STATE OF NEW JERSEY

In the Matter of Mark Fogg, South Woods State Prison, Department of Corrections CSC DKT. NO. 2022-204 OAL DKT. NO. CSR 06754-21	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**

ISSUED: NOVEMBER 2, 2022

The appeal of Mark Fogg, Senior Correctional Police Officer, South Woods State Prison, Department of Corrections, removal, effective June 14, 2021, on charges, was heard by Administrative Law Judge Tama B. Hughes (ALJ), who rendered her initial decision on September 26, 2022. No exceptions were filed.

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 of November 2, 2022, rejected the recommendation contained in the attached ALJ's initial decision and acknowledged the attached settlement.

In this matter, the parties contacted the Commission subsequent to the issuance of the ALJ's initial decision. Specifically, the parties indicated that they had settled the matter and forwarded the settlement to the Commission for review and acknowledgment. The policy of the judicial system strongly favors settlement. *See Nolan v. Lee Ho*, 120 *N.J.* 465 (1990); *Honeywell v. Bubb*, 130 *N.J. Super.* 130 (App. Div. 1974); *Jannarone v. W.T. Co.*, 65 *N.J. Super.* 472 (App. Div. 1961), *cert. denied,* 35 *N.J.* 61 (1961). This policy is equally applicable in the administrative area. A settlement will be set aside only where there is fraud or other compelling circumstances. Upon review of the settlement, the Commission finds that it complies with Civil Service law and rules. As such, the Commission rejects the initial decision and acknowledges the settlement.

ORDER

The Civil Service Commission rejects the initial decision and acknowledges the settlement.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 2ND DAY OF NOVEMBER, 2022

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
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Civil Service Commission
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 06754-21
AGENCY DKT. NO. N/A
2022-204

IN THE MATTER OF MARK FOGG,
SOUTH WOODS STATE PRISON.

Arthur J. Murray, Esq., and **Timothy J. Prol**, Esq., for appellant Mark Fogg (Alterman & Associates, LLC, attorneys)

Kendall J. Collins, Deputy Attorney General, for respondent South Woods State Prison (Matthew J. Platkin, Acting Attorney General of New Jersey, attorney)

Record Closed: July 25, 2022 Decided: September 26, 2022

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

STATEMENT OF THE CASE

Mark Fogg (Fogg or appellant), a correction officer with South Woods State Prison (South Woods or respondent), appeals South Woods' Final Notice of Disciplinary Action (FNDA) and decision to terminate his employment.

PROCEDURAL HISTORY

On June 15, 2021, appellant appealed South Woods' FNDA with the Civil Service Commission (CSC) and the Office of Administrative Law (OAL) pursuant to N.J.S.A. 40A:14-202(d). The appeal was perfected on August 4, 2021, and thereafter assigned to the undersigned for hearing on August 23, 2021. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. An initial call was held on September 8, 2021, at which time hearing dates of November 1, 2021, and November 19, 2021, were set. By letter dated October 11, 2021, appellant requested an adjournment of the November 2021 hearing dates, which was granted.[1] The hearing took place on May 18, 2022. The record remained open to allow the parties the opportunity to obtain transcripts and submit closing briefs.[2] Upon receipt of the same, the record closed on July 25, 2022. By Order dated September 1, 2022, an extension for filing of the initial decision was granted.

FACTUAL DISCUSSION

The following is not in dispute, and is therefore **FOUND** as **FACT**:

Fogg commenced employment with the Department of Corrections (DOC) on February 15, 1997. (J-1, paragraph 1.) A year into his employment, Fogg was promoted to the position of senior correction officer.

Prior to commencing employment with the DOC, Fogg signed an acknowledgment of receipt of all applicable DOC policies, including the Drug Screening Procedure, Law Enforcement Rules and Regulations, and Human Resources Bulletin 84-17, as Amended (Disciplinary Policy & Attendance Verification Policy on January 22, 1997). (J-1, paragraph 3; R-16.)

Under the DOC guidelines, employees, including senior correction officers, are required to submit to random drug testing. (R-12; R-13.) As part of its drug-testing

[1] Appellant waived the 180-day rule during the interim period between the original hearing date and the new date in May 2022.
[2] By letter dated May 17, 2022, appellant waived the 180-day rule in its entirety.

program, the DOC put in place drug-testing policies and/or procedures, and chain-of-custody protocol. Among the drug-testing procedures is the requirement that the employee being tested provide two urine samples—sample "A" and sample "B." (J-1, paragraph 6; R-12.) If an employee tests positive, the employee has the ability to have the second specimen, sample "B," tested in an independent laboratory. (R-11.)

Under DOC Human Resources Bulletin 99-01, amended November 6, 2009, and the DOC Drug Testing Policy, the consequence of testing positive for illegal drug use is immediate suspension and termination. (R-11; R-12.)

On October 5, 2020, Fogg was required to provide a random drug test. (J-1, paragraph 4.) Prior to testing, Fogg was given a medical questionnaire which required that he describe all medications—both prescription and over-the-counter—that he had ingested in the past fourteen days. (R-4.)

