STATE OF NEW JERSEY

In the Matter of Robertha Addison, Burlington County, Department of Corrections CSC DKT. NO. 2022-1174 OAL DKT. NO. CSR 09803-21	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**

ISSUED: OCTOBER 12, 2022

The appeal of Robertha Addison, County Correctional Police Officer, Burlington County, Department of Corrections, removal, effective November 3, 2021, on charges, was heard by Administrative Law Judge Judith Lieberman (ALJ), who rendered her initial decision on September 8, 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, including a thorough review of the exceptions and reply, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of October 12, 2022, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision.

The Commission makes the following comments. As indicated above, the Commission thoroughly reviewed the exceptions filed by the appellant in this matter. The Commission notes that the ALJ's findings and conclusions in upholding the charges and the penalty imposed was based on her thorough assessment of the record and were not arbitrary, capricious or unreasonable. In this regard, upon its *de novo* review of the record, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.,* 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See also, In re Taylor,* 158 *N.J.* 644 (1999) (quoting *State v. Locurto,* 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes

the findings clear. *Id.* at 659 (citing *Locurto, supra).* The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System,* 368 *N.J. Super.* 527 (App. Div. 2004). In this matter, the exceptions filed by the appellant are not persuasive in demonstrating that the ALJ's credibility determinations, or her findings and conclusions based on those determinations, were arbitrary, capricious or unreasonable. As such, the Commission has no reason to question those determinations or the findings and conclusions made therefrom.

Additionally, the Commission notes that much of the appellant's arguments regarding the alleged procedural violations relating to the drug testing were appropriately addressed in the ALJ's initial decision. Regardless, it is clear that any identified procedural violations in this case do not provide a basis to nullify the results of the drug test. *See In the Matter of Mario Lalama,* 343 *N.J. Super.* 560 (App. Div. 2001); *In the Matter of Bruce Norman,* Docket No. A-5633-03T1 (App. Div. January 26, 2006), *cert. denied,* 186 *N.J.* 603 (2006) (Deviations from drug testing that do not amount to violations of the appellant's right to due process or call into question the validity of the positive test result, do not mandate voiding the test result).

Finally, the Commission notes that the infraction in this matter is clearly worthy or removal from employment for a County Correctional Police Officer. In this regard, the Commission emphasizes that a Correction Officer is a law enforcement officer who, by the very nature of her job duties, is held to a higher standard of conduct than other public employees. *See Moorestown v. Armstrong,* 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied,* 47 *N.J.* 80 (1966). *See also, In re Phillips,* 117 *N.J.* 567 (1990). Moreover, even when a Correction Officer does not possess a prior disciplinary record after many unblemished years of employment,[1] the seriousness of an offense such as in this matter may, nevertheless, warrant the penalty of removal.

<u>ORDER</u>

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 Robertha Addison.

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

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[1] This is not the case in this matter as the appellant's prior record includes several disciplinary actions, including major discipline.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 12TH DAY OF OCTOBER, 2022

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 09803-21

AGENCY DKT. NO. N/A

2022-1174

IN THE MATTER OF ROBERTHA ADDISON, BURLINGTON COUNTY DEPARTMENT OF CORRECTIONS.

Mark W. Catanzaro, Esq., for appellant (The Law Offices of Mark W. Catanzaro, attorney)

Margaret E. McHugh, Esq., for respondent (Malamut & Associates, LLC, attorneys)

Record Closed: June 9, 2022 Decided: September 8, 2022

BEFORE **JUDITH LIEBERMAN**, ALJ:

STATEMENT OF THE CASE

Appellant Robertha Addison ("appellant") appeals her removal by respondent, Burlington County Department of Corrections ("respondent" or "Department"), from her position of county correctional police officer due to a determination that she tested positive for drugs during a random drug screen, in violation of N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency or failure to perform duties; N.J.A.C. 4A:2-2.3(6), conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; and N.J.A.C.

4A:2-2.3(a)(12), other sufficient cause, due to violation of Burlington County Department of Corrections Policy and Procedural Manual Sections 1007, 1033 and 1145.

PROCEDURAL HISTORY

On January 26, 2021, the Department issued a Preliminary Notice of Disciplinary Action (PNDA) setting forth the charges and specifications made against the appellant. A departmental hearing was conducted on May 13, 2021. On November 3, 2021, the Department issued a Final Notice of Disciplinary Action (FNDA) sustaining the charges in the PNDA and removing the appellant from employment effective November 3, 2021. The appellant filed a timely appeal with the Office of Administrative Law and Civil Service Commission, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The appeal was perfected on November 18, 2021. A hearing was conducted on April 4, 2022, and April 12, 2022. The record remained open to permit the parties to submit post-hearing briefs. The last brief was received on June 9, 2022, and the record closed that day. An extension of time to file this Initial Decision was granted on July 27, 2022.

FACTUAL DISCUSSION AND FINDINGS

The following is undisputed. I, therefore, **FIND** the following as **FACT**:

1. Appellant is a Burlington County Correctional Police Officer. Until she was suspended effective January 26, 2021, she worked at the Burlington County Jail ("jail" or "facility").

2. The Attorney General's Law Enforcement Drug Testing Policy ("Policy"), Revised April 2018, was in effect when appellant was required to provide a urine sample for drug testing. R-14.

3. The Policy requires correction officers to "execute a form (attachment C) advising the officer that a negative result is a condition of employment and

that a positive result will result in the consequences outlined in Section III C of this policy." Id. at 6.

4. Section III C provides that "a positive result will result in: a) the officer's termination from employment; b) inclusion of the officer's name in the central drug registry maintained by the Division of State Police; and c) the officer being permanently barred from future law enforcement employment in the State of New Jersey." Id. at 5.

5. Prior to testing, "officers shall complete the Drug Testing Medication Information form . . . listing all prescription medication, non-prescription (over-the-counter) medication, dietary supplements and nutritional supplements that were ingested by the officer during the past 14 days." Id. at 6.

6. Department Policy and Procedure Section 1007, revised June 1, 2018, requires correctional police officers to, on a weekly basis, "review policies and procedures, updates, training, videos, memos or documents." R-4 at 1. Officers are required to "[p]erform assigned duties in accordance with established rules, regulations, policies and procedures at all times." Id. at 2.

7. Policy and Procedure Section 1033 provides, "No officer or employee shall . . . use . . . any type of drug or controlled substances while on or off duty." R-5 at 4.

