



STATE OF NEW JERSEY

DECISION OF THE CIVIL SERVICE COMMISSION

In the Matter of Christopher Carralero, West New York, Police Department

CSC DKT. NO. 2022-3119 OAL DKT. NO. CSR 04770-22

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ISSUED: DECEMBER 21, 2022

The appeal of Christopher Carralero, Police Officer, West New York, Police Department, removal, effective May 25, 2022, on charges, was before Administrative Law Judge Gail M. Cookson (ALJ), who rendered her initial decision on October 31, 2022, wherein she granted the appellant's motion for summary decision and recommended reversing the removal. Exceptions were filed on behalf of the appointing authority and a reply to-exceptions was filed on behalf of the appellant.

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 December 21, 2022, did not adopted the Conclusion as contained in the attached ALJ's initial decision and the recommendation to reverse the removal. Rather, the Commission remanded the matter to the Office of Administrative Law (OAL).

The Commission thoroughly reviewed the ALJ's initial decision and, at this time, cannot agree with her determination. In this matter, the record indicates that Carralero was terminated from employment with West New York after testing positive for a metabolite of THC. The drug screening took place on April 4, 2022, and the positive result came back on May 9, 2022. Accordingly, the drug screening took place prior to the Cannabis Regulatory Commission's opening of New Jersey's regulated recreational cannabis market, which began on April 21, 2022. See N.J.S.A. 24:61-34(d)(2) ("[T]he [cannabis regulatory] commission shall determine the first date . . . on which cannabis retailers issued licenses and conditional licenses may begin retail sales of personal use cannabis items"). Moreover, pursuant to an April 13, 2022, memorandum from the Acting Attorney General to all law enforcement chief executives regarding compliance with the Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA), "there should be zero

tolerance for unregulated marijuana consumption by officers at any time, on or off duty, while employed in this State.” In the present matter, because the regulated market had not yet begun, it would be impossible for Carralero to have used regulated recreational cannabis. As such, based on the present record, the ALJ incorrectly held that the appointing authority categorically could not take an adverse employment action against Carralero based on his positive testing result. Accordingly, the Commission rejects that determination.

Given the above, the Commission finds it necessary to remand this matter to the OAL for further proceedings. Specifically, there needs to be a hearing to develop a factual record as to how the marijuana/cannabis was obtained and ingested. Because the regulated recreational market had not yet opened, Carralero could have only ingested unregulated marijuana (which he could be terminated for), or regulated medical cannabis (for which he would have protections). There are no facts in the record establishing either scenario. Thus, on remand, a factual finding should be made as to whether Carralero’s use was unregulated or not. Moreover, on remand, additional mitigating facts could plausibly be developed, such as accidental exposure, *see e.g., In the Matter of Alberto Aponte*, Docket No. A-1782-19 (App. Div. July 20, 2021), or prescribed use of a derivative product like CBD, *see, e.g., In the Matter of William Shorter*, Docket No. A-3150-18T3 (App. Div. May 4, 2020).

ORDER

The Civil Service Commission remands the matter to the Office of Administrative Law as directed above.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 21ST DAY OF DECEMBER, 2022

Deirdre' L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON CROSS
MOTIONS FOR SUMMARY DECISION

OAL DKT. NO. CSR 04770-22

AGENCY REF. NO. N/A

2022-3119

**IN THE MATTER OF CHRISTOPHER
CARRALERO, TOWN OF WEST
NEW YORK.**

Michael P. Rubas, Esq., for appellant Christopher Carralero (Rubas Law Offices,
attorney)

Angelo Auteri, Esq., for respondent Town of West New York (Scarinci Hollenbeck,
attorney)

Record Closed: October 24, 2022

Decided: October 31, 2022

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

STATEMENT OF THE CASE

This appeal was initiated by way of a Major Discipline Appeal Form filed by appellant Christopher Carralero (appellant/Carralero) simultaneously with the Civil Service Commission (CSC) and the Office of Administrative Law (OAL), and perfected on June 13, 2022, from the decision of the Town of West New York (City or Respondent) terminating him from his position as a police officer after testing positive for 11-carboxy-tetrahydrocannabinol (11-carboxy-THC or THC), a cannabinoid metabolite, following a random drug urine screening on April 4, 2022. Appellant was charged with violations of:

(1) insubordination pursuant to N.J.A.C. 4A:2-2.3(a)(2); (2) conduct unbecoming a public employee pursuant to N.J.A.C. 4A:2-2.3(a)(6); (3) neglect of duty pursuant to N.J.A.C. 4A:2-2.3(a)(7); (4) other sufficient cause pursuant to N.J.A.C. 4A:2-2.3(a)(12); and (5) failure to comply with the Departmental Rules and Regulations. The appellant denies the allegations and states that he could only be found to have used a cannabis substance while off-duty from his police responsibilities, which he asserts is now legal in New Jersey.