Fogg was also provided and signed an "Employee Notice and Acknowledgment." (J-1, paragraph 5; R-4.) Through this notice, Fogg was advised that if he tested positive for illegal drug use, he would be dismissed from the DOC and from his position, and that he would be permanently barred from serving as a law-enforcement officer in New Jersey. He was further advised that if he tested positive for illegal drug use, the information would be forwarded to the central drug registry maintained by the New Jersey State Police and made available by court order as part of a confidential investigation relating to law-enforcement employment. (J-1, paragraph 5; R-4.)

On October 5, 2020, Fogg provided two urine samples in accordance with the DOC random-drug-testing protocol. At all times the specimens were secured and maintained in accordance with the DOC procedure, including chain-of-custody protocol. (J-1, paragraphs 6–10, 16.) On January 8, 2021, the Special Investigations Division received the toxicology report from the New Jersey State Toxicology Laboratory indicating that Fogg had tested positive for cannabinoids (THC), 11-carboxy-THC, which is a controlled dangerous substance. (J-1, paragraphs 11–16; R-6.) The cutoff level for 11-carboxy-THC using a gas chromatograph-mass spectrometry (GCMS) test is 15 ng/ml. Fogg's urine sample contained 152.9 g/ml of 11-carboxy-THC, which is ten times above the cutoff

level. (J-1, paragraph 15; R-5; R-8.) Fogg did not challenge the findings, nor did he seek to have specimen "B" analyzed by an independent laboratory. (J-1, paragraph 7.)

Fogg did not list any medication on the Drug Testing Medication Information form that he signed on October 5, 2020, that could have caused a positive test for 11-carboxy-THC (cannabinoids). (J-1, paragraph 17; R-5; R-8.)

A Preliminary Notice of Disciplinary Action (PNDA) was issued against Fogg on January 12, 2021. (R-1.) The charges were violation of N.J.A.C. 4A:2-3(a)(6), conduct unbecoming a public employee, and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, specifically, HRB 84-17, As Amended, C(11)—conduct unbecoming an employee, and E(1)—violation of a rule, regulation, policy, procedure, order, or administrative decision.[3]

The incident giving rise to the charges was described as follows:

> On October 5, 2020, you provided a urine specimen as required to the Special Investigation Division at SWSP. On January 8, 2021, Investigator B. Busnardo received positive test results from the New Jersey State Toxicology Laboratory dated December 8, 2020, for donor ID 148-46-xxxx (Sample ID 20LO11606). The State Toxicology report indicated a positive test for 11-Carboxy-THC (Cannabinoids THC) confirmed by Mass Spectrometry. The patient information matched your donor number information. You did not list this controlled dangerous substance on your Drug Testing Medication Information Sheet you authored on October 5, 2020.

The disciplinary action sought was removal. (R-1.)

[3] On the Notification of Major Disciplinary Action—Specification Attachment, the Specification(s) stated: "SCPO M. Fogg violated the Law Enforcement Personnel Rules and Regulations Article I—General Provisions—Section 1—All Law Enforcement Officers of the NJDOC shall be required to observe and comply with these rules of conduct and with any amendments promulgated and approved by the Commissioner. SCPO M. Fogg violated the Law Enforcement Personnel Rules and Regulations Article III—Section 3, No officer shall act or behave, either in an official or private capacity, to the officer's discredit, or to the discredit of the Department. Officers are public servants twenty-four hours a day and will be held to the law enforcement higher standard both on and off duty. SCPO M. Fogg violated the Law Enforcement Personnel Rules and Regulations Article IV—Intoxicants/Drugs/Smoke/Electronic Communication Devices—Section1—No officer shall: b. use, possess or sell any illegal drug or controlled dangerous substance, whether on duty or off duty. Such conduct is unbecoming a Senior Correctional Police Officer and violates relevant rules, regulations, policies and procedures." (R-1.)

A departmental hearing was held on May 12, 2021, and thereafter, on June 14, 2021, an FNDA was issued. (R-2.) All charges were sustained, and the disciplinary action taken was removal.[4] At the time of removal, Fogg had over twenty-four years of service. With the exception of a written reprimand in July 2020, the only disciplinary action that Fogg had was the instant matter.

Fogg admits to and accepts the charges and specifications as stated in the FNDA.

TESTIMONY

Kenneth H. Peploe (Peploe) testified that he worked for the DOC at South Woods starting in 1997. Over the years he held several positions at South Woods, starting as a correctional police officer for ten years, then a sergeant for seven years, until he was promoted to the position of lieutenant for several more years until he retired in 2022.

Prior to becoming a correctional police officer, he attended the police academy, where he received training on identifying individuals under the influence of drugs such as cannabis, THC, and marijuana. Some of the signs and symptoms of an individual under the influence of cannabis that he has observed over the course of his career include red eyes, slurred speech, and fidgetiness.

He has known Fogg for over thirty-eight years, since high school. He is personal friends with him. He has also worked with him professionally at South Woods, where they worked with one another as correctional police officers. After his promotion to sergeant and then lieutenant, he would occasionally supervise Fogg.