8. Policy and Procedure Section 1145 provides, "It is the policy of the [Department] that employees are not permitted to work under the influence of any illicit drug. This includes narcotics as well as any non-narcotic which interferes with the ability to perform job duties. . . . Any . . . employee who tests positive for illicit drugs . . . shall be terminated from employment. R-6 at 1. "Prior to submission of urine sample all officers shall complete a "Drug Screening Medication Information" medical questionnaire, which shall

clearly describe all drugs, both prescribed and non-prescribed, that they have ingested in the past thirty days." Id. at 2.

9. Policy and Procedure 1145 also provides:

An employee who tests positive for the presence of illegal drugs/substances shall:

a. Be dismissed from the Department.

b. Be included in the central registry maintained by the New Jersey State Police.

c. Be reported to the County Prosecutor.

d. Be permanently barred from law enforcement employment in New Jersey.

10. On November 19, 2020, appellant was randomly selected to submit to a drug test.

11. On November 24, 2020, appellant signed a Department Urine Specimen Collection form acknowledging the New Jersey Attorney General's Law Enforcement Drug Testing Policy revision of April 2018, which requires the collection and submission of two concurrent urine samples to the New Jersey State Toxicology Laboratory. Pursuant to the policy, both samples are sent to the Laboratory. The first is tested by the Laboratory and the second is stored pending the test results. The second sample will be released if the test produces a positive result and the officer who provided the sample requests an independent test of the second sample and designates an approved laboratory for testing. R-1.

12. Appellant completed a "Drug Testing Medical Information" form prior to her drug test. She listed no prescription medication. Under the heading "Non-prescription Medication," she listed Tylenol and vitamins. R-7.

13. Appellant provided a urine sample for testing. Her urine sample tested positive for a metabolite of cocaine.

14. Due to the positive drug test result, the Department issued a January 26, 2021, PNDA that charged appellant with violations of N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency or failure to perform duties; N.J.A.C. 4A:2-2.3(6), conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(7), neglect of duty and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, due to violation of Burlington County Department of Corrections Policy and Procedural Manual Sections 1007, 1033 and 1145. The PNDA proposed a penalty of termination.

15. A departmental hearing was held on May 13, 2021. The charges in the PNDA were sustained. A November 3, 2021, FNDA advised that appellant was removed from her position effective that day.

Testimony

The following is not a verbatim recitation of the testimony but a summary of the testimonial and documentary evidence that I found relevant to the above-described issue.

For respondent

On November 24, 2020, **Captain Patricia Cauley**[1] served as the monitor of appellant's random drug test. She gave appellant the paperwork she was required to complete prior to her drug test and told her to list all medications and anything else she consumed that could be questionable. She recommended appellant research her

[1] Cauley was a Lieutenant at the relevant times.

medications, and contact a pharmacy, to be sure she listed all substances that could possibly interact with the drug test. Appellant could use her phone or a computer in the facility to conduct this research. She advised, "If you have a question about anything that you have ingested in the last thirty days . . . make sure you put it on the paper whether it be herbals or anything like that." T[2] 15:17-20. Appellant completed the Burlington County Department of Corrections Drug Testing Medical Information Form and listed only Tylenol and vitamins. R-7.

Cauley gave appellant two vials to collect urine. Appellant was instructed to open the bags in which the vials were stored; write her social security number and "A" and "B" on them or an accompanying piece of paper; return the vials to the bag; and then go to the bathroom to collect the specimens.

Appellant's first samples were discarded because they were insufficient. Because appellant needed to rehydrate, she was permitted to return to her work area and was directed to advise when she was again able to provide samples. It was not unusual for an officer to need additional time to be able to produce a sample. The Attorney General's guidelines required officers to provide samples within three hours.

Approximately two and one-half hours later, appellant was able to provide sufficient samples. She followed the same procedure as earlier. When she exited the bathroom, she placed the samples in a bag, which Cauley opened. Appellant sealed the bag and Cauley carried it to a refrigerator in the Internal Affairs Unit, which Lieutenant Pyaegbaye Blango unlocked. Blango is the only officer who had keys to the refrigerator. Cauley placed the bag in the refrigerator and either she or Blango closed it. Cauley placed a lock on the refrigerator and Blango locked it.

Cauley was not involved with the testing of the samples, analysis of the results or the proposed discipline.

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[2] "T" and "T2" refer to the transcripts of the April 4, 2022, and April 12, 2022, hearing transcripts, respectively. They are followed by the referenced page and line numbers.

On cross-examination, Cauley acknowledged that the Attorney General's guidelines do not permit an officer to return to work if they are unable to provide a urine sample. Rather, the officer must remain in the presence of the monitoring officer. During that time, the officer should consume liquids in the presence of the monitoring officer. Only the warden can authorize a deviation from the guidelines. Cauley did not know if the warden authorized appellant's return to work between attempts to provide a sample. She was not involved with the decision to permit appellant to return to work. Blango was the senior Lieutenant at that time.

Lt. Pyaegbaye Blango has been involved with drug testing for approximately four years. He oversees the random selection for testing and confirms that all employees are on duty at the time they are selected. He runs a random selection report in the presence of a union representative.

He pulled a random list of employees on November 19, 2020. R-9. The union representative was present and did not object. The form that documented the random employee selection was signed by Blango and Lt. Nicholas Ptaszenski. Ibid. Appellant's name was selected.

Appellant's drug test was conducted on November 24, 2020. Her first sample was insufficient as she did not produce enough urine to fill two specimen cups. Because she was required to produce this quantity of urine at one time, Blango sent her back to her work area, Control 4. He sent her back to work due to staffing needs in Control 4, which controls two wings of the facility. Having previously served as a floor supervisor, Blango knew that additional personnel was needed. He did not consult with anyone before he sent her back to Control 4.

Appellant produced an adequate sample between two and one-half and three and one-half hours later. Blango unlocked the refrigerator and Cauley retrieved a black bag, into which the samples would be placed. Appellant exited the bathroom and put the two specimen cups into the black bag. Cauley put the black bag with the cups into the refrigerator and shut its door. Blango locked the refrigerator and then went home. He had no further involvement with appellant's sample. No officers other than he and Cauley

were present when appellant provided her sample. Only Blango and Lt. Ptaszenski have keys to the refrigerator.

Upon learning about the positive test result, Blango advised the warden and deputy warden and evaluated whether disciplinary action was warranted. He checked to see if the positive result was caused by a medication that appellant forgot to list. He compiled reports and prepared a disciplinary packet, which he submitted to the warden and deputy warden.

On cross-examination, Blango acknowledged that he violated the Attorney General's guidelines when he excluded captains and the warden from the pool of officers who could be selected for random drug testing. However, he did not know if they were excluded from the November 19, 2020, officer pool. The guidelines require that all sworn law enforcement officers must be included in the pool. He also acknowledged that he violated the Attorney General's guidelines when he permitted appellant to return to Control 4 after she failed to provide a sufficient sample. He did not have authority to exempt her from the requirement that she remain in the presence of the monitor until she could provide a sufficient sample.