PROCEDURAL HISTORY

On May 18, 2022, respondent served upon appellant an Immediate Suspension Notice, after receiving the results of the random urine screening on May 9, 2022, which indicated a positive result of 20.13 ng/ml 11-carboxy-THC.¹ Appellant responded to the City that he had not been provided a Loudermill hearing or a Preliminary Notice of Disciplinary Action (PNDA). On May 20, 2022, respondent issued the PNDA setting forth the charges and specifications made against the appellant. Appellant requested a departmental hearing on May 25, 2022, but respondent deemed it untimely, and the respondent issued Final Notice of Disciplinary Action (FNDA) that same day sustaining the charges in the Preliminary Notice and removing appellant from employment, effective immediately. Appellant filed a direct removal appeal on June 7, 2022, perfected with the filing fee on June 13, 2022, simultaneously to the Civil Service Commission and the Office of Administrative Law (OAL), where it was filed as a contested case pursuant to N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52: 14F-1 to 13.

On June 15, 2022, the matter was assigned to the undersigned. On June 27, 2022, a telephonic case management conference was convened at which time hearing dates, discovery and pretrial motions were discussed.² Thereafter, another case management conference was held on August 15, 2022, at which time a briefing schedule was established for dispositive motion practice. All briefs having been submitted, the matter is now ripe for determination.

¹ A result of under 15 ng/ml is considered a negative result.

² While appellant maintains that his request for a departmental hearing was timely and that respondent had violated his Loudermill rights, both parties agreed at this time to proceed at the OAL insofar as it is a de novo proceeding and time is of the essence.

CROSS-MOTIONS UNDER CONSIDERATION

Appellant has filed for summary decision on the basis that his termination was unlawful and violated the New Jersey Constitution and the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA), N.J.S.A. 24:6I-31 et seq., made effective on August 19, 2021. He argues that no employer is permitted to take adverse employment action against an employee solely due to the presence of cannabinoid metabolites in that person's bodily fluid, and that such prohibition includes off-duty police officers.

Respondent argues against that interpretation of CREAMMA and asserts that it was ineffective to prohibit appellant's termination because the law's provisions depend on the establishment of a Workplace Impairment Recognition Expert (WIRE) Certification program, which has yet to be created. N.J.S.A. 24:6I-52; N.J.A.C. 17:30-2.1(e). It points out that, in recognition thereof, the Cannabis Regulatory Commission (CRC) promulgated a regulation staying the requirement that a physical evaluation of the employee must be conducted to impose discipline. In other words, pending the creation of the WIRE Certification, respondent argues that an employee may be disciplined solely on account of the presence of cannabinoids in their system. Respondent also asserts that there is a significant distinction between "cannabis" and "marijuana" claiming that the former is the regulated substance and that the latter is an unregulated and illegal substance, and that the Attorney General has kept prohibitions in place for law enforcement.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

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

policy to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

Nevertheless, “[t]here is no constitutional or statutory right to a government job.” State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against him and, if so, the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). In the within matter, the parties both move for judgment in their favor as a matter of law under CREAMMA and seem to agree that there are no genuine issues of material facts.

Summary decision may be granted “if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” N.J.A.C. 1:1-12.5(b). The standard for granting summary judgment (decision) is found in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995). In Brill, the Court adopted a standard that “requires the motion judge to engage in an analytical process essentially the same as that necessary to rule on a motion for a direct verdict,” i.e. “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Brill, supra, 142 N.J. at 533 (quoting Liberty Lobby, supra, 477 U.S. at 251-252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214). For the reasons set forth below, I **CONCLUDE** that appellant is entitled to summary decision as a matter of law.

In general, and specifically in response to approval in 2020 by New Jersey voters of a Constitutional amendment legalizing “the controlled form of marijuana known as cannabis” by persons over the age of twenty-one,³ the Legislature enacted CREAMMA.