Throughout his personal and professional relationship with Fogg, he has never seen him or believed him to be under the influence of cannabis, marijuana, or otherwise. In his professional capacity, he never saw or heard that Fogg was, or had been, under the influence of marijuana, cannabis, or THC. If he had, he would have followed protocol

[4] The incident(s) giving rise to the charges and specifications were the same as in the PNDA.

and brought the situation to the attention of administration and the Special Investigation Department.

It was his belief that Fogg was a good correction officer. He did his job properly, was dependable and well respected. While he was not familiar with Fogg's disciplinary record, if there had been disciplinary issues, he would have heard about them. Peploe went on to state that he was aware that Fogg had tested positive for THC. While he is familiar with the DOC's zero-tolerance policy for drugs, he believes that Fogg should be given a second chance. He is a good officer, has good character, and has never before had any disciplinary issues. It was his further belief that Fogg would have been a good supervisor had the opportunity arisen.

On cross-examination, Peploe confirmed that he was familiar with the DOC's random-drug-testing policy and the mandate for removal if an individual tests positive. He acknowledged that over the years he, as well as all of the DOC officers, received training on the policies and procedures, as well as the consequences of testing positive.

While he has known Fogg for over thirty-eight years, he is not with him every day and has no idea, nor has Fogg told him, how he ingested THC. He was testifying on behalf of Fogg because of their friendship. Peploe was aware that random drug tests were just that—random, and that all officers were aware of the process/random-drug-testing requirement.

Joseph Saverine (Saverine) testified that he worked for the DOC at South Woods from 1990 until 2015. Over the years he worked his way up the ranks—first as a correctional police officer, then as a sergeant for six years, after which he was promoted to lieutenant—a position that he held for eight years until he retired in 2015. He has been friends with Fogg for over thirty years, and over the years has gotten together with him and his family socially. He has also worked with Fogg during his time at South Woods in his capacity as a supervisor—both as a sergeant and as a lieutenant.

The parties stipulated that the rest of Saverine's testimony would have been consistent with Peploe's, in that Fogg was a good correction officer. He did his job

properly and was dependable and well respected. He would have also testified that in both his personal and professional relationship with Fogg, he has never seen him or believed him to be under the influence of cannabis, marijuana, or otherwise.

Fogg testified that he is fifty-six years old and a high-school graduate. Upon graduation from high school, he took some college courses; however, he left college to pursue other job opportunities. In 1997 he took the civil-service exam, passed, and was hired by the DOC as a correction officer recruit at South Woods. A year or so after he was hired, he was promoted to the position of senior correction officer. He remained in that position until January 10, 2021, which was his last day of work as a result of a positive drug-test result.

As part of the DOC hiring process, he was required to undergo a psychological examination, which he passed. He has never had cause to see, and has never seen, a mental-health provider, nor has he ever had a substance-abuse problem. At no time during his career at the DOC was he sent home for being inebriated or under the influence of drugs. Nor has he ever been sent home for a reasonable-suspicion test or a fitness-for-duty examination for being under the influence.

Fogg reported that over the years that he was a correction officer he was subject to at least ten random drug tests. Prior to October 5, 2020, he had never failed a test, nor had he ever been disciplined for a drug-testing violation. He does not deny that he failed the random drug test on October 5, 2020; however, he can only speculate how that occurred. He put it down to two possibilities, the first being a card game that he attended with his stepbrother at someone's house in early October 2020. There were about a dozen people there; however, he only knew a couple of them. He brought his own adult beverages to the game/party and there was food put out for everyone, which included pizza, pretzels, and homemade cookies, of which he partook. About two or three hours after he arrived and after he had eaten some of the food, including the cookies, he started feeling tired and possibly fell asleep on the couch. He was so tired that he had his stepbrother take him home. He did not report feeling ill after the card game and before taking the drug test, primarily because he did not think anything of it and had felt fine the next day. However, after he tested positive, he asked his stepbrother to talk to the host

where the party had been held, to see if there had been something added to the food. The homeowner was allegedly non-committal.

The second possibility was the CBD oil that he obtained from a friend in February 2020 but did not use until September 2020. (P-1.) According to Fogg, his friend had obtained the product online and was himself taking it for back pain. He started taking the CBD oil in September for a couple of weeks after he hurt his knee hunting. He ingested it by placing three drops of the oil underneath his tongue two times a day until the bottle was empty. He had spoken to his doctor prior to taking the CBD oil who told him that sometimes it works and sometimes it doesn't. He personally found that it helped ease his pain, and he wasn't going to constantly run to the doctor every time he had an ache or a pain.

When he took the random urine test on October 5, 2020, he did not disclose that he had ingested the CBD oil prior to taking the test. He did not think it was necessary, nor did he believe that ingestion of the CBD oil would result in a positive result. He also did not read the label prior to taking the oil, therefore did not know what was in it. Fogg went on to state that his friend had told him that he had obtained it over the counter, but not from where.[5] His friend had also informed him that he too got drug tested at work, which Fogg interpreted to mean that he did not have anything to worry about as far as drug testing was concerned.[6] He did not know what his friend did for a living, but whatever it was, he was required to undergo random drug testing.