Blango was not aware of training provided to officers about drug testing. However, he tells staff to always document anything that they are unsure of on the medication list form. He did not advise officers of "potential issues" including foods or substances that could generate a positive drug test. T 76:15.

Lt. Nicholas Ptaszenski has been an Administrative Lieutenant since February 2019 and has worked at the facility since February 2003. He has been involved with drug testing since February 2019. He and Lt. Blango are the only officers who have access to the refrigerator and who mail samples to the New Jersey State Toxicology Laboratory.

Lt. Ptaszenski was not involved with the selection of appellant for testing or with the collection of her urine sample. He was not present when appellant's sample was produced. He shipped the sample to the laboratory on December 7, 2020, at 12:30 p.m. R-3. He also signed and sent to the laboratory a Law Enforcement Drug Testing Custody

and Submission Form (Custody Form) that listed all of the samples. It identified the personnel who supplied the samples by their social security numbers. R-8.

Either Lt. Ptaszenski or Lt. Blango received the results from the laboratory. Appellant's test result was the first positive result he had been involved with. He briefed the deputy warden and created a disciplinary packet.

On cross-examination, Lt. Ptaszenski acknowledged that his initials were under the "monitor" heading on the Custody Form. R-8. He testified that he believed the initials indicated that he shipped the samples to the laboratory. However, he also acknowledged that the guidelines issued by the Attorney General and Burlington County Department of Corrections provide that the monitor is the person who supervises staff members as they complete paperwork and provide samples. The monitor must also inspect the specimen bottle packet to ensure the absence of tampering. The guidelines also require that the monitor must be of the same gender as the staff member. R-6 at 90; R-14 at 6-7. He recognized that he misunderstood the meaning of "monitor" on the Custody Form. However, he completed the form in accordance with his training and referred to previously completed forms for guidance. He clarified that, before he mails samples to the laboratory, he reviews the Custody Form, custody paperwork, medical and acknowledgement forms and ensures that each employee's sample is matched to the forms.

William S. Rudderow, Jr. is the Division Head for the Public Safety Division of Information Technology. He has held this position for four years and has worked for Burlington County for eight years. The county began using a record management system to randomly select personnel for drug testing on October 2, 2019. When individuals are hired, their agencies input their employee numbers into the records management system. All active, sworn law enforcement officers' employee numbers are entered. The employee numbers are randomly selected from the list of officers. He is not involved with the "random pulls" of jail personnel and does not know who performs this function.

George F. Jackson is the Executive Director of the Laboratories and Chief Forensic Toxicologist for the New Jersey Office of the Chief State Medical Examiner. He

has been a forensic toxicologist for thirty years and has served as Chief Forensic Toxicologist for two years. The laboratory serves as a neutral reviewer and provides double blind analyses of drug tests performed by law enforcement entities in the state.

The Qualitative Analysis Complete Report and Toxicology Report (R-10, R-11) for appellant's urine test indicated she "had a presumptive positive for cocaine and it went to confirmation and we confirmed the presence of the active metabolite of cocaine, which is benzoylecgonine or BZE, above our cutoff of 100 nanograms per milliliter." T 137:19-23. Benzoylecgonine is the "predominant metabolite from exposure to cocaine." T 143:3-4. The test indicated 321 nanograms per milliliter of benzoylecgonine in appellant's urine. R-10. Because the specimen was above 100 nanograms per milliliter, it is a "confirmed positive." T 138:7-8. This measurement is based on industry standard guidelines from the United States Department of Transportation and the Substance Abuse and Mental Health Services Administration. The test results concerned only exposure to compounds, not whether appellant was impaired as a result of any exposure. The results also did not indicate the source of the exposure.

The medical review officer, Dr. Andrew Falzon, reviewed the list of medications that appellant reported having taken to "determine whether or not anything on that list would result in a confirmed positive finding." T 142:22-23. Dr. Jackson reviewed and signed off on all of the materials and reports accompanying the tests, and he issued a final report.

Deputy Warden Teechy Blango received the toxicology report that documented appellant's positive drug test result (R-11) and her medication list (R-7). Based upon her medication list, she did not consume a substance that would cause a positive test result for a cocaine metabolite. He thus determined that appellant was subject to termination due to the positive drug test. Appellant was charged with violating Correction Officer Policy 1007, which requires officers to follow all policies and procedures (R-4); Section 1033 of the Agency Rules and Regulations, which prohibits drug use (R-5) and Policy 1145, which implements the Attorney General's Guidelines concerning staff random drug screening (R-6). The Guidelines require termination when an officer fails a random drug screen test. R-6 at 9.

Deputy Warden Blango explained that officers are "responsible for our bodies[.]" T2 14:5-6. Thus, if an officer claimed that a positive drug test result was caused by accidental ingestion of a drug, the Department must still comply with the Attorney General's Guidelines. If, however, an officer advised of drug consumption before being randomly selected for a drug test, the Department could refer them to treatment for drug use. He has not encountered the latter circumstance.

Deputy Warden Blango did not provide officers with information about non-drug substances that could produce a positive drug test result. When asked about what "etc." was intended to refer to on the medication disclosure form, he replied, "I guess anything not prescribed by a doctor." T2 18:3. He did not "believe it means food that you would normally eat on a daily basis or drink." T2 18:17-18. He recognized that some common foods, like poppy seed bagels, could produce a positive drug test result. If this were to occur, the officer must provide proof that he consumed the food. "[T]hey should provide a receipt or something that says that they ate it as far as why they tested positive." T2 19:9-12. He acknowledged that it is unlikely that someone would retain a receipt for everything they ate during the months prior to the random sample and subsequent drug test.

Deputy Warden Blango acknowledged that Lt. Ptaszenski should not have been listed as the monitor on the Custody Form (R-8). He also acknowledged that an officer could unintentionally ingest something that could cause a positive drug test result. The officer would thus not know to alert Department staff concerning the consumption prior to a random drug test.

<u>For appellant</u>

Denise Addari is a friend of appellant. She and appellant have known each other since 1988, when they worked together as physical therapy aides. They remained friends after appellant joined the Army and while she was stationed in a variety of locations. Addari lived in Delran, New Jersey, until she moved to Clayton, New Jersey in December

2019. Clayton is approximately forty five minutes from where appellant lives. The women see each other approximately twice each month.

