passive exposure.

Dr. Lage testified, in relevant part, that oxazepam could get into the system by handling it and be detected at the level found here. Dr. Lage also stated that he believed the appellant’s positive urine result for oxazepam was “insufficient to scientifically determine any potential drug use by Mr. Jones, and in [his] opinion [was] due to his concentrated urine and the laboratory margin of error.”

The appellant was the only witness to testify about the direct circumstances surrounding his claimed accidental drug usage. He stated that he had never used recreational drugs. The appellant indicated that when his superiors told him he had tested positive and asked if he had taken any prescription medications, he responded that if he took anything, it would have been over-the-counter medication. The appellant stated that he did not initially recognize what might have led to his positive urine test. He indicated that after he retained an attorney, the attorney had him bring all of his wife’s medications and her medical records to a meeting. They took photographs of his wife’s pillbox and two pills, diazepam¹ and aspirin.² The

¹ The record indicates that diazepam (Valium) is a benzodiazepine which is metabolized to nordiazepam, oxazepam, and temazepam, all of which may be detected in a urine sample after diazepam use.

² The ALJ stated that the photograph of the pillbox showed at least six different types of pills, including both prescription and over-the-counter pain relievers. Among these pills were Advil, Aleve and 81 mg low-dose aspirin. The ALJ further indicated that the diazepam and low-dose aspirin were similar in color and somewhat similar in size.

appellant's wife had a prescription for diazepam and they realized that the diazepam must have come from her pillbox, but the appellant remained unsure of exactly how he ingested it. The appellant stated that in the week before the drug test, he was experiencing some pain and soreness after physical training at the police academy and took over-the-counter medication for relief. He explained that he had asked his wife if she had any Advil, ibuprofen or Aleve. She responded that she had some in her pillbox. He further stated that his wife normally put narcotics in her pillbox with over-the-counter medication. The appellant indicated that he did not show her the pill he was taking before ingesting it. He explained that on November 21, 2019, when he was listing the medication he had taken within the preceding 30 days on paperwork associated with the subject drug test, he did not remember taking aspirin, so he did not list it with the other over-the-counter medications he had taken during that timeframe. It was only after his attorney showed him a medication sheet that he made that connection. The appellant denied taking benzodiazepines to relieve pain. The appellant also acknowledged that the diazepam did not look like Advil, ibuprofen, or Aleve. The appellant also stated during the hearing that he did not have his wife testify because he did not want to put any undue stress on her or put her nursing license in jeopardy.

The ALJ found that the appellant commenced his employment with the appointing authority in 2010. Prior to that time, the appellant had been employed as a Correctional Police Officer with the Department of Corrections (DOC) for five years and had 23 years of active and reserve service with the United States Navy (Navy). The appellant had been subject to drug testing by the appointing authority, DOC and Navy. He had been subject to hundreds of drug tests and had never tested positive prior to November 21, 2019. Prior to the instant matter, the appellant did not have any major discipline in his record. One of two samples the appellant gave on November 21, 2019, "Sample A," was tested by the State Toxicology Lab.³ The sample tested positive for benzodiazepines, showing oxazepam at a concentration of 140 ng/ml, which was in excess of the 100 ng/ml cutoff concentration.

The ALJ noted that the appellant cited several cases in which the removal for a positive drug test was reversed. However, the ALJ found these cases distinguishable from the instant matter. In this regard, the ALJ observed that the appellant's wife did not testify and found there was no corroboration for the explanation he provided. In particular, the ALJ noted there was no testimony to corroborate that the pills in the photograph presented by the appellant were generally the same pills contained in the pillbox prior to the November 21, 2019, drug test, and that there was no testimony about why the pillbox contained the pills that it did or why the prescription and non-prescription medications were co-mingled. The ALJ also indicated that no testimony was presented about the appellant's wife taking low-dose aspirin or why the appellant would have taken an 81-mg low-dose aspirin

³ The second sample, "Sample B," was initially placed in storage, to be sent out to another lab under chain of custody if requested. Sample B also tested positive for oxazepam in excess of the cutoff.

for pain relief. The ALJ concluded that testing positive for a prescription drug without a prescription was unbecoming a Police Officer. Therefore, the ALJ concluded that the charge of conduct unbecoming a public employee was sustained. However, the ALJ dismissed the remaining charges of incompetency, inefficiency, or failure to perform duties; insubordination; and neglect of duties, as the ALJ found no evidence in the record to support those charges. As to the penalty, the ALJ observed that termination is generally supported by case law, except in circumstances where there is a credible explanation for the positive result that is supported by evidence. The ALJ found that the appellant had no valid prescription for benzodiazepines and there was no credible explanation supported by evidence for oxazepam to otherwise have been in his urine. Accordingly, the ALJ recommended that the appointing authority's removal of the appellant be sustained.