According to Fogg, the first time he realized that he had ingested an illegal substance was when his random drug test came back positive. At no time had he ever intentionally ingested cannabis or a banned narcotic or drug since being employed by the DOC and can only speculate how his test came back positive. Additionally, at no time has he ever performed his job responsibilities at South Woods while under the influence of any cannabis, narcotic, or drug. While he believes that discipline is appropriate, he does not believe removal is warranted. This is particularly so in light of his twenty-four

[5] Notably, this statement differed from his earlier testimony.
[6] When later questioned on this point, Fogg admitted that the reason he asked his friend whether usage of the CBD oil would impact a drug test was because he suspected that it could.

years of service, lack of a disciplinary history other than a written reprimand, and the fact that he was a good officer.

On cross-examination, Fogg acknowledged that prior to February 2022 a person could not purchase CBD without a prescription. He further acknowledged that he had obtained the CBD oil in February 2020. Fogg went on to add that he had obtained the CBD oil because he had a history of back and knee problems. He wasn't having any back issues at the time, but he had an opportunity to get the product from his friend, so he did and held on to it for future use.

When asked why he didn't go to his doctor for a prescription, he stated that he had gone down that route before, but didn't really answer the question. The person he got the CBD oil from was an acquaintance of his through poker and mutual friends. He acknowledged that his friend did not have medical training. When questioned again about his friend, Fogg changed his testimony and admitted that he was a fellow correction officer, and he didn't want to get him in trouble.

Fogg was also questioned about the CBD-oil label and whether he had read the label before ingesting the CBD oil. In response, he stated that at no time did he read the label on the bottle, and therefore was unaware that it contained THC. When questioned further on this statement, his testimony again evolved, this time claiming that he may have "looked" at the bottle but did not read the wording. He went on to add that if his friend had been taking the oil himself and had no problem with the drug testing, he believed that it was okay to take it without repercussion. Even if he had read the label, he still would have taken the oil because his friend said it worked—adding that every label contains warnings. It did not cross his mind to google CBD oil, because from what he read or heard, the results varied with individuals, therefore he felt that he should find out for himself.

He is aware that the DOC has a zero-tolerance policy and that others who have tested positive have been removed. He acknowledged that he knew or should have known that he would test positive from taking the CBD oil.

When asked how he ingested the CBD oil, Fogg stated that he put three drops under his tongue in the morning and again at night. This is the amount his friend had recommended. He was aware that his drug test results came back at ten times the normal limit for THC. He has no explanation why the results came back so high, other than the possibility that he had ingested something at the card game, or it was due to the CBD oil.

Regarding the card game, Fogg stated that he ate some of the chips, pretzels, and cookies. He initially said that the cookies appeared to be in a store-bought wrapping, then he said that the cookies appeared to be homemade, but he couldn't say for sure, which then morphed into the cookies were in a Tupperware container. He started feeling ill—tired and intoxicated—despite the fact that he had only had a drink and a half, two or three hours after he arrived. His stepbrother had to wake him up and then took him home. He didn't think anything about falling asleep, even though that was an aberration on his part. Fogg saw other people eating the cookies, but did not see anyone else feeling ill. He had taken the CBD oil in the morning but could not say whether he took it that evening.

Fogg admitted and accepted all of the charges that had been levied against him. He did not ask for a split sample to be tested by a laboratory of his choosing and was unaware that had he done so, the laboratory could have determined whether there was CBD oil in his urine. He was aware that THC was an illegal substance when he took the drug test.

FINDINGS OF FACT

When assessing credibility, inferences may be drawn concerning the witness' expression, tone of voice, and demeanor. MacDonald v. Hudson Bus Transp. Co., 100 N.J. Super. 103 (App. Div. 1968). Additionally, the witness' interest in the outcome, motive, or bias should be considered. Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

I found the testimony of Fogg to be less than credible. It stretches credulity that he obtained the CBD oil in February 2020 because of back pain, but did not use it until September 2020 when he allegedly hurt his knee while hunting. According to Fogg, he got it from his friend, whom he saw infrequently, and seized the opportunity to get the product from him because it was hard to get. He did not read the label on the bottle, and instead relied upon his friend's advice on the appropriate dosage. Nor did he seek medical advice from his doctor. His credibility was further undermined when on direct examination he claimed that he did not know what his friend did for a living. On cross-examination, he admitted that he had lied under oath because he did not want to get his friend, who was also a correction officer, in trouble.

Fogg's proclamation that he did not know what was in the CBD oil also rang hollow. Clearly, he was concerned that the product contained an ingredient that could affect his mandatory-drug-testing requirement. Why else question his friend about it? On this same note, Fogg was adamant that he never read the back of the bottle for directions or ingredients, yet when pressed on this very statement, his story evolved to an acknowledgment that he may have or probably "looked" at the bottle, but didn't "read" it. Equally as specious was his testimony surrounding the card party and ingestion of what he claimed to be homemade cookies that caused him to be ill and possibly caused his positive drug test. He went through several permeations of what the cookies were wrapped in and whether they were homemade before settling on the version that the cookies were homemade and in a Tupperware container.