³ See 2020-public-question-01-english.pdf (nj.gov).

The Legislature finds and declares that:

a. It is the intent of the people of New Jersey to adopt a new approach to our marijuana policies by controlling and legalizing a form of marijuana, to be referred to as cannabis, in a similar fashion to the regulation of alcohol for adults;

b. It is the intent of the people of New Jersey that the provisions of this act will prevent the sale or distribution of cannabis to persons under 21 years of age;

c. This act is designed to eliminate the problems caused by the unregulated manufacturing, distribution, and use of illegal marijuana within New Jersey;

* * *

h. Controlling and legalizing cannabis for adults in a similar fashion to alcohol will strike a blow at the illegal enterprises that profit from New Jersey's current, unregulated illegal marijuana market;

* * *

k. Controlling and regulating the manufacturing, distribution, and sales of cannabis will strengthen our ability to keep it along with illegal marijuana away from minors;

* * *

m. The legalized cannabis marketplace in New Jersey must be regulated so as to prevent persons younger than 21 years of age from accessing or purchasing cannabis;

* * *

o. New Jersey cannot afford to sacrifice public safety and individuals' civil rights by continuing its ineffective and wasteful past marijuana enforcement policies.

[N.J.S.A. 24:61-32.]

One of the central tenets of the law is its non-discrimination provisions making it clear that employers cannot differentiate on the job between persons who chose to and those who chose not to use marijuana recreationally and on their own time.

Nothing in [CREAMMA]:

Requires an employer to amend or repeal, or affect, restrict or preempt the rights and obligations of employers to maintain a drug- and alcohol-free workplace or require an employer to permit or accommodate the use, consumption, being under the influence, possession, transfer, display, transportation, sale, or growth of cannabis or cannabis items in the workplace, or to affect the ability of employers to have policies prohibiting use of cannabis items or intoxication by employees during work hours;

[N.J.S.A. 24:6I-52(b)(1)(a) (emphasis added).]

CREAMMA also made clear, however, that employers could treat workplace impairment from cannabis in a similar manner to impairment from alcohol.

[A]n employer may require an employee to undergo a drug test upon reasonable suspicion of an employee's usage of a cannabis item while engaged in the performance of the employee's work responsibilities, or upon finding any observable signs of intoxication related to usage of a cannabis item, or following a work-related accident subject to investigation by the employer. A drug test may also be done randomly by the employer, or as part of a pre-employment screening, or regular screening of current employees to determine use during an employee's prescribed work hours. The drug test shall include scientifically reliable objective testing methods and procedures, such as testing of blood, urine, or saliva, and a physical evaluation in order to determine an employee's state of impairment. The physical evaluation shall be conducted by an individual with the necessary certification to opine on the employee's state of impairment, or lack thereof, related to the usage of a cannabis item in accordance with paragraph (2) of this subsection. The employer may use the results of the drug test when determining the appropriate employment action concerning the employee, including, but not limited to dismissal, suspension, demotion, or other disciplinary action.

[N.J.S.A. 24:6I-52(a)(1) (emphasis added).]

The requirement of "an individual with the necessary certification" was provided for in CREAMMA thusly:

[Cannabis Regulatory Commission], in consultation with the Police Training Commission established pursuant to section 5 of P.L. 1961, c.56 (C.52:17B-70), shall prescribe standards in

regulation for a Workplace Impairment Recognition Expert certification, to be issued to full- or part-time employees, or others contracted to perform services on behalf of an employer, based on education and training in detecting and identifying an employee's usage of, or impairment from, a cannabis item or other intoxicating substance, and for assisting in the investigation of workplace accidents.

[N.J.S.A. 24:6I-52.]

Nevertheless, because the CRC and the Police Training Commission have not yet set up the WIRE program, the CRC included in the published regulations the following provision:

Notwithstanding the provisions of N.J.S.A. 24:6I-52, until such time that the Commission, in consultation with the Police Training Commission established pursuant to N.J.S.A. 52:17B-70, develops standards for a Workplace Impairment Recognition Expert certification, no physical evaluation of an employee being drug tested in accordance with N.J.S.A. 24:6I-52 shall be required.

[N.J.A.C. 17:30-2.1(e).]