In his exceptions, the appellant argues, in relevant part, that he provided a credible explanation, as his accidental ingestion of a controlled substance that was corroborated by substantial evidence and that the ALJ erred by imposing a far stricter burden on him than is required under Civil Service precedent. The appellant argues that applicable case law demonstrates that that an employee with no prior disciplinary history no prior history of substance abuses, and a credible, reasonably corroborated explanation for accidental ingestion will be given the benefit of the doubt by the Commission and that the level of corroboration he provided exceeds those of the cases he cites. He proffers that the ALJ did not make a finding that he was not credible as a witness. Rather, she found insufficient corroboration for his testimony. However, he disputes the ALJ's conclusion in this regard, maintaining that the testimony of both experts proves that his explanation for accidental ingestion was possible and corroborates the idea that he only took a trace amount accidentally. Given that evidence, his lack of disciplinary history and his credible explanation, he argues that the Commission should grant his appeal and dismiss the charges against him or modify his removal to a lesser penalty.

In its reply, the appointing authority asserts, in relevant part, that the ALJ correctly applied the facts and the law to this case. It argues that there was insufficient proof that that the appellant's explanation of accidental ingestion was reasonable, as the testimony of the witnesses merely indicated that it was a possibility. In addition, it contends that his decision to ingest a pill from his wife's pillbox without double checking with her that it was the over-the-counter medication he supposedly intended to take was unreasonable, given his testimony that he knew she routinely mixed narcotics with over-the-counter medication in her pillbox. It also contends that the appellant's failure to list aspirin among the medication he believed he was taking rebuts his explanation. Furthermore, it asserts that the agreement of its witness, Dr. Jackson, regarding exposure to oxazepam was merely a hypothetical example without any evidential support by the appellant and unrelated to his explanation and was insufficient to establish that it was likely to have occurred in this case. Moreover, the appointing authority argues that the appellant's disciplinary history is irrelevant and not a defense to his conduct, as it is not an element of the

Attorney General's Guidelines for enforcement of the drug testing policy or termination for a positive drug test. Finally, given these considerations, the appointing authority asserts that the ALJ correctly found the circumstances of this matter distinguishable from the accidental ingestion cases cited by the appellant.

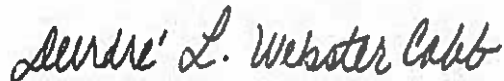
Upon its *de novo* review of the record, the Commission finds that the initial decision contains insufficient information for it to make a reasoned and informed decision and that it is necessary to remand this matter to the OAL for further development of the record as it relates to the circumstances surrounding the appellant's ingestion of diazepam. In this regard, the Commission observes that there may be relevant evidence which addresses the multiple outstanding questions about the contents of the pillbox noted by the ALJ, the rationale behind the appellant going to his wife's pillbox for the pain relief medication he was supposedly seeking in lieu of any other location and the specific over-the-counter medication the appellant may have believed he was taking for pain relief.

Therefore, in the interest of the public and so that justice may be served, the Commission orders that the case be remanded back to the OAL for further development of the record as to the circumstances surrounding the appellant's ingestion of diazepam, including additional witness testimony and/or documentary evidence that the parties consider relevant to this issue. Further, the Commission authorizes the ALJ, pursuant to her powers under *N.J.A.C. 1:1-14.6(n)*, to act in its stead to compel production of relevant materials, files, records and documents and/or issue subpoenas to compel the appearance of any witness should the ALJ believe that the witness or produced materials may assist in a full and true disclosure of the facts related to this issue.

ORDER

The Commission orders that this matter be remanded to the OAL for clarification and further proceedings as set forth above.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MARCH, 2022



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

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and
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 10180-20

AGENCY DKT. NO. 2021-343

**IN THE MATTER OF STEVEN JONES,
UNION COUNTY (POLICE DEPARTMENT).**

Peter B. Paris, Esq., for appellant Steven Jones (Beckett & Paris, attorneys)

Allan C. Roth, Esq., for respondent Union County Police Department (Ruderman
& Roth, attorneys)

Record Closed: December 23, 2021

Decided: February 2, 2022

BEFORE **KELLY J. KIRK, ALJ**:

STATEMENT OF THE CASE

Union County police officer Steven Jones was removed from his employment at the Union County Police Department for alleged incompetency, inefficiency, or failure to perform duties; insubordination; conduct unbecoming a public employee; and neglect of duty arising from a random drug test positive for benzodiazepines.

PROCEDURAL HISTORY

On January 14, 2020, the Union County Police Department (UCPD) issued Jones an Immediate Suspension Notice, reflecting that an immediate suspension was

necessary to maintain safety, health, order, or effective direction of public services, as a result of a "random urine test positive result." (R-2.) The UCPD served upon Jones a Preliminary Notice of Disciplinary Action (PNDA) on January 23, 2020 (January PNDA), and another PNDA dated February 5, 2020 (February PNDA), after the split sample was tested. (R-6.) No departmental hearing was held. On September 15, 2020, the UCPD served upon Jones an Immediate Suspension Final Notice of Disciplinary Action (FNDA) and a Merits Charges FNDA reflecting that he was removed effective January 14, 2020.