With the above in mind, having considered the testimonial and documentary evidence offered by the parties, in addition to the findings of fact set forth above, I **FIND** as **FACT**:

Fogg obtained CBD oil from his friend, and the CBD oil contained THC. The label on the container clearly stated that the product was cannabidiol (CBD) and contained THC. The label also stated that the product was derived from hemp and may contain THC, which could result in the consumer failing a drug test for marijuana.

Regardless of this fact, Fogg ingested the product without talking to his doctor or, at a minimum, researching the product to determine its appropriate dosage and/or side effects. By his own admission, even if he had read the label, he still would have taken the CBD oil because his friend said it worked, and every label contains warnings.

No credible evidence was presented that Fogg unintentionally, inadvertently, or accidently ingested THC at a card game or otherwise.

The DOC has a zero-tolerance drug policy. Fogg's drug-test results came back at 152.9 ng/ml—ten times over the level of 11-carboxy-THC cutoff level of 15 ng/ml. Under the disciplinary policy, the return of a positive drug screening warrants a penalty of removal. (R-12.)

Putting aside the instant charges, Fogg had, with the exception of one written reprimand, an exemplary employment record with the DOC. No evidence was presented that Fogg reported to work under the influence or was suspected of being under the influence on the date of the test or on any other occasion.

On November 3, 2020, the New Jersey Constitution was amended to legalize regulated marijuana, also known as "cannabis," for recreational use pursuant to the Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA) P.L. 2021, c.16. The conduct that formed the basis of the sustained charges arose on October 5, 2020, prior to the passage of CREAMMA.

LEGAL ANALYSIS AND CONCLUSION

A civil service employee's rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C.

4A:1-1.1. The Act is an inducement to attract qualified individuals to public-service positions, and is to be liberally construed toward attainment of merit appointments and broad tenure protections. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576, 581 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972) (citing Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 145, 147 (1965)).

A civil service employee who commits a wrongful act related to their employment may be subject to discipline, which may be a reprimand, suspension, or removal from employment, depending upon the incident. N.J.S.A. 11A:1-2, 11A:2-20; N.J.A.C. 4A:2-2. Public entities should not be burdened with an employee who fails to perform their duties satisfactorily or engages in misconduct related to their duties. N.J.S.A. 11A:1-2(a). Thus, a public entity may impose major discipline upon a civil service employee, including termination/removal from their position. N.J.S.A. 11A:1-2; N.J.A.C. 4A:2-2.2.

The appointing authority employer has the burden of proof to establish the truth of the disciplinary action brought against a civil service employee. N.J.A.C. 4A:2-1.4(a). The standard of proof in administrative proceedings is by a preponderance of the credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); see Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is considered to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro Bottling Co., 26 N.J. 263, 275 (1958).

In the case at bar, appellant was determined to have violated:

N.J.A.C. 4A:2-2.3(a)—General causes:

(6) Conduct unbecoming a public employee;

(12) Other sufficient cause—specifically HRB 84-17, As Amended

- C-11 (Conduct Unbecoming An Employee);

- E-1 (Violation of a Rule, Regulation, Policy, Procedure, Order, or Administrative Decision).[7]

N.J.A.C. 4A:2-2.3(a)(6)—Conduct Unbecoming a Public Employee

Conduct unbecoming a public employee is an elastic phrase that encompasses conduct that "adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services." Karins v. City of Atl. 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)). Suspension or removal may be justified where the misconduct occurred while the employee was off duty. In re Emmons, 63 N.J. Super. at 140.

Appellant's status as a correction officer subjects him to a higher standard of conduct than an ordinary public employee. In re Phillips, 117 N.J. 567, 576–77 (1990). Law-enforcement employees, such as a correction officer, 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." Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). In military-like settings such as police departments and prisons, it is of paramount importance to maintain strict discipline of employees. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971); Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967).

[7] See footnote 4.

It is the policy of the DOC to ensure that "law enforcement employees do not report for work or enter NJ DOC grounds under the influence of drugs or in an impaired condition resulting from the use of drugs, or consume illegal substances either off duty or while on duty." (R-12.) In furtherance of this objective, the DOC has a zero-tolerance policy for drug use and requires that all "covered persons" submit to random urine drug testing in order to maintain their employment. The policy further mandates that a negative result is required in order to maintain employment and a positive finding will result in termination.

The facts in this case are undisputed that appellant, after submitting to a random drug test, tested positive—ten times over the acceptable limit—for 11 carboxy-THC (cannabinoids THC). Overall, I found appellant's credibility lacking and his explanations of how THC ended up in his system farfetched. In other words, no credible evidence was presented that appellant's ingestion was inadvertent or accidental.

As a senior correction officer, appellant represents law and order to the public and must present an image of personal integrity. Drug use among law-enforcement personnel is conduct that adversely affects the moral or efficiency of a governmental unit and has a tendency to destroy public respect in delivery of governmental services. There is no question that appellant's conduct violates the implicit standard of good behavior that one would expect from a senior correction officer.