While in Clayton, Addari frequented various farmer's and produce markets, where she would purchase items she typically did not find at ordinary grocery stores. She shared these items with appellant because "[w]e have been friends for so long and . . . if I'm shopping and there is something out of the ordinary that I'm trying that I know that she is going to like I'll get it and just share it with her." T 118:19-22.

Addari estimated that appellant told her about the drug test results in January 2021. She was "shocked" to learn that appellant tested positive for drugs. It was "unbelievable" based upon her knowledge of appellant. T 119:16. She and appellant discussed what could have caused the positive test result, including topical items and foods or drinks she may have consumed, and prepared a list of these items. She did not retain the list as she did not "think there was a reason to keep it." T 126:14-15. She could not estimate the number of items they listed.

While researching the items appellant regularly ingested, via the Internet, she discovered that a tea could "have cocaine in it[.]" T 120:11. She identified two images of a box of Delisse Mate de Coco – Coca Inka tea, which were printed from an Internet sales listing. A-2 at 1-2. Addari purchased that tea in June or July 2021, and gave it to appellant. She also kept some for herself but threw it away when she realized it could contain cocaine. She did not read the ingredient list. Rather, she believed, based upon the name of the tea, that it had chocolate in it. She did not want her grandchildren to accidentally ingest it. She did not recall where she purchased the tea because she visits many markets and did no retain the receipt or the packaging.

On cross-examination, Addari explained that she has visited farmer's markets her "whole adult life." T 124:3. She shared with appellant the coffees and teas that she purchased at farmer's markets only within "the last couple years[.]" T 123:25 to 124:1. She explained that if "there is something out of the ordinary I know she likes or something I'm trying I get it for both of us, but . . . to the best of my memory it's just been a few years

as far as tea and coffee -- well, where I live." T 124:11-15. She did not observe appellant drink the tea.

Also on cross-examination, Addari was asked if she could access her Internet search history to document the research she conducted into items appellant used or consumed. In response, she offered to immediately access her search history. She was directed to not do so. She also explained further that she gave the tea to appellant "[b]ecause whenever we're out and about she does the same thing[.] I know she likes teas and coffee so when I find something different I share it with her." T 130:1-3.

Appellant **Robertha L. Addison** has worked as a correctional police officer for Burlington County since September 2002. She graduated high school in 1985 and worked with Addari as a physical therapy aide until May 1989, when she enlisted in the United States Army. She served in active duty for six years and was discharged at the range of E4 Specialist, which is four grades above private and one grade below sergeant. Starting in 1997, she was in the United States Army Reserves and retired in 2013 with the rank of E5 Sergeant. From 1989 through 2013, she was subject to drug testing and never failed a test. While in the Reserves, she was a Drug Analysis Monitor, responsible for administering and monitoring random drug tests.

Appellant was still in the Reserves when she started working as a Burlington County correctional police officer. She was subject to random drug tests during her tenure and was tested three or four times. She passed every test.

Appellant consumed coffee and tea while employed by the Department. In June 2018, she had gastric sleeve surgery, which reduced the size of her stomach. This limited her food consumption to liquids. She purchased coffee and tea at the military commissary and from Amazon.com. She also got coffees and teas from Addari. They shared coffees and teas with each other. They "gifted each other lots of things through the time that [they] have known each other." T 153:7-9. Appellant never had concerns about the items she received from her friend and consumed them regularly. She drank a cup of tea or coffee about three times a day when she was home. She drank two cups of coffee each day before she left for work and drank tea while at work.

On the day of the drug test, she arrived at work at 5:00 a.m. She was assigned to Control 4, a control booth that operates two inmate housing tiers. Lt. P. Blango called her while she was in the control booth to advise that she was required to submit to a urine test. He asked if she could provide a specimen at that time and she replied that she could not. At approximately 2:30 p.m., when she was relieved of duty, she reported to Lt. Blango's office. She filled out the required paperwork and Lt. Cauley escorted her to the bathroom, where she entered a stall. She was given a container into which she was to deposit urine. When she exited with the container, she was told that she had not provided a sufficient amount of urine. She was directed by Cauley to return to Control 4 and told that she would be required to complete the urine test that day.

Appellant returned to the facility's Administration office at approximately 4:00 p.m. P. Blango and Cauley were there. Cauley provided appellant with the same containers and paperwork as before. After appellant completed the paperwork, Cauley escorted her to the bathroom. Appellant produced an adequate urine sample, which she poured into two vials that she snapped closed. She exited the bathroom while holding the two vials and placed them on a table. She spoke with both lieutenants and then left the area. She did not observe what was done with the vials after she left.

The facility had not given appellant a list of substances that could possibly cause a positive drug test result. She was also not given instructions concerning teas, supplements or other items, other than non-prescription drugs, that were prohibited.

Appellant received the drug test result on January 24, 2021. She was shocked by the test result because she is "not a drug user and [doesn't] use drugs." T 162:21. She "started to do some investigating." T 162:22. She sent the second sample to a different laboratory, not the State Laboratory. That sample also tested positive for drugs. She received the second test result in March 2021. She spoke with "some" nurses who "directed [her] to go through [her] food intake and [her] liquid intake due to the gastric sleeve[.]" T 163:10-13.

Appellant made a list of the food and liquids she consumed. She ate very little food because of her surgery; she only ate yogurt and two pre-workout supplements. She drank coffee. When asked, she clarified that she referred to both coffee and tea as "coffee." T 164:1-2. She identified a photograph of the type of tea that Addari gave her, which was printed from an Internet sale site. A-2 at 2. The image did not show the tea's ingredients.

Appellant next spoke about this with Addari. They researched the coffees, teas and pre-workout supplements. They discovered that the Delisse tea, which Addari gave her, had cocaine in it. She was unaware of this when she consumed the tea in November 2020. By the time she learned this, she had consumed all of it and none was left in her house. T 160:14-20. Appellant also testified that she "immediately stopped" consuming the tea after she learned that it had cocaine in it. T 167:1-3. She also said to Addari, "Hey, I think we should stop this[,]" referring to the tea.

Appellant took a polygraph test to "prove her innocence." T 167:16. She passed the test. She also retained a chemist. She asserted that she did not knowingly ingest cocaine and that, when she drank the tea, she did not know that it had cocaine in it. She would not have consumed it had she known this.

On cross-examination, appellant testified that she did not doubt that the urine samples at issue were in fact her samples. She acknowledged that she did not write anything about the tea or pre-workout supplements she consumed on the drug test medication form. She also did not mention the tea to anyone at the facility or read the ingredients of the tea before she consumed it.

Also on cross-examination, appellant testified that she consulted with only one nurse, a family friend who is a retired school nurse. She testified that she did not speak with any other nurses.