Jones filed an appeal on September 16, 2020, with the Office of Administrative Law (OAL) and the Civil Service Commission (Commission). The appeal was received by the OAL on September 17, 2020, pursuant to N.J.S.A. 52:14B-1 to -15, N.J.S.A. 52:14F-1 to -13 and N.J.S.A. 40A:14-200 et seq., and it was perfected on October 22, 2020.

By letter dated December 10, 2020, Jones waived the "180-day rule." The hearing was scheduled for March 22, 2021, but it was adjourned at the request of respondent due to a witness issue. The hearing was rescheduled for May 12, 2021, and May 25, 2021. The May 25, 2021, hearing date was adjourned at the request of respondent due to a dispute over a subpoena relative to "Attachment D" and rescheduled for July 20, 2021. The July 20, 2021, hearing date was adjourned at the request of respondent due to a pending Order to Show Cause in Superior Court relative to "Attachment D" and rescheduled for September 23, 2021.

I heard the matter on May 12, 2021, and September 23, 2021, and the record closed on December 23, 2021, upon receipt of the parties' post-hearing briefs.

FACTUAL DISCUSSION

Gary Lage, Ph.D., Chief James Debbie, and Steven Jones testified on behalf of the appellant. George Jackson, Ph.D., and Lieutenant Andrew Klein testified on behalf of the respondent.

Background

Having had an opportunity to consider the evidence and to observe the witnesses and make credibility determinations based on the witnesses' testimony, I **FIND** the following material **FACTS** in this case:

Jones commenced his employment with the UCPD in 2010. Prior thereto he was employed for five years as a New Jersey State correction officer at East Jersey State Prison. Prior to his employment as a correction officer, he was in the United States Navy. He served in the Navy, both active and reserve, for twenty-three years and was honorably discharged. He was subject to drug testing by the military, the Department of Corrections, and the UCPD, and is also subject to drug testing by his current employer. He has been drug tested hundreds of times in his life and otherwise never tested positive.

Sergeant Andrew Klein conducted a random drug testing for the UCPD. (R-18.) Seven officers were selected, and the selection was witnessed by members of both bargaining units. (R-18.) Six officers were tested on November 21, 2019, and one officer was tested on November 22, 2019. (R-18.)

Specifically, on November 21, 2019, at 10:25 a.m., Jones voided at the UCPD for random selection, monitored by Sergeant Klein, and that specimen was placed in the evidence refrigerator by Sergeant Klein at 10:28 a.m. (R-12.) Samples were stored in a locked refrigerator located in the small evidence room in the Detective Bureau. (R-18.) The specimens were removed from the evidence refrigerator on November 25, 2019, at 8:50 am. by Captain McGuire and given to Lieutenant Michael Sandford. The specimens were transported from the UCPD to the New Jersey State Toxicology Laboratory by Lieutenant Sandford at 9:25 a.m. (R-12; R-18.) The State Toxicology Lab Law Enforcement Drug Testing Custody and Submission Form reflects that seven specimens were accepted at the State Toxicology Lab on November 25, 2019, at 9:26 a.m. (R-13; R-21.) The samples were received by technician Melinda Udvarine on November 25, 2019, at 9:30 a.m. (R-11; R-12; R-18.)

Jones' sample was tested on November 26, 2019. (R-14.) The Sample Record reflects that Jones' sample was positive for benzodiazepines. (R-14.) The Law Enforcement Drug Testing Toxicology Report, dated January 7, 2020, also reflects that Jones' immunoassay screening was positive for benzodiazepines and that the mass spectrometry confirmed that Jones' sample was positive for benzodiazepines, specifically, oxazepam, a controlled substance not listed on a medication sheet. (R-15.) Oxazepam's cutoff is reflected as 100 ng/ml. (R-15.) The GC/MS Drug Confirmation Report, dated December 24, 2019, reflects the analytical results for Jones' specimen as follows: Nordiazepam detected (67 ng/ml) below cutoff (100 ng/ml cutoff concentration); Oxazepam detected (140 ng/ml) (100 ng/ml cutoff concentration); and Temazepam detected (101 ng/ml) not reportable—qualifier out (100 ng/ml cutoff concentration). (R-16.)

Benzodiazepines are extensively metabolized, and the parent compounds are not detectible in urine. (R-22.) Diazepam (Valium) is metabolized to nordiazepam, oxazepam, and temazepam, and all may be detected after diazepam use. (R-22.) Approximate detection times for the drug or metabolites in urine of long-acting benzodiazepines is up to ten days, intermediate-acting is up to five days, and short-acting is up to two days. (R-22.) Oxazepam falls under intermediate-acting. (R-22.) Oxazepam is a Schedule IV controlled substance and is used to treat anxiety disorders or alcohol-withdrawal symptoms. (R-18.) Oxazepam, or a drug capable of producing oxazepam, was not listed on Jones' Attachment D. (R-20; J-1.) Common oxazepam side effects include, inter alia, drowsiness, dizziness, blurred vision, headache, amnesia or forgetfulness, and trouble concentrating. (R-23.)