For the foregoing reasons, I **CONCLUDE** that the respondent has met its burden in establishing a violation of N.J.A.C. 4A:2-2.3(a)(6)—conduct unbecoming a public employee.

N.J.A.C. 4A:2-2.3(a)(12)—Other Sufficient Cause

Appellant has been charged with other sufficient cause, specifically, violations of HRB 84-17 As Amended—C(11) conduct unbecoming an employee, and E(1) violation of a rule, regulation, policy, procedure, order, or administrative decision.

Having concluded that appellant's conduct constitutes a violation of conduct unbecoming a public employee under N.J.A.C. 4A:2-2.3(a)(6), I similarly **CONCLUDE** that his actions constitute a violation under the Human Resources Bulletin, C(11) conduct unbecoming an employee.

On the charge of violation of HRB 84-17 E(1), on October 5, 2020, appellant submitted to a random drug screening as required under the DOC drug-testing policy, the result of which came back positive. Based on the foregoing, I **CONCLUDE** that appellant's conduct was in direct violation of the DOC drug-testing policy set forth in HRB 99-01, DOC Policy PSM.001.019, and the Law Enforcement Personnel Rules and Regulations.

For the foregoing reasons, I **CONCLUDE** that the respondent has met its burden in establishing a violation of N.J.A.C. 4A:2-2.3(a)(12)—other sufficient cause, specifically, violation of HRB 84-17 As Amended—C(11) conduct unbecoming an employee, and E(1) violation of a rule, regulation, policy, procedure, order, or administrative decision.

PENALTY

The next question is the appropriate level of discipline. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is considered to be an appropriate analysis for determining the reasonableness of the penalty. West New York v. Bock, 38 N.J. 500 (1962). The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is that the nature, number, and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

The law is also clear that a single incident can be egregious enough to warrant removal without reliance on progressive-discipline policies. See In re Herrmann, 192 N.J.

19 (2007) (Division of Youth and Family Services worker snapped lighter in front of five-year-old), in which the Court stated:

> [J]udicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty 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.
>
> [192 N.J. at 33.]

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. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

In addition to considering an employee's prior disciplinary history when imposing a penalty under the Act, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Ibid. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Bock, 38 N.J. at 522–24. Major discipline may include removal, disciplinary demotion, or a suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

With the above in mind, and turning to the instant matter, appellant asserts that he accidentally ingested the THC, and aside from one prior written reprimand, his disciplinary history has been exemplary over the course of his twenty-four-year career. Citing to recent cases believed to be factually similar wherein the discipline imposed was short of termination, appellant contends that he is entitled to the same consideration. See In the Matter of Alberto Aponte, Essex Cnty., Dep't of Corr., 2019 N.J. AGEN LEXIS 923, CSC (October 24, 2019); In the Matter of Alberto Aponte, Essex Cnty., Dep't of Corr., No. A-1782-19 (App. Div. July 20, 2021) (slip. op. at *1); In the Matter of Dennis Turner, Bayside

State Prison, 2022 N.J. CSC LEXIS 403 (June 29, 2022); In the Matter of William Shorter, N.J. Dep't of Corr., No. A-3150-18 (App. Div. May 9, 2020) (slip op.).

Appellant further contends that with the advent of the recent Attorney General Guidelines legalizing cannabis, law-enforcement officers should not be terminated from their employment when they ingest legally sanctioned cannabis while off duty.

Respondent, on the other hand, contends that appellant's removal should stand because the DOC is bound by the Attorney General's Law Enforcement Drug Testing Policy and guidelines. That policy dictates, among other things, that if correction officers, who are law-enforcement officers with full police powers and held to a higher standard of conduct, test positive, they will be immediately suspended and terminated from service. It is a zero-tolerance policy that exists not only for the safety and security of the correctional institutions, but to ensure public trust in the agency. Maccio v. Mid-State Corr. Facility, OAL Dkt. No. CSV 2428-87, Initial Decision (June 8, 1987), aff'd, Merit Sys. Bd. (July 14, 1987); Ruiz v. Dep't of Corr., 2018 N.J. CSC LEXIS 596, Initial Decision (July 18, 2018), at *11, adopted, CSC (August 15, 2018); In re Carter, 191 N.J. 474, 478 (2006); In re Phillips, 117 N.J. at 576.

Respondent relies upon several recent cases in support of its argument that removal is in accordance with prevailing caselaw. See McClenny v. PBA Local 105, N.J. State Policemen's Benevolent Ass'n, No. A-4797-18 (App. Div. November 25, 2020); In re Griffin, 2021 N.J. CSC LEXIS 431 (September 22, 2021). Respondent points out that while the system of progressive discipline has evolved over the years, if the underlying conduct is egregious, the imposition of a penalty up to and including removal is appropriate, regardless of the individual's disciplinary history. West New York v. Bock, 38 N.J. 500; Henry v. Rahway State Prison, 81 N.J. 571. Respondent distinguished Shorter, Aponte, and Turner as factually dissimilar—primarily because appellant's testimony was not credible, and his ingestion of THC was not accidental.