I concur with appellant and **CONCLUDE** that these legal provisions make clear that the lack of a certified WIRE at a workplace only implicates an allegation of impairment in the workplace, workplace accidents, and related discipline action. The more central question in this matter is whether there is a different standard for law enforcement workplaces involving random drug screening, not for cause, that is, impairment. This might be an issue of first impression as I have not been able to locate any other cases that have raised the anti-discrimination provision of the new law as a defense since the State legalized cannabis and the CRC published its regulations.

In In re Alzamora, OAL Dkt. CSR 05442-21, Final Decision (March 24, 2022), Initial Decision (February 14, 2022) <<http://lawlibrary.rutgers.edu/oal/search.html>>, appellant appealed from a removal from his police officer position on the basis of a January 14, 2021, pre-CREAMMA random drug screening. Alzamora's urine tested positive for THC at the level of 54.38 ng/ml, which the ALJ found after a plenary hearing was too high for passive inhalation. Affirming the chain of custody procedures used and finding no credible explanation for the drug being in his urine, the ALJ upheld the penalty of removal.

The Initial Decision in Alzamora referenced the Attorney General's Law Enforcement Drug Testing Policy (AG Policy), its attached Consent Form, and the Attorney General's Frequently Asked Questions, Marijuana Decriminalization and Legalized Cannabis (FAQs). The FAQs was issued February 22, 2021, and, at the time of the Alzamora decision, had been updated on March 26, 2021. It set forth in question 8 that a law-enforcement officer cannot use cannabis while off duty without consequence:

Until the Cannabis Regulatory Commission promulgates and implements regulations⁴, there is no regulated, legal cannabis in New Jersey. Therefore, any marijuana consumed by a law enforcement officer or applicant for a law enforcement position will be a controlled dangerous substance and illegal. The Attorney General's Law Enforcement Drug Testing Policy remains unchanged.⁵

Interestingly, the FAQs had been amended again on May 27, 2022, and question 8 was dropped entirely, leaving no mention of an officer's cannabis use or its consequences. Nevertheless, as briefed by respondent (but with relevant omissions, inserted herein), the Attorney General did issue a memorandum to law enforcement on April 13, 2022, contemporaneously to appellant's random urine screen:

In light of [recreational cannabis sales], I write to remind law enforcement officers of the provisions of the CREAMMA that set the parameters for departments issuing policies pertaining to cannabis use – please be reminded, however, that unregulated marijuana continues to be a controlled dangerous substance, N.J.S.A. 24:2I-2, and that cannabis legalization law in no way insulates employees from adverse consequences from their employers for the possession or consumption of unregulated marijuana. Law enforcement agencies shall continue to maintain a drug- and alcohol-free workplace, which prohibition includes marijuana/cannabis whether regulated or illicit. The CREAMMA does not require law enforcement agencies to permit or accommodate the possession, use, or consumption of cannabis in the workplace, or strict the ability of an agency to implement a

⁴ Those regulations were adopted and since readopted. 54 N.J.R. 1470(a) (adopted August 19, 2021) (readopting with amendments N.J.A.C. 17:30, Personal Use Cannabis Rules.

⁵ While Judge Kirk referenced and quoted the March 26, 2021, version of the AG FAQs, that is no longer available on the Attorney General's website. It was located at https://womenaware.net/wp-content/uploads/2021/04/FAQs-Updated-3.26.21_.pdf.

policy prohibiting use of cannabis items or intoxication “during work hours.” N.J.S.A. 24:6I-52(b)1(a).

The CREAMMA further provides that law enforcement agencies may not take any adverse action against any officers because they do or do not use cannabis off-duty. But should there be a reasonable suspicion of an officer’s use of cannabis while engaged in the performance of their duties, or upon finding any observable signs of intoxication related to cannabis use (including following a work-related accident subject to investigation by the agency), that officer may be required to undergo a drug test. N.J.S.A. 24:6I-52(a)(1). Per the CREAMMA, the drug test shall include scientifically reliable objective testing methods and procedures, such as testing of blood, urine, or saliva, and a physical evaluation, set forth in CREAMMA, in order to determine the officer’s state of impairment. N.J.S.A. 24:6I-52(a)(1) –(a)(2)(b). Per the CREAMMA, law enforcement agencies may randomly require a drug test as part of pre-employment screening or regular screening of employees “to determine use during an employee’s prescribed work hours[.]” following the above described process for drug testing, including the physical evaluation. The law enforcement agency may use the results of the drug testing procedure, defined above, to determine the appropriate employment action concerning the officer, including, but not limited to dismissal, suspension, demotion, or other disciplinary action. A revised Law Enforcement Drug Testing Policy to reflect CREAMMA is forthcoming.⁶

But to be clear, there should be zero tolerance for cannabis use, possession, or intoxication while performing the duties of a law enforcement officer. And there should be zero tolerance for unregulated marijuana consumption by officers at any time, on or off duty, while employed in this State. The safety of our communities and our officers demands no less.