Heather Harris, MFS was admitted as an expert in forensic chemistry and forensic toxicology. She evaluated the results of the State Laboratory's analysis of appellant's random urine test to determine if the results are "consistent with [appellant's] claim that

she was consuming coca inka tea at the time of the drug testing." A-5. She wrote a July 29, 2021, report concerning her review, which listed the documents she reviewed. They included documents concerning the random selection and sample collection processes, the chain of custody of the sample and the laboratory testing reports. Ibid.

Benzoylecgonine (BZE) "is the primary metabolite that is generated after a human being ingests and then metabolizes cocaine." T2 41:15-17. Coca tea is "kind of known throughout the forensic community" as a "product that could potentially cause positive results if ingested." T2 41:24 to 42:1. Harris reviewed scientific literature and forensic literature concerning the "analysis of cocaine in human[s]", specifically urine, as well as articles that addressed how ingestion of coca tea "would manifest in an analytical test." T2 4:9-13. The literature indicated that coca tea caused very high values of BZE in urine.

Appellant's toxicology report indicated a positive reading of BZE of 321 nanograms per milliliter. This was "just right above the cut off mark" for a positive test, which is 300 nanograms per milliliter. T2 43:4-5. Coco tea can generate BZE readings as high as ten times' appellant's test result.

Harris explained that the amount of drug that collects in a person's urine is dependent upon how frequently they void their bladder. Waste products that are water soluble, like BZE, will store in the bladder until it is voided. Studies have examined the time between ingestion of tea and collection of urine for drug testing when that information is available. She wrote in her report:

> Mate de coca (coca tea) is made of the pulverized leaves of the natural coca plant. As a result, it contains the full alkaloid profile of the coca plant, including cocaine. Drinking the tea results in the ingestion of approximately 2.5 mg to 5 mg of cocaine per tea bag. A single ingestion of this tea bag can produce positive BZE results for at least twenty-four hours. Due to individual variations in metabolism and the highly sensitive analytical instrumentation used in laboratories, positive results are expected beyond twenty-four hours.
>
> [A-5 at 2.]

Harris referenced a study in which all participants' urine tested positive two hours after ingestion. Other individuals who consumed two cups of tea tested positive up to thirty-six hours later and their test results were high. "None of the test participants reported stimulant effects after consuming the tea." Ibid.

Harris was told that appellant ingested the tea "near the time of the urine collection." T2 45:7. Assuming this is correct, her test result is "consistent with the consumption of one or two cups of coca tea." A-5 at 2. If appellant consumed the tea "in a similar time frame" as the test subjects referenced above, "it would make perfect sense that the ingestion of coca tea would lead to a positive test result for BZE." T 45:16-17.

On cross-examination, Harris acknowledged that she did not review the report of appellant's second drug test; did not know when appellant ingested the tea; and could not opine when she consumed the tea. She also did not have the ingredient list of the tea that appellant actually consumed. Although she was given two possible brands of tea, she referenced coca inka tea because it is a popular brand that is consistent with the literature. She did not address the other tea. She further acknowledged that she cannot determine the source of the BZE in appellant's urine.

Jerry Lewis was offered[3] as an expert in administration of polygraph tests. He conducted a polygraph test of appellant on April 21, 2021. Prior to the test, he was advised that a urine test indicated that she tested positive for a metabolite of cocaine and that she "adamantly denied ever using any type of cocaine or its derivates." T2 61:7-8.

Lewis evaluated appellant, using his routine methodology, to determine that she could appropriately take the test. Appellant explained the circumstances that caused her to request a polygraph test and adamantly denied ever using cocaine in any form.

Lewis routinely devised questions in conjunction with the test subject. This ensured that the subject was able to answer without equivocation. He, thus, devised

[3] Respondent objected to the admission of polygraph experts and reports absent a stipulation. This is addressed below.

questions in conjunction with appellant. She asked Lewis if he could ask her, during the test, if she ever used cocaine. He asked her the following questions, which are followed by appellant's answers:

- At any time prior to taking your urine test, did you ever knowingly use cocaine? No.
- Did you drink any type of coca tea in the days leading up to your positive drug test? Yes.
- Prior to your urine test, did you knowingly use any form of cocaine? No.
- Had she ever used cocaine?[4]

  [T2 69:4 to 70:9.]

Lewis administered the test three times and averaged their results. Using the Empirical Scoring System that is used by all polygraph administrators, and Kircher features, which are "proven to be indicative of whether someone is telling the truth or not," he determined appellant's score was +24. T2 80:6-15. This was a "relatively high score" as a score of +3 or higher indicates that the test subject was truthful. T2 81:16. A computer was also used to score appellant's test. It indicated a score of +31.

The manufacturer of the polygraph instrument developed a proprietary algorithm that "looks individually at the scores of [the] four questions [that are asked] and then it makes a calculation and says that the probability that this person is telling the truth to all the questions is a certain figure[.] [Appellant's] was .9852, [which equals] 98 and ½ percent – according to the computer's calculations, that she was being truthful to all of the questions." T82: 2-10. Lewis explained that a percentage of seventy or higher "is totally truthful." T 82:10-11. It is impossible to "get 100 . . . [and] very few people score 99 or 98." T 82:14-15.

[4] Lewis did not expressly repeat appellant's answer to this question. However, he explained that this type of broad question is the "hardest one . . . to pass" and appellant did "very well on that question." T2 70:9-22.

On cross-examination, Lewis acknowledged that he has not testified in a court as an expert concerning polygraph matters since 2000.

ADDITIONAL FACTUAL FINDINGS

It is the obligation of the fact finder to weigh the credibility of the witnesses before making a decision. Credibility is the value that a fact finder gives to a witness' testimony. Credibility is best described as that quality of testimony or evidence that makes it worthy of belief. "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Estate of Perrone, 5 N.J. 514, 522 (1950). To assess credibility, the fact finder should consider the witness' interest in the outcome, motive, or bias. A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). In addition to considering each witness' interest in the outcome of the matter, I observed their demeanor, tone, and physical actions. I also considered the accuracy of their recollection; their ability to know and recall relevant facts and information; the reasonableness of their testimony; their demeanor, willingness or reluctance to testify; their candor or evasiveness; any inconsistent or contradictory statements and the inherent believability of their testimony.

Respondent's witnesses testified professionally, clearly and directly about their roles in this matter. They clearly identified those matters about which they have firsthand knowledge. Also, they readily and candidly acknowledged when they did not have firsthand knowledge of relevant information and when their actions may have been in conflict with the jail's policies or Attorney General's guidelines. For these reasons, I find their testimony to be credible.