Respondent is correct.

In Aponte, a correction officer tested positive during a random drug test for benzoylecgonine, a derivative of cocaine and a controlled dangerous substance. Aponte claimed that his positive test was due to his ingestion of a nutritional supplement, Inka Leaf, and that he was unaware that the supplement contained a banned substance. There was no dispute by either party that Aponte was trained on banned coca-leaf products and that by testing positive he was in violation of DOC policy. In rendering her decision, the administrative law judge (ALJ) found Aponte credible and that he was not a drug abuser. She ordered, among other things, the reversal of his termination and instead suspended Aponte for six months. The CSC upheld this determination, as did the Appellate Division.

In Turner, a correction officer tested positive for THC after submitting to a random drug test. Turner claimed to have inadvertently ingested cookies containing THC. The ALJ sustained most of the charges, but dismissed one of the charges, HRB 84-17(C), which prohibits the use, possession, or sale of any controlled dangerous substance. The ALJ thereafter reduced the penalty of removal to a thirty-day suspension. The CSC affirmed the ALJ's Initial Decision.

In Shorter, a correction officer tested positive for THC after submitting to a random drug test. The results indicated THC carboxy levels of 23 nanograms per milliliter, which was over the 15 nanograms-per-milliliter cutoff for a positive sample. Shorter claimed that he had been using CBD oil which had been purchased at his doctor's office upon advice of his medical professionals; however, he failed to list the CBD oil on his list of medications. After he tested positive, he produced a prescription from his doctor that recommended that he use the CBD oil. The ALJ who heard the case upheld the appointing authority's removal of Shorter. On appeal, the CSC adopted all of the ALJ's findings of fact and credibility; however, the CSC reduced the penalty, finding that Shorter had no prior major disciplinary actions in his record and only one minor disciplinary action—a written reprimand. The CSC further found that the amount of THC in Shorter's system was small and consistent with the valid prescription. Accordingly, the CSC reduced the penalty of removal to a 120-day suspension. The Appellate Division affirmed the CSC's findings.

In all of the cases cited above, the correction officer either inadvertently or accidentally ingested a banned substance, or was prescribed CBD oil by a medical professional, and failed to realize that ingestion could affect drug-testing results. That is not the case here. Absolutely no credible evidence was presented to suggest that appellant's ingestion was accidental, inadvertent, or sanctioned by a medical provider. Assuming it was the CBD oil that caused a positive result, it is clear that appellant was aware and concerned that usage could impact a random drug test. Yet, despite the warning label on the bottle, which also contained the recommended dosage – both of which he ignored, appellant ingested the product. At the end of the day, regardless of how appellant ingested the THC, or in what form, unlike in Shorter, he tested positive well in excess of the cutoff point.

As a law-enforcement agency, the DOC is bound by the Attorney General's Law Enforcement Drug Testing Policy. This policy requires that a correction officer's positive drug test will result in that officer's immediate suspension and termination from service. It further requires that officers who test positive will be reported by the Special Investigation Division to the central drug registry maintained by the New Jersey State Police and that they will be barred permanently from future law-enforcement employment in New Jersey. The policy does not call for a range of discipline, and removal is the only option for a violation of the drug-testing policy.

While the appellant asserts that given that the New Jersey Attorney General's Memorandum regarding recreational cannabis use in New Jersey favors progressive discipline as opposed to removal, a policy revision has yet to occur. Unless and until that happens, despite appellant's almost impeccable disciplinary record, I am constrained, particularly under the facts of this case, to deviate from the Attorney General Guidelines as implemented by the DOC's zero-tolerance policy.

For the foregoing reasons, I **CONCLUDE** and **AFFIRM** that removal is the appropriate discipline for the violations of N.J.A.C. 4A:2-2.3—General Causes—(6) conduct unbecoming a public employee, and (12) other sufficient cause, specifically, violation of HRB 84-17 As Amended—C(11) conduct unbecoming and E(1) (violation of a rule, regulation, policy, procedure, order, or administrative decision.

ORDER

For the reasons set forth above, it is **ORDERED** that all charges entered on the June 14, 2021, FNDA by the Department of Corrections, South Woods State Prison, are hereby **SUSTAINED**.

I further **ORDER** that the action of the appointing authority removing the appellant from his position as a senior correction officer 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.