On January 14, 2020, Sergeant Klein received the toxicology reports from the State Toxicology Lab, reflecting that Jones had tested positive for benzodiazepines, specifically, oxazepam. (R-18.) Jones was working and was called in off the road. (R-18.) Captain McGuire and Sergeant Klein brought Jones and his PBA representative into an interview room and confronted him with the lab results. (R-18.) Jones denied having a valid prescription or taking the medication. The UCPD immediately suspended Jones without pay due to the positive urine test result and issued an Immediate Suspension Notice. (R-2; R-3.) A January 15, 2020, memorandum from the UCPD to the Union

County Prosecutor's Office (UCPO) reflects that Jones tested positive for oxazepam and that he was suspended without pay pending termination. (R-4.)

Jones requested that the second sample be tested. The specimen was received by NMS Labs on January 16, 2020, and it was tested for benzodiazepines. The NMS Labs Toxicology Report issued on January 21, 2020, reflects the results as Nordiazepam 71, Oxazepam 100, and Temazepam 91.

On January 27, 2020, Sergeant Klein received the Toxicology Report from NMS Labs. (R-18.) After the second sample also tested positive for benzodiazepines, more specifically, oxazepam, as well as nordiazepam and temazepam, Sergeant Klein contacted the State Toxicology Lab to confirm the results and was informed that nordiazepam and temazepam were below the Attorney General reporting limit. (R-18.)

Jones has no prior major disciplinary history.

Testimony

George Jackson

Jackson is currently employed by the State of New Jersey as executive director of laboratories for the New Jersey Office of the Chief State Medical Examiner. He has a Ph.D. in pathology and is a board-certified toxicological chemist.

Jackson testified to the chain of custody and procedures. The lab only tests the Sample A bottle, and Sample B is placed in storage. Sample B is sent out to another lab under chain of custody if requested. There are two processes: screening and confirmation. If Sample A is negative (below the cutoff), no further action is taken. If Sample A is positive (presumptive positive—above the cutoff) another aliquot is taken from Sample A and the presence of the compound is confirmed using gas chromatography/mass spectrometry (GC/MS). If the presence of the compound is confirmed, there is secondary and tertiary review of the screening and confirmation results. The sealed medication list is only authorized to be opened by the medical review

officer (MRO). The MRO reviews the results and medication list and decides whether the confirmed positive is the result of something on the medication list. The MRO includes a statement for the final report, and then the report is issued.

The margin of error is 20 percent lower or 20 percent higher. NMS Labs is a highly accredited and credible lab that follows the College of American Pathologists (CAP) guidelines. There is some degradation of samples, and each laboratory uses different techniques, so there will be some differences in findings. Thus, the concentration always goes down over time.

When the compound benzodiazepines is ingested, it undergoes four processes: it is (1) absorbed into the system; (2) distributed throughout the whole body; (3) metabolized (broken down to other compounds so it can be excreted); and (4) eliminated. Testing urine shows exposure to a compound. Benzodiazepines are not indigenous to the body, so for urine to be positive one must be exposed to it—whether by ingesting it or other means.

The amount of urine in the body varies by individual, depending upon hydration. If urine is concentrated, it will give a higher result, while if urine is dilute, it will give a lower result. Creatinine is naturally produced and is used as a marker of how concentrated or dilute a specific urine sample is. If creatinine is high, it indicates that the urine sample is very concentrated. It does not affect the ability to do the analysis. At a certain level, additional testing is done to determine if urine is too dilute.

Anything is “possible,” so rubbing benzodiazepine powder on the fingers could possibly result in a result of 140 ng/ml, depending on whether the amount of powder was a little or a lot, and other variables, such as the four processes in the body. However, the feasibility of achieving this concentration is very, very low or nonexistent because of several factors, such as how much dust was actually on the pill, and that it would be diluted by the body. It might not be untraceable but should not exceed the screening cutoff. The Substance Abuse and Mental Health Services Administration did all kinds of testing to address scenarios like that, which is why the cannabinoids confirmation is 15 ng/ml—to rule out passive inhalation and things of that nature.

Gary Lage

Lage is the founder of ToxiLogics, Inc. He has a Ph.D. in pharmacology and is certified as a diplomate by the American Board of Toxicology. His employment history reflects positions as director and senior toxicologist, and a professor of toxicology at the Philadelphia College of Pharmacy and Science.

Jones' oxazepam level was close to the cutoff. Urine changes throughout the day, and there is a difference between concentrated and dilute urine. If urine is concentrated, it concentrates the chemicals or drugs present in the urine. If urine is dilute, it dilutes the chemicals or drugs present in the urine. In a concentrated urine, something at 100 ng/ml might register, but in a dilute urine, it might only be 20 ng/ml. The creatinine level is a way to determine how concentrated the urine is when collected and allows one to interpret the drug levels reported. The concentration of the urine is important in urine drug samples. Some laboratories do not report creatinine levels. Per a study of creatinine levels for various ages, races, and gender, the average creatinine level for an African American male, age forty to forty-nine years old, is 180.6 mg/dl. Jones' urine had a creatinine level of 516.12 ng/ml, so his urine was very concentrated. If he had had an average creatinine level, his oxazepam level probably would have been 50 ng/ml. Fluid intake has a major impact on concentration of creatinine levels, and if you google how to beat a urine drug test it says to consume large quantities of water before the drug test. It is a recognized way to reduce the drug levels. It reduces the creatinine level and drug level. Jones' creatinine level was almost three times higher than normal, so it would be expected that the oxazepam level was three times higher than normal. So, conversely, if his urine reflected normal levels of creatinine, it would be expected that the oxazepam level would be three times lower.