Dr. Jackson and Heather Harris, MFS testified about matters within their areas of expertise. They explained their reasoning and conclusions clearly and professionally and their conclusions and reasoning corresponded to their written reports. Both were careful

to explain that they were not offering opinions concerning the ultimate issue, whether appellant ingested drugs or coca tea. I find their testimony to be credible.

Addari offered an understandable explanation about her relationship with her friend, the appellant. Longstanding friends would want to share items that they both enjoy. However, Addari's testimony lacked specificity concerning where she procured the specific tea that appellant consumed and when she gave it to appellant. She retained no documentation, such as a receipt, or even the name of the market or store where she purchased it. While it is reasonable to believe that she could have purchased it at a market or shop that was new to her, it strains credulity that there could be absolutely no recollection of details about the purchase.

Appellant seeks to rely, in large part, upon the testimony of Jerry Lewis, the polygraph test administrator, to bolster her credibility. Respondent objected to the admissibility of Lewis's testimony and the polygraph test results. Before addressing this, I note that, like Addari, appellant offered little in the way of details about her consumption of the coca tea. Instead, she relied upon general assertions. Also, while she testified in a calm and apparently thoughtful manner, her testimony included some statements that were notably inconsistent. In particular, she contradicted herself when she initially testified that she consulted with multiple friends about her positive drug test but later testified that she spoke with only one person other than Addari. Also, she testified that she did not initiate any of these discussions until after she received the second test result in March, three months after the first test result. While it is conceivable that she may have wanted to not reveal the test result prematurely, given her familiarity with drug testing protocols as a long-term employee of respondent and as a former Army Reservist who was a drug test monitor, it is reasonable to believe that she would understand the import of promptly addressing the positive test. Moreover, given her familiarity with the testing process, it is reasonable to believe that she would know that some otherwise ordinary foods, drinks and supplements can cause positive drug test results. In addition, appellant's testimony that she refers to tea and coffee interchangeably is questionable. She testified that she drinks two coffees every morning. That she claims to refer to "coffee" and "tea" interchangeably suggests that she seeks to bolster her assertion that she drank tea regularly and, thus, must have consumed the specific tea at issue at the

relevant time. Finally, her testimony concerning her reaction to the discovery that coca tea can cause a positive test result was inconsistent. She first testified that, when she learned this, she had no more coca tea in her house. She then testified that she "immediately stopped" consuming it after she learned it could cause a positive test result. These elements of appellant's testimony caused concern about her credibility.

Nonetheless, appellant relies upon the polygraph test results to bolster her claim that she did not use cocaine and did consume coca tea prior to her drug test. The New Jersey Supreme Court has clearly held that polygraph test results are not admissible absent the parties' joint stipulation. State v. A.O., 198 N.J. 69 (2009). In A.O., the Court stressed its "continuing doubts about the reliability of polygraph evidence[.]" Id. at 74. An "exception" to the general rule of inadmissibility may be appropriate when both parties stipulate to the admission of the evidence and that their agreement is "clear, unequivocal and complete[.]" Id. at 86-87. Here, respondent objected to the admission of the polygraph evidence because the parties had not entered into a stipulation. For this reason, the testimony and documentary evidence concerning the polygraph test is inadmissible.

Additional Factual Findings

Having considered the testimony and documentary evidence and the credibility of the witnesses, I **FIND** the following as **FACT**. After a random urine screen, appellant tested positive for BZE, a metabolite of cocaine. Appellant's toxicology expert, Heather Harris, MFS explained that coca tea can produce a positive BZE test result. However, she did not opine concerning both forms of tea that appellant suggested she may have consumed. Also, she could not offer an opinion about whether appellant had, in fact, consumed either of the teas or whether that consumption caused the positive test result. There is no direct evidence showing or bolstering appellant's account that she consumed coca tea and, if so, when she did so. Given the absence of direct evidence of this, and the inconsistencies in appellant's testimony, I am constrained to find that there is insufficient evidence that appellant consumed coca tea and that this was the cause of her positive test result.

I also **FIND** as **FACT** that, while respondent did not produce written training materials concerning the consumption of coca tea, Captain Cauley counseled appellant to list on her pre-test disclosure form anything she consumed or used that was even potentially questionable, including "herbals." The Captain also encouraged appellant to take time to research anything she may have consumed, via her cell phone or an available computer, prior to completing the form.

I also **FIND** as **FACT** that the officers who testified violated some procedural requirements associated with the random drug testing process. In particular, Lt. Blango permitted appellant to return to her work assignment between attempts to produce a urine sample. He also excluded captains and wardens from random screens. Lt. Nicholas Ptaszenski, and not the monitor, initialed the Custody Form.

LEGAL ANALYSIS AND CONCLUSION

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The appointing authority bears the burden of establishing the truth of the allegations by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co, 124 N.J.L. 420, 423 (Sup. Ct 1940) (citation omitted). Stated differently, 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, 275 (1958); see also Loew v. Union Beach, 56 N.J Super. 93,104 (App. Div. 1959).

Due to appellant's positive drug test result, she was charged with incompetency, inefficiency or failure to perform duties in violation of N.J.A.C. 4A:2-2.3(a)(1). In this type of breach, an employee performs his duties in a manner that exhibits insufficient quality

of performance, inefficiency in the results produced or untimeliness of performance, such that his or her performance is substandard. See Clark v. N.J. Dep't of Agric., 1 N.J.A.R. 315 (1980)[5], http://njlegallib.rutgers.edu/njar/. Incompetence means that an individual lacks the ability or the qualifications to perform the duties required of him or her. Rivera v. Hudson Cty. Dep't of Corr., CSR 6456-16, Initial Decision (October 24, 2016), adopted, CSC (November 28, 2016), http://njlaw.rutgers.edu/collections/oal/.

Appellant was also charged with "conduct unbecoming a public employee." N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase which encompasses conduct that adversely affects the morale or efficiency of a governmental unit, or that tends to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't. of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

"Neglect of duty," in violation of N.J.A.C. 4A:2-2.3(a)(7), has been interpreted to mean that an employee "neglected to perform an act required by his or her job title or was negligent in its discharge." In re Glenn, CSV 5072-07, Initial Decision (February 5, 2009), adopted, CSC (March 27, 2009), http://njlaw.rutgers.edu/collections/oal/. The term "neglect" means a deviation from the normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" means conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (citation omitted). Neglect of duty can arise from omitting to perform a required

[5] The administrative and unpublished Appellate Division decisions cited here are not precedential. They are referenced because they address the pertinent area of law and provide relevant guidance.

duty as well as from misconduct or misdoing. State v. Dunphy, 19 N.J. 531, 534 (1955). Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job. A failure to perform duties required by one's public position is self-evident as a basis for the imposition of a penalty in the absence of good cause for that failure.