September 26, 2022
DATE

TAMA B. HUGHES, ALJ

Date Received at Agency:

Date Mailed to Parties:

TBH/gd

APPENDIX

WITNESSESS

For appellant

Mark Fogg
Kenneth H. Peploe
Joseph Saverine

For respondent

None

EXHIBITS

Joint Stipulations of Fact

Paragraphs 1–22

For appellant

P-1 Skinny Skies CBD product information/label

For respondent*

R-1 Preliminary Notice of Disciplinary Action
R-2 Final Notice of Disciplinary Action
R-3 Master List for Donor Notification
R-4 Drug Screening Program Monitor
R-5 Toxicology Report, November 8, 2020
R-6 Special Investigations Division Investigation Report, January 11, 2021
R-7 Curriculum Vitae, Dr. George Jackson

R-8 New Jersey State Toxicology Laboratory Litigation Packet

R-9 Curriculum Vitae, Dr. Andrew L. Falzon

R-10 Medical Review Officer Certification Form

R-11 Department of Corrections Human Resources Bulletin

R-12 Department of Corrections Drug Testing Policy

R-13 Law Enforcement Personnel Rules and Regulations

R-14 Standards of Professional Conduct

R-15 Department of Corrections Bulletin As Amended Disciplinary Action Policy

R-16 Department of Corrections Checklist For Processing New Hire

R-17 Work History

*Appellant stipulated to all of respondent's exhibits.

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Stuart J. Alterman
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North Jersey Office
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(973)956-1621 - Phone
(973)956-1421 – Fax

October 17, 2022

Via Email and Regular Mail
Nicholas F. Angiulo, Director
Division of Appeals and Regulatory Affairs
Unit H, Civil Service Commission
44 South Clinton Avenue
P.O. Box 312
Trenton, NJ 08625-0312

RE: In the Matter of Mark Fogg, South Woods State Prison
OAL Dkt. No. CSR 06754-21

Dear Director Angiulo:

As you know this Firm represents Mark Fogg with regard to the above captioned matter.

Please be advised that we have settled the case between the parties and are respectfully requesting the Commission's approval of the agreement, attached hereto.

Thank you in this regard.

Respectfully submitted,
ALTERMAN & ASSOCIATES, LLC
Timothy J. Prol/s/
Timothy J. Prol, Esquire
tprol@alterman-law.com

TJP/cm
cc: Kendall Collins, Esquire (Via Email)
Mark Fogg (Via Email)

OAL DKT. NO. CSR 06754-2021S

SETTLEMENT AGREEMENT

IN THE MATTER OF MARK FOGG

AND

NEW JERSEY DEPARTMENT OF CORRECTIONS,
SOUTHWOODS STATE PRISON

The parties in this appeal ("Appellant" or "Mark Fogg") and New Jersey Department of Corrections, Southwoods State Prison ("Respondent" or "Department of Corrections") have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action dated June 14, 2021, contained the following charges and proposed discipline;

Charge	Discipline	Dates Effective
1. N.J.A.C. 4A:2-2.3(a)(6). Conduct unbecoming a public employee;	Removal	June 14, 2021
2. N.J.A.C. 4A:2-2.3(a)12. Other sufficient cause;	Removal	June 14, 2021
3. Human Resources Bulletin 84-17, As Amended, C-11 Conduct unbecoming an employee;	Removal	June 14, 2021
4. Human Resources Bulletin 84-17, As Amended, E-1 Violation of a rule, regulation, policy, procedure, order, or administrative decision.	Removal	June 14, 2021

B. The parties have agreed to the following resolution of these charges:

Charge	Discipline	Disposition
1. N.J.A.C. 4A:2-2.3(a)(6). Conduct unbecoming a public employee;	Removal	General Resignation
2. N.J.A.C. 4A:2-2.3(a)12. Other sufficient cause;	Removal	General Resignation
3. Human Resources Bulletin 84-17, As Amended, C-11 Conduct unbecoming an employee;	Removal	General Resignation
4. Human Resources Bulletin 84-17, As Amended, E-1 Violation of a rule, regulation, policy, procedure, order, or administrative decision.	Removal	General Resignation

1. The Appellant, Mark Fogg agrees to accept a General Resignation in Lieu of Removal for all of the above-referenced charges, which shall be effective upon the approval of the fully executed Settlement Agreement by the Civil Service Commission.

2. The total number of days of backpay, if any, to be paid by the Respondent, appointing authority to the Appellant is as follows: No back pay.

3. The time period between January 13, 2021 (the date of Appellant's suspension without pay) and April 22, 2022 (the date of Appellant's reinstatement to pay status shall be treated as follows: Approved leave of absence without pay.

C. Appellant hereby withdraws his appeal and the Respondent, appointing authority agrees that the following result will occur with regard to each of the above-referenced charges: General Resignation, as authorized by N.J.A.C. 4A:2-6.3(b). The parties acknowledge that no pension or seniority time may be credited for periods for which the employee was not paid by the employer. Appellant agrees not to seek or accept employment with the New Jersey Department of Corrections at any time in the future.

D. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

E. Respondent shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Corrections will be kept intact. Nothing herein shall preclude the DOC from releasing information on this matter to anyone who has a written release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

F. Appellant waives all other claims against Respondent, appointing authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Corrections, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages

and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions with regard to this matter.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

9/25/2022
DATE:

Mark Fogg
Mark Fogg, Appellant

9/30/22
DATE:

Timothy Prol, Esq.
Counsel for Appellant

10/18/22
DATE:

K. Krieger
Kathleen Krieger, Esq.
ON BEHALF OF Respondent, New Jersey Department of Corrections

CERTIFICATION

I, Mark Fogg, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

9/29/2022
DATE

Mark Fogg
Mark Fogg