In a concentrated urine sample, the chemicals or drugs present in the urine are concentrated, and 100 ng/ml of oxazepam in a concentrated urine sample would be much lower than 100 ng/ml in a dilute urine sample, even though the amount of oxazepam is the same. Cutoff levels are set for many drugs to avoid false positives. The federal government sets cutoff levels for many commonly abused drugs. Sometimes they are

pretty low and sometimes they are pretty high. The morphine level is pretty high, because there can be exposure just from eating poppy-seed bagels. The federal government does not set cutoff levels for benzodiazepines. He does not know why the cutoff is 100 ng/ml. With almost all drugs, toxicology labs recognize plus or minus 20 percent. It could be 20 percent higher or lower than the reported result.

140 ng/ml is a trace amount. Degradation is possible, depending on how a sample is stored over time. The margin of error for 140 ng/ml could be as high as 168 ng/ml or as low as 112 ng/ml, or for 100 ng/ml as high as 120 or as low as 80. If ingesting large amounts of benzodiazepines, levels in the thousands would be expected. He did not know when or how much diazepam Jones ingested—it had to get into the body somehow—but it was a small amount. Oxazepam could get into his system by handling it and result in that level. Time frame does matter in drug testing. The half-life for diazepam is twenty-one to thirty-seven hours.

Based on the information he reviewed and on a reasonable degree of scientific certainty, Lage stated, "the positive urine result for Oxazepam of 100 ng/ml is insufficient to scientifically determine any potential drug use by Mr. Jones, and in my opinion is due to his concentrated urine and the laboratory margin of error."

Andrew Klein

Klein is presently a lieutenant but was a sergeant at the time of the drug test. Klein testified about the November 21, 2019, random drug test and procedures, as well as the Attorney General policy. The UCPD must be on notice of an officer prescribed a controlled dangerous substance because it may affect ability to work. A drug test positive for prescription medication with a prescription is okay, but without a prescription is not okay. Klein instructs officers to list everything they have taken in the past thirty days on Attachment D, not just the past fourteen days—even if uncertain of the exact date.

James Debbie

Debbie had no information that Jones was a drug abuser or that he had ever previously tested positive for any illegal drugs or prescription drugs without a prescription. However, Jones' character is irrelevant because the UCPD follows the Attorney General Guidelines, which require termination for illegal drugs or prescription drugs without a prescription. Jones' prior disciplinary history consisted of "some counselings and maybe an oral reprimand or two."

Steven Jones

He has never used recreational drugs. He has a family, including his wife. His wife has been a nurse for over twenty years. She is not testifying because he does not want to put any undue stress on her or put her license in jeopardy.

When Jones was told by Captain McGuire and Sergeant Klein that he tested positive he told them that was impossible, and that he has never tested positive for anything. Captain McGuire asked him if he had taken any prescription medication, and Jones replied that he did not and does not take any prescription medication. If he takes anything, it is over-the-counter. Captain McGuire left to get Chief Debbie. Chief Debbie hugged Jones and said that he was sorry, but that Jones was being suspended per the Attorney General Guidelines. Jones was never previously suspended from work. Sergeant Klein gave Jones a document reflecting what he tested positive for, but it did not have the exact name of the benzodiazepine and Jones did not know what it was.

After Jones left, he called his wife and told her he was suspended for a positive drug test. His wife said that is not possible and that is not his character, and he has been military and law enforcement his whole life. They sat down that night and tried to figure out where it could have come from. Neither of them had a clue. That night Jones contacted an attorney to figure out what to do and what was the process. Jones and his wife met with the attorney, who requested that the second sample be tested by a second lab. At another meeting, Jones brought all his wife's medications to his attorney, as well as her medical records.

Photographs of his wife's pillbox and two pills were taken at his attorney's office after he was notified of the positive drug test. One pill looks like diazepam and the other pill is aspirin. It took a while for Jones and his wife to figure out that the diazepam must have come from her pillbox. Jones' wife has a prescription for diazepam. She has seven autoimmune diseases and takes various medications to alleviate pain and symptoms. The Atlantic Health System medical records are for his wife, and several records reflect 5 mg of diazepam (Valium).

Prior to his drug test, Jones took some over-the-counter medication his wife had—Advil, aspirin, ibuprofen, and Aleve—from her pillbox. Lieutenant Klein said to list anything he took in the past thirty days, not just fourteen days. Jones did not recall when exactly he took the over-the-counter medications. He has never been prescribed a benzodiazepine and would never knowingly, intentionally, or purposely take any benzodiazepine. Jones does not know for certain how he ingested the diazepam. He is being truthful. Being truthful is very important. He is a Christian and must walk a respectful walk in the eyes of God. He is accountable for his actions if he does anything immoral or illegal, and he teaches his children to always do the right thing because they must answer to God for everything. He only knowingly took over-the-counter medication. Jones does not know if he took diazepam or not.