With respect to the charge of "other sufficient cause," in violation of N.J.A.C. 4A:2-2.3(a)(12), appellant is charged with violations of several Burlington County Department of Correction policies and procedures:

- Department Policy and Procedure Section 1007, which requires correctional police officers to "[p]erform assigned duties in accordance with established rules, regulations, policies and procedures at all times."

- Policy and Procedure Section 1033, which provides, "No officer or employee shall . . . use . . . any type of drug or controlled substances while on or off duty."

- Policy and Procedure Section 1145, which prohibits reporting to work while under the influence of any illicit drug and requires termination.

Appellant's status as a correctional police officer subjects her to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1980). Law enforcement officers represent "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." Township of Moorestown v. Armstrong, 89 N.J. Super. 560 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Our courts have clearly held that maintenance of strict discipline is important in military-like settings such as police departments, prisons, and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967).

Pursuant to N.J.S.A. 52;17B-4[6], the Attorney General has established uniform statewide drug testing policy guidelines to maintain a "drug-free law enforcement community and at the same time safeguard the rights of individual police officers." In re Carberry, 114 N.J. 574, 580 (1989). The guidelines mandate dismissal, listing in the State Police drug registry and a permanent bar to future law enforcement employment for a positive test result. Dimaria v. N.J. Dep't of Corr. Training Acad., 2012 N.J. Super. Unpub. LEXIS 2189 (September 26, 2012).

In Dimaria, a corrections recruit tested positive for cocaine during a random test. He stipulated to the test result but claimed that, on the morning of the random test, his mother served him coca de mate tea. The recruit's mother testified about having cared for her son while he was sick and that she served him tea. Although the Director of the Training Academy testified that he verbally advised recruits to not drink coca de mate tea, the recruit claimed that he was not so advised and he did not list the tea on his pre-testing disclosure form. The ALJ did not find the recruit or his mother's testimony credible, as there were significant inconsistencies, including the mother's testimony about when she had the tea in her house. Also, the recruit and his mother testified inconsistently about who first considered the connection between the tea and cocaine. Due to the inconsistencies, the ALJ could not find the testimony credible. The ALJ thus found that the positive drug test was not caused by the ingestion of the tea and that the Training Academy had proven its case by a preponderance of the evidence. The Appellate Division affirmed. Id. at *12.

In Wayne Roesch v. City of Jersey City, OAL Dkt. NO. CSV 07735-04, 2005 N.J. AGEN LEXIS 312, Adopted, Comm. (June 21, 2005), a police officer tested positive for BZE, after he provided a urine sample in conjunction with a random drug test. The officer claimed he did not consume cocaine but, rather, mate de coca tea, which his aunt purchased at a flea market. He did not know that the tea could produce a positive drug test result. The ALJ found that, assuming the officer ingested the tea and that the tea

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[6] The Attorney General, in addition to the functions, powers and duties specifically conferred and imposed upon him, shall . . . d. Formulate and adopt rules and regulations for the efficient conduct of the work and general administration of the department, its officers and employees[.]

could produce a positive BZE test result, the officer did not establish whether he ingested the tea within a time period that could have caused a positive test result. Although the officer presented expert testimony concerning coca tea's capacity to produce a positive result, the expert "had no information as to the contents of the tea bag or the amounts of the substances in the tea [the officer] may have ingested." 2005 N.J. AGEN LEXIS 312, *14. "Not only can [the officer] not establish that he drank any of the tea within a scientifically significant period before the test, he cannot establish that he ingested enough of the tea within a scientifically [sic] period before the test to cause a positive reading." Id. at *15. Because the Attorney General's Guidelines do not require a "culpable mental state in order to find a violation" and require termination when a sworn law enforcement officer tests positive for illegal drug use, the ALJ determined that termination was the appropriate penalty. The Civil Service Commission adopted the ALJ's decision and the Superior Court, Appellate Division, affirmed. 2006 N.J. Super. Unpub. LEXIS 1359 (August 14, 2006).

Appellant argues that the officers' administrative errors invalidated the positive drug test result. She suggests the exclusion of the wardens and captains from the random selection pool caused the selection process to not be truly random. She seemingly also argues the incorrect monitor's initials on the Custody Form calls into question the validity of the entire process. She also points to the fact that she was impermissibly permitted to return to her worksite until she was able to produce an adequate urine sample, using this as another basis for her contention that the administrative failures were systemic and require that her test results be disregarded.

The Office of the New Jersey Attorney General has published a policy for the testing of law enforcement officers for drugs. Violation of the policy can form the basis to challenge the test results, but only if the employee proves that there was a material violation. A procedural variation from the Attorney General's policy must rise to the level of egregious or substantial violation to invalidate the test results. Id. at *34. The case of I/M/O Darryl Martin, CSV 8656-98, Initial Decision, (Sept. 15, 2000), adopted, MSB (Oct. 24, 2000) addresses this standard. In Martin, the Merit System Board upheld the ALJ's finding that the agency violated the drug testing policy by having four drug tests, including the appellant's test, performed at one time with at least three of those tests being

performed simultaneously. Ibid. The policy required that only one drug test be performed at a time. The Board determined that such procedural irregularities constituted "a substantial abandonment of proper drug testing procedures as testified to by several witnesses . . . sufficient to invalidate the appellant's test." Ibid.

In re Huchko, 2006 N.J. Super. Unpub. LEXIS 2580, *30 (App. Div. June 12, 2006). The appointing authority in Huchko failed to comply with the Attorney General's policy for specimen collection when it had the officer void into one container and then split the volume between the first and second containers, instead of collecting his second specimen "in the same fashion" as his first one. Id. at *29 – 30. Despite the discrepancy, the testing program supervisor testified that he was not aware of any problems that could develop as a result of pouring urine from one container into another as opposed to voiding directly into separate containers. Id. at *30. Furthermore, the officer who performed the actual specimen collection testified that representatives of the State Lab instructed him on how to split urine specimens at the program sponsored by the Attorney General. Ibid. The Appellate Court held this was "sufficient and competent evidence that appellant's tests were reliably obtained and the test results were not compromised by splitting the sample." Ibid. "Nor [was] there evidence that any of the other alleged deviations, such as whether the specimen cups were sterile, whether they were approved by the State Lab, whether [the collection officer] opened the seal on the bags containing the cups, and whether the specimens were properly stored, amounted to material violations." Ibid.