[Teijido Cert., Exhibit B (emphasis both in original and added).]

These AG guidance documents clearly support appellant’s argument that under CREAMMA, he cannot be disciplined, let alone terminated, for off-duty cannabis (but not

⁶ The Attorney General continues to roll-out new directives based on CREAMMA, as well as Covid. https://www.nj.gov/oag/dcj/agguide/directives/ag-Directive-2022-13_Directive-Adjusting-the-Timeframe-and-Reporting-Requirements-of-Mandatory-Random-Law-Enforcement-Drug-Testing-Program-for-2022.pdf

marijuana) use that is unrelated to any on-duty workplace impairment.

Query, if possession of marijuana or hashish in small quantities is not “subject to any punishment” or is no longer considered an “act of delinquency,” then why would appellant’s possession of them or of a cannabis product still make him subject to removal as a law enforcement officer? Thus, the distinction between cannabis and marijuana has significance for this appeal. It should be noted that the latest version of the FAQs states:

6. What is the difference between marijuana and cannabis? Despite the different names, there is no difference in substance, as the two terms both describe parts of the plant *Cannabis sativa* L. However, the law now creates a distinction between legal “cannabis,” which is parts of the plant cultivated and produced for use in a cannabis item regulated by the Cannabis Regulatory Commission in accordance with the provisions of P.L.2021, c.16 (the cannabis legalization act), and illegal “marijuana,” which is parts of the same plant that have not been subject to Cannabis Regulatory Commission regulation. Cannabis may be legally manufactured and distributed pursuant to the CREAMMA and regulations promulgated by the Cannabis Regulatory Commission, while marijuana may not. The first recreational cannabis sales in New Jersey began on April 21, 2022.

[https://www.nj.gov/oag/marijuana/docs/FAQs_Updated_5.27.22.pdf (emphasis added).]

Moreover, as part of CREAMMA, possession of marijuana or hashish in small quantities for personal use is no longer criminalized in New Jersey, which was an important policy consideration in the new law, as set forth above.

On and after the effective date of P.L.2021, c.16 (C.24:6I-31 et al.), possession of six ounces or less of marijuana, including any adulterants or dilutants, or 17 grams or less of hashish is not subject to any punishment, as this possession is not a crime, offense, act of delinquency, or civil violation of law; . . .

[N.J.S.A. 2C:35-10(a)(4)(b) (emphasis added).]

Additional definitions in the law do not necessarily make any of these distinctions readily apparent insofar as they are circular and/or cross-referenced by exclusion:

"Cannabis" means all parts of the plant *Cannabis sativa* L., whether growing or not, the seeds thereof, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds, except those containing resin⁷ extracted from the plant, which are cultivated and, when applicable, manufactured in accordance with P.L.2021, c.16 (C.24:6I-31 et al.) for use in cannabis products as set forth in this act, but shall not include the weight of any other ingredient combined with cannabis to prepare topical or oral administrations, food, drink, or other product. "Cannabis" does not include: medical cannabis dispensed to registered qualifying patients pursuant to the "Jake Honig Compassionate Use Medical Cannabis Act," P.L.2009, c.307 (C.24:6I-1 et al.) and P.L.2015, c.158 (C.18A:40-12.22 et al.); marijuana as defined in N.J.S.2C:35-2 and applied to any offense set forth in chapters 35, 35A, and 36 of Title 2C of the New Jersey Statutes, or P.L.2001, c.114 (C.2C:35B-1 et seq.), or marihuana as defined in section 2 of P.L.1970, c.226 (C.24:21-2) and applied to any offense set forth in the "New Jersey Controlled Dangerous Substances Act," P.L.1970, c.226 (C.24:21-1 et al.); or hemp or a hemp product cultivated, handled, processed, transported, or sold pursuant to the "New Jersey Hemp Farming Act," P.L.2019, c.238 (C.4:28-6 et al.).

[N.J.S.A. 24:6I-33.]