In the week before the drug test, Jones had physical training at the police academy. He was a little sore and took over-the-counter medications to relieve pain. He did not take benzodiazepines to relieve pain. At the time he completed Attachment D he did not remember taking aspirin and did not remember to list it until after his attorney showed him the medication sheet.

He acknowledged that as a police officer subject to random drug testing, it is his responsibility to know what pills he takes. The Valium his wife was prescribed was a round yellow pill. Valium does not look like Advil, ibuprofen, or Aleve. He asked his wife if she had any Advil, ibuprofen, or Aleve. She said it was in her pillbox. He took the pills out of her pillbox. He did not show her the pills. She normally puts narcotics in her pillbox with over-the-counter pills.

LEGAL ANALYSIS AND CONCLUSIONS

N.J.S.A. 11A:1-1 through 12-6, the “Civil Service Act,” established the Civil Service Commission in the Department of Labor and Workforce Development in the Executive Branch of the New Jersey State government. N.J.S.A. 11A:2-1. The Commission establishes the general causes that constitute grounds for disciplinary action, and the kinds of disciplinary action that may be taken by appointing authorities against permanent career-service employees. N.J.S.A. 11A:2-20. N.J.S.A. 11A:2-6 vests the Commission with the power, after a hearing, to render the final administrative decision on appeals concerning removal, suspension or fine, disciplinary demotion, and termination at the end of the working test period, of permanent career-service employees.

N.J.A.C. 4A:2-2.2(a) provides that major discipline shall include removal, disciplinary demotion, and suspension or fine for more than five working days at any one time. An employee may be subject to discipline for reasons enumerated in N.J.A.C. 4A:2-2.3(a), including incompetency, inefficiency, or failure to perform duties; insubordination; conduct unbecoming a public employee; and neglect of duty. N.J.A.C. 4A:2-2.3(a) (1), (2), (6), and (7). In appeals concerning such major disciplinary actions, the burden of proof is on the appointing authority to establish the truth of the charges by a preponderance of the believable evidence. N.J.A.C. 4A:2-1.4; N.J.S.A. 11A:2-21; Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

Attorney General Law Enforcement Directive No. 2018-2, from the Attorney General of New Jersey to “All Law Enforcement Chief Executives,” dated March 20, 2018, relative to Statewide Mandatory Random Drug Testing states, in pertinent part:

The Attorney General is responsible for ensuring that law enforcement provides the highest level of service to the public, and that all officers have the physical and mental capacity to perform their duties safely and effectively. An officer’s life, the lives of fellow officers, and the lives of the public depend on the officer’s alertness and ability to make rational decisions unaffected by illegal drug use.

Testing of law enforcement officers in New Jersey for illegal drug use is governed by the *Attorney General’s Law*

Enforcement Drug Testing Policy (hereinafter "AG Testing Policy"). . . .

Some County Prosecutors already mandate random drug testing in each police department within their jurisdiction and a significant number of police departments in New Jersey presently conduct random drug testing of their officers. To ensure that all law enforcement agencies are employing random drug testing and doing so in a consistent manner, this Directive establishes a uniform policy requiring that all law enforcement agencies statewide conduct mandatory random drug testing of all sworn officers.

Therefore, pursuant to the authority granted to me under the Criminal Justice Act of 1970, N.J.S.A. 52:17B-97 to -117, which provides for the general supervision of criminal justice by the Attorney General as chief law enforcement officer of the State to secure the benefits of a uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the State, I, Gurbir S. Grewal, hereby DIRECT all law enforcement and prosecuting agencies operating under the authority of the laws of the State of New Jersey to implement and comply with the following policies, procedures, standards, and practices.

[R-7.]

The foregoing Directive applies to all state, county and municipal law enforcement agencies and sworn officers who are responsible for enforcing the criminal laws in New Jersey, come under the jurisdiction of the Police Training Act, and are authorized to carry a firearm under N.J.S.A. 2C:39-6. (R-7.) The Attorney General's Law Enforcement Drug Testing Policy (AG Policy) provides, in pertinent part:

The goal of the policy is deterring illegal drug use by law enforcement officers. The policy provides law enforcement agencies with a mechanism to identify and remove those law enforcement officers engaged in the illegal use of drugs. Because illegal drug use is inconsistent with the duties, obligations and responsibilities of sworn law enforcement officers, the policy mandates that officers who test positive shall be terminated from employment.

[R-8.]

Section VIII, "CONSEQUENCES OF A POSITIVE TEST RESULT," provides, in pertinent part:

C. When a sworn law enforcement officer tests positive for illegal drug use:

1. The officer shall be immediately suspended from all duties.
2. The officer shall be administratively charged and, upon final disciplinary action, terminated from employment as a law enforcement officer.
3. The officer shall be reported by his or her employer to Central Drug Registry maintained by the Division of State Police.
4. The officer shall be permanently barred from future law enforcement employment in New Jersey.