Fundamentally, test results should be admitted if there is a "reasonable probability that the evidence has not been changed in important respects." In re Lalama, 343 N.J. Super. 560, 565-66 (App. Div. 2001) (citation omitted). The party introducing the test results need not "negate every possibility of substitution." Id. at 566 (citation omitted). "[A] party seeking to introduce drug test results only needs to show a 'reasonable probability' that the integrity of the sample has been maintained, because a relaxed standard of admissibility of evidence applies in administrative proceedings." Ibid. See also IMO Michael Picariello, CSV 13866-08, Initial Decision (December 20, 2010), adopted, Comm. (February 17, 2011).

Here, there is no evidence in the record that suggests a failure such that appellant's sample was not properly tested. In fact, appellant testified that she did not doubt that her sample was, in fact, tested. To the extent appellant asserts other procedural violations, she has not shown in any manner how these incidents adversely impacted the process here or compromised the reliability and validity of the test results.

As discussed above, it is undisputed that appellant's urine sample produced two positive drug tests. The evidence in the record does not permit a finding that she consumed a particular tea in the appropriate quantity and at the relevant time, such that her consumption caused the positive results. Accordingly, I **CONCLUDE** that the Department has demonstrated by a preponderance of credible evidence that appellant tested positive for use of an illegal drug and violated its drug use policy. I, therefore, also **CONCLUDE** that the charges against appellant must be and are hereby **SUSTAINED**.

PENALTY

A civil service employee who commits a wrongful act related to his duties may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). This requires a de novo review of appellant's disciplinary action. In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983).

Notwithstanding the general principal of progressive discipline, the New Jersey Supreme Court wrote:

> [T]hat is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when . . . the misconduct is severe, when it is unbecoming to the

> employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property.
>
> [In re Herrmann, 192 N.J. 19, 33 (2007)].

Termination is generally supported by case law where there is a positive drug result that is supported by a preponderance of the credible evidence. One exception was found in IMO Alberto Aponte, Essex County, Department of Corrections, OAL DKT. NO. CSR 02049-19 (July 22, 2019). Aponte tested positive for BZE and claimed it was caused by his use of inka-leaf based nutritional supplement. It appears from the Initial Decision that he produced a bottle of the supplement as a hearing exhibit. The bottle label indicated that the supplement contained a substance that is a derivative of cocoa leaf. Aponte had not noticed this before he consumed the supplement. The ALJ noted Aponte had no prior disciplinary history and was promoted to sergeant, which "evidence[ed] good employment." Id. at *7. He also found credible Aponte's testimony that he was not a drug abuser. Although the ALJ noted that "it cannot be absolutely determined whether his positive drug test was due to his ingestion of a supplement, the amount of drugs in his system . . . is consistent with the taking of a supplement." Ibid. The ALJ concluded that he was "persuaded that the positive drug test was due to the supplement." Ibid. The ALJ thus determined that Aponte would not be terminated but, rather, suspended for six months, with a loss of rank, and subject to twice monthly random drug tests for one year.

Here, unlike in Aponte, appellant does not have an unblemished disciplinary record. R-15. Her record indicates that she was the subject of seven prior disciplinary hearings, between April 22, 2004, and July 29, 2020. The record does not clearly state the nature of the charges; however, one was for "incompetence," three were for "conduct" and one was related to "parking." Id. at 1. The penalties included a fifteen-day suspension (for "incompetence"), a twenty-day suspension, with ten days held in abeyance (for "conduct"), four letters of reprimand and one counseling. The second page of the disciplinary record submitted by respondent lists thirty-five "letters for time clock

violations or reprimands" that were issued between August 29, 2003, and September 30, 2019. Id. at 2. Little in the way of detail is offered other than brief summaries including "no clock in," "lateness," "early clock out" and "no swipe card." Ibid. Some entries include the number of minutes appellant was late or left work early.[7] No further explanations about the facts of each matter were included.

Here, unlike in Aponte, the record does not permit a comfortable conclusion that appellant consumed coca tea. The testimony in this regard was not wholly credible. Moreover, as much as it would be desirable to be able to rely upon mitigating circumstances, none that would permit a lesser penalty is present. Accordingly, I **CONCLUDE** that the appropriate penalty is removal of appellant from her position as county correctional police officer, in accordance with the Attorney General's and the Department's polices.

ORDER

I **ORDER** that the charges of incompetency, inefficiency or failure to perform duties, in violation of N.J.A.C. 4A:2-2.3(a)(1); conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6); neglect of duty, in violation of N.J.A.C. 4A:2-2.3(a)(7) and other sufficient cause, in violation of N.J.A.C. 4A:2-2.3(a)(12), be **SUSTAINED**. I **FURTHER ORDER** the Burlington County Department of Corrections to terminate appellant from her employment.

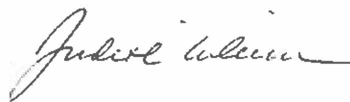
I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

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

[7] See e.g., Four minutes late on January 30, 2004; clocked out seventeen minutes early on April 4, 2005 and clocked out twenty-six minutes early on September 5, 2012. Ibid.

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.



September 8, 2022
DATE

JUDITH LIEBERMAN, ALJ

Date Received at Agency: ________________

Date Mailed to Parties: ________________

JL/JM/cb

APPENDIX

WITNESSES

For appellant

Denise Addari

Robertha Addison

Heather L. Harris, MFS

Jerry Lewis

For respondent

Captain Patricia Cauley

Lieutenant Pyaegbaye Blango

Lieutenant Nicholas Ptaszenski

William S. Rudderow, Jr.

George F. Jackson, Ph.D., F-ABFT, TC (NRCC)

Deputy Warden Teechy Blango

EXHIBITS IN EVIDENCE

For appellant

A-1 Urine specimen collection procedure

A-2 Coca tea advertisement

A-4 Heather Harris, MFS curriculum vitae

A-5 Harris report, July 29, 2021

A-6 Jerry Lewis, curriculum vitae

A-7 Lewis report (undated)

For respondent

R-1 Urine specimen collection acknowledgment, November 24, 2020

R-2 Attorney General's Law Enforcement Drug Testing Policy, December 2020

R-3 Chain of custody, November 2020

R-4 Policies and Procedures, sections 1007-1008

R-5 Policies and Procedures, sections 1012-1074

R-6 Policies and Procedures, section 1145

R-7 Drug Testing Medical Information, November 24, 2020

R-8 New Jersey State Toxicology Drug Test Form

R-9 Random employee selection, November 2020

R-10 Toxicology Laboratory Results packet

R-11 Toxicology report, January 7, 2021

R-12 Standard Operating Policies and Procedures

R-13 George F. Jackson curriculum vitae

R-14 Attorney General's Law Enforcement Drug Testing Policy, revised April 2018

R-15 Appellant's disciplinary history