Similarly --

"Marijuana" means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds, except those containing resin extracted from the plant. "Marijuana" shall not mean: hemp and hemp products cultivated, handled, processed, transported, or sold pursuant to the "New Jersey Hemp Farming Act," P.L.2019, c.238 (C.4:28-6 et al.); or cannabis as defined in section 3 of P.L.2021, c.16 (C.24:6I-33) which is cultivated and produced for use in a cannabis item, as defined in that section, in accordance with the "New Jersey Cannabis

⁷ "Cannabis resin" also has a separate, if not clearly distinct definition in CREAMMA:

"Cannabis resin" means the resin extracted from any part of the plant *Cannabis sativa* L., including cannabis extract and resin extracted using non-chemical processes, processed and used in accordance with P.L.2021, c.16 (C.24:6I-31 et al.). "Cannabis resin" does not include hashish as defined in N.J.S.2C:35-2.

[N.J.S.A. 24:6I-33]

Regulatory, Enforcement Assistance, and Marketplace Modernization Act," P.L.2021, c.16 (C.24:6I-31 et al.).

[N.J.S.A. 2C:35-2.]

While it is true that "cannabis" and "marijuana" are not purely synonyms, people often use the words interchangeably, as referenced by another AG fact sheet, <https://www.nccih.nih.gov/health/cannabis-marijuana-and-cannabinoids-what-you-need-to-know> --

- The word "cannabis" refers to all products derived from the plant *Cannabis sativa*.
- The cannabis plant contains about 540 chemical substances.
- The word "marijuana" refers to parts of or products from the plant *Cannabis sativa* that contain substantial amounts of tetrahydrocannabinol (THC). THC is the substance that's primarily responsible for the effects of marijuana on a person's mental state. Some cannabis plants contain very little THC. Under U.S. law, these plants are considered "industrial hemp" rather than marijuana.

In other words, CREAMMA (1) legalized the cultivation, manufacturing, and distribution of products that rely upon cannabis resin; (2) prohibited the manufacturing and distribution of marijuana or hash plant substances; but (3) decriminalized the possession for personal or recreational use of marijuana or hash simple plant substances for persons over twenty-one (21) years of age. Marijuana and hash are factually both cannabis but are now legally distinct in New Jersey, the primary distinction being the potency of the THC content of each.

Moreover, while NJSTL is testing for metabolites of THC, specifically, 11-carboxy-THC, all these natural plant parts or cannabis resin products manufactured from them contain that compound, as set forth in CREAMMA:

"THC" means delta-9-tetrahydrocannabinol⁸ and its precursor, tetrahydrocannabinolic acid, the main psychoactive chemicals contained in the cannabis plant.

⁸ According to the Mayo Clinic –

“Usable cannabis” means the dried leaves and flowers of the female plant *Cannabis sativa* L., and does not include the seedlings, seeds, stems, stalks, or roots of the plant.

[N.J.S.A. 24:6I-33.]

Moreover, while the CRC regulations define the levels of THC allowed in cannabis products, N.J.A.C. 17:30-11.5(d), there does not appear to be any corresponding legal provision or scientific formula for how cannabis THC translates over time lapse and across unique individuals to a level of the 11-carboxy-THC metabolite in bodily fluid.

Respondent also argues that appellant knew, or maybe should have known, that the Departmental and AG Policy law enforcement had not been changed or amended. The Attorney General’s Policy provides that a positive result will result in: (a) the immediate suspension from all duties; (b) administrative charges, and upon final disciplinary action, termination from employment as a law enforcement officer; (c) an official report to the Central Drug Registry maintained by the Division of State Police; and (d) a permanent bar from future employment as a law enforcement officer in New Jersey. It is not disputed that appellant signed an acknowledgment form on April 4, 2022, wherein he acknowledged that the penalty for a positive drug test was termination:

I understand that a negative drug test is a condition of my continued employment as a sworn officer . . . I understand that if I produce a positive test result for illegal drug use, it will result in my termination from employment.

[Auteri Cert., Exhibit 3.]

I **CONCLUDE** that significant changes have occurred in New Jersey and even

The presence of tetrahydrocannabinol carboxylic acid (THC-COOH), a major metabolite of delta-9-tetrahydrocannabinol, in urine at concentrations greater than 15.0 ng/mL is a strong indicator that the patient has used marijuana. The metabolite of marijuana (THC-COOH) has a long half-life and can be detected in urine for more than 7 days after a single use. The presence of THC-COOH in urine greater than 100.0 ng/mL indicates relatively recent use, probably within the past 7 days. Levels greater than 500.0 ng/mL suggest chronic and recent use.