[R-8.]

There are six attachments (A through F) to the AG Policy. Attachment C (OFFICER NOTICE AND ACKNOWLEDGMENT), states, inter alia: "I understand that a negative drug test result is a condition of my continued employment as a sworn officer at the above listed department; I understand that if I produce a positive test result for illegal drug use, it will result in my termination from employment." (R-10.) Jones signed Attachment C on November 21, 2019. (R-10.) Attachment D (DRUG TESTING MEDICATION INFORMATION) states, in pertinent part, as follows:

As part of the drug testing process, it is essential that you inform us of all medications you have taken in the last fourteen (14) days. Please *carefully* complete the information below:

Check all that apply:

_____ A. During the past 14 days I have taken the following medication prescribed by a physician.

.....

_____ B. During the past 14 days, I have taken the following non-prescription medications (cough medicine, cold tablets, aspirin, diet medication, nutritional supplements, etc.)

.....

_____ C. During the past 14 days, I have taken NO prescription or non-prescription medications.

Attachment D provides a table after section A with blank spaces to complete the name of medication, prescribing physician, and date last taken, and a table after section B to complete the name of medication and date last taken. (R-8.) The parties' stipulated that Jones' Attachment D reflects that he took "over-the-counter medicines, which were "advil, ibuprofen, aleve," and the last date taken was November 20, 2019, and that he took over-the-counter medicine called "zyrtec," and the last date taken was September 30, 2019. (J-1.)

Jones testified that in the week prior to the drug test, he had physical training at the police academy and was a little sore, so he took over-the-counter pain medication—not diazepam—to relieve pain. Jones also testified that the pillbox belonged to his wife, and that before taking any of the medications he first asked her if she had any "Advil, ibuprofen, or Aleve" and she said they were in her pillbox. Jones took pills out of his wife's pillbox without showing her the pills. The photograph of the pillbox shows at least a half dozen different types of pills—prescription and over-the-counter pain relievers, including Advil and Aleve, as well as 81 mg low-dose aspirin. The diazepam and low-dose aspirin are similar in color and somewhat similar in size. Jones testified that after speaking with his wife and his attorney about the positive test result, he realized that he must have inadvertently taken a diazepam, or alternatively took a pill contaminated with diazepam.

The AG Policy reflects that when a sworn law-enforcement officer tests positive for illegal drug use, the officer shall, inter alia, "be administratively charged and, upon final disciplinary action, terminated from employment." (R-8.) Jones has cited several cases wherein the removal was reversed, but those cases are distinguishable from this matter for several reasons. In Shorter, the appellant testified that he had used CBD oil, not

knowing that it contained THC, and the Appellate Division noted that “[t]he record supports the CSC’s observation that, given the small amounts of THC detected in his sample, it was entirely possible that Shorter’s positive result was caused by the CBD oil recommended to him by his pain management doctor,” and that “the CSC properly considered the mitigating circumstances of Shorter’s positive drug screen, including the fact that he relied on the advice of medical professionals in ingesting CBD oil shortly before the test.” In re Shorter, 2020 N.J. Super. Unpub. LEXIS 821 (May 4, 2020), *16–17. In Martinez, the Merit System Board, now known as the Commission, noted that the appellant “and other witnesses credibly testified” and “[w]itnesses also confirmed” the appellant’s explanation, and in Swinney, the appellant and her mother both testified. In re Martinez, CSV 7553-02, Merit Sys. Bd. (March 28, 2004), <https://njlaw.rutgers.edu/collections/oal/>; In re Swinney, 2010 N.J. AGEN LEXIS 682 (Nov. 24, 2010), *1. Here, Jones’ wife did not testify and there is no corroboration for the explanation provided by Jones. Thus, there was no testimony to corroborate that the pills in the photograph are generally the same pills contained in the pillbox prior to the November 21, 2019, drug test, and no testimony about why the pillbox contains the pills that it does or why the prescription and non-prescription medications were co-mingled. Additionally, it is observed that Attachment D to the AG Policy does mention “aspirin” as follows: “During the past 14 days, I have taken the following non-prescription medications (cough medicine, cold tablets, aspirin, diet medication, nutritional supplements, etc.)” Yet, despite “aspirin” being referenced on the form, Jones testified that at the time he completed Attachment D he did not remember taking aspirin until after his attorney showed him the medication sheet, so he did not list aspirin and instead listed three other over-the-counter medications. There was also no testimony that his wife takes low-dose aspirin or explanation for why Jones would have taken an 81 mg low-dose aspirin for pain relief.

A credibility determination requires an overall evaluation of the testimony considering its rationality or internal consistency and the manner in which it “hangs together” with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 555 (1954). It must be such as the common experience and observation can approve as probable in the circumstances. Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961). “The interest, motive, bias, or prejudice of a witness

may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). Unfortunately, there was no testimony to corroborate what otherwise was a generally implausible explanation for the positive drug test.

The evidence reflects that all processes and procedures for the reception, testing, and reporting of the results were in accordance with the AG Policy. Thus, there is no question that Jones' sample tested positive for benzodiazepines—a controlled-substance screened per the AG Policy. (R-8.) Both experts testified about creatinine and urine concentration, and while likely that the oxazepam would have been under the cutoff level and therefore not reportable if his urine had not been so concentrated, it does not change that Jones' urine sample tested positive for oxazepam. Additionally, Dr. Lage's testimony relative to the 20 percent margin of error and that it was a "trace" amount of oxazepam is similarly unpersuasive, as it was not established when the oxazepam was ingested, and the cutoff level for benzodiazepines is 100 ng/ml and the first sample was 140 ng/ml, and the second sample was 100 ng/ml. Thus, even if cutoff levels did not already account for margin of error, the first sample would still have been above the cutoff at 112 ng/ml. Finally, if the pills in the pillbox were in the same condition as in November 2019, from the photograph, none appear deteriorated or to contain "powder" from another pill.

In view of the foregoing, I **CONCLUDE** that testing positive for a prescription drug without a valid prescription is unbecoming a police officer. I therefore **CONCLUDE** that the charge of conduct unbecoming a public employee is sustained. However, I further **CONCLUDE** that the remaining charges of incompetency, inefficiency, or failure to perform duties, insubordination, and neglect of duty are not sustained, as there was no evidence in the record to support these charges.

The Commission may increase or decrease the penalty imposed by the appointing authority, though removal cannot be substituted for a lesser penalty. N.J.S.A. 11A:2-19. Police officers are held to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576–77 (1990). This higher standard of conduct is one of the obligations a police officer undertakes upon voluntary entry into the public service. In re

Emmons, 63 N.J. Super. 136 (App. Div. 1960). A police officer's primary duty is to enforce and uphold the law, and a police officer "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). The obligation to act in a responsible manner is especially compelling in a case involving a law-enforcement official. In re Phillips, 117 N.J. at 576.

Termination is generally supported by case law except in circumstances where there is a credible explanation for the positive result that is supported by evidence. Jones tested positive for benzodiazepines for which he had no valid prescription and for which there was no credible explanation supported by evidence for oxazepam to otherwise have been in his urine. Accordingly, I **CONCLUDE** that the UCPD's removal of Jones from his public employment should be affirmed.

ORDER

It is hereby **ORDERED** that the charge of conduct unbecoming a public employee is **SUSTAINED**. It is hereby further **ORDERED** that the UCPD's removal of Steven Jones from his public employment is **AFFIRMED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 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.

February 2, 2022



DATE

KELLY J. KIRK, ALJ

Date Received at Agency:

February 2, 2022

Date Mailed to Parties:

February 2, 2022

db

APPENDIX

WITNESSES

For Appellant:

Gary Lage
James Debbie
Steven Jones

For Respondent:

George Jackson
Andrew Klein

EXHIBITS IN EVIDENCE

Joint:

J-1 Joint Stipulations of Fact

For Appellant:

P-1 Curriculum Vitae of Gary Lage, Ph.D.
P-2 Lage Report, dated June 19, 2020
P-3 Photograph (pillbox)
P-4 Photograph (pills)
P-5 (Not in evidence)
P-6 Pill images (Diazepam DAN 5619 5)
P-7 Medical records (wife)
P-8 NMS Labs Toxicology Report, dated January 21, 2020 (duplicate of R-17)

For Respondent:

R-1 Curriculum Vitae of George Jackson, Ph.D.
R-2 Immediate Suspension Notice, dated January 14, 2020
R-3 Memorandum, dated January 14, 2020 (McGuire to Debbie)
R-4 Memorandum, dated January 15, 2020 (UCPD to UCPO)

- R-5 (Not in evidence)
- R-6 PNDA, dated January 23, 2020
- R-7 Attorney General Law Enforcement Directive No. 2018-2, dated March 20, 2018
- R-8 Attorney General's Law Enforcement Drug Testing Policy
- R-9 UCPD General Order, Volume 3, Chapter 23, dated August 4, 2018
- R-10 Attachment C, dated November 21, 2019
- R-11 Administrative Memorandum, dated February 3, 2020
- R-12 Continuity of Evidence for Urine Specimen
- R-13 Law Enforcement Drug Testing Custody and Submission Form
- R-14 Edwin H. Albano Institute of Forensic Science Sample Record
- R-15 Toxicology Report Law Enforcement Drug Testing, dated January 7, 2020
- R-16 GC/MS Drug Confirmation Report, dated December 24, 2019
- R-17 NMS Labs Toxicology Report, dated January 21, 2020 (duplicate of P-8)
- R-18 UCPD Internal Affairs Investigation Report
- R-19 (Not in evidence)
- R-20 Medical Review Officer Certification Form
- R-21 Law Enforcement Drug Testing Custody and Submission Form (with Tox Case #)
- R-22 Mayo Clinic Laboratories (Drug Testing: Benzodiazepines)
- R-23 Side Effects of Oxazepam