[<https://logan.testcatalog.org/show/THC-Q>.]

within the Attorney General's Office since the previous FAQs and lack of CRC regulations were relied upon in the earlier cases. I further **CONCLUDE** that it is the clear intention of the Attorney General that even law enforcement agencies must focus under CREAMMA on workplace or on-duty impairment. I reiterate that scientifically speaking, 11-carboxy-THC is present in both cannabis and marijuana. Accordingly, I grant summary decision in favor of appellant. Because of the lack of current caselaw on this matter of first impression, I have still reviewed respondent's application for summary decision on the removal of appellant.⁹

Even if appellant's results might not be excused under CREAMMA, the City asserts that it is entitled to summary decision because a random urine test failure must be met with an automatic termination as the appropriate discipline to be imposed under both the AG Policy and its own. For the following reasons, I do not agree. Even before CREAMMA, some law enforcement removals for a positive THC test were reduced to a period of suspension. See, e.g., In re Shorter, No. A-3150-18T3, 2020 N.J. Super. Unpub. LEXIS 821 (App. Div. May 4, 2020), *aff'g* OAL Dkt. CSR 17546-17, Final Decision (June 22, 2018), *mod'g* penalty only, Initial Decision (May 8, 2018) <<http://lawlibrary.rutgers.edu/oal/search.html>>; and In re Turner, OAL Dkt. CSR 472-22, Final Decision (June 29, 2022), *mod'g* penalty only, Initial Decision (May 25, 2022) <<http://lawlibrary.rutgers.edu/oal/search.html>>.

In Shorter, the officer had a test result of 23 ng/ml, which was not much over the 15 ng/ml cut-off level, and the facts bore out that it was from a prescribed use of CBD oil.

Here, as the CSC correctly notes, the DOC has not established that Shorter's conduct, based only on his failed drug screen, "subverted the discipline" at the prison. Indeed, the DOC provided no evidence that Shorter was intoxicated or exhibited any psychoactive symptoms from the THC in the CBD oil during the performance of his duties. Shorter also did not engage in any illicit activities with or around inmates at the prison, unlike the officer in Bowden [v. Bayside State Prison, 268 N.J. Super. 301, 306 (App. Div. 1993)], Shorter's conduct (and his prior disciplinary record) clearly did not rise to the

⁹ I hope that careful consideration of the above analysis will be undertaken by the CSC and the AG so that those officers impacted, as well as those who must adjudicate the issue, can be appropriately guided.

level of impropriety engaged in by the officer in Bowden, as he only began taking the CBD oil after consulting multiple licensed medical professionals.

[Shorter, supra, 2020 N.J. Super. Unpub. LEXIS 821, at *13 (emphasis added).]

In Turner, appellant, a Senior Corrections Police Officer (SCPO) at Bayside State Prison, was randomly selected for a drug urine screen on March 5, 2021. The NJSTL confirmed a result for THC of 28 ng/ml. The Department of Corrections issued disciplinary action against him and removed him from employment. The CSC reviewed de novo the ALJ's Initial Decision and upheld both the factual finding of accidental ingestion of cookies baked with legally-acquired medical marijuana and the reduction of the discipline from termination to a thirty (30) day suspension. It also made note of his long and unblemished employment history as a correctional officer and the fact that this incident had no impact on or carry-over into his workplace responsibilities.

Here, appellant tested even lower than either Shorter or Turner at 20.13 ng/ml, and while there is no evidence in this summary record as to the causes, if any, for his positive result, there is no allegation, no genuine issue of material fact, of workplace impairment or interference with appellant's law enforcement duties. Accordingly, I **CONCLUDE** that termination of appellant from his position as a police officer in the Town of West New York because of the result of his urine screen of 20.13 ng/ml 11-carboxy-THC, without any proffered evidence that appellant was in any manner impaired on the job, must be reversed.

ORDER

Accordingly, and for the reasons set forth herein, it is hereby **ORDERED** that the appeal of Christopher Carralero is **GRANTED**. It is further **ORDERED** that the motion for summary decision of appellant Christopher Carralero is **GRANTED**, and the motion of respondent Town of West New York is **DENIED**. It is further **ORDERED** that the termination of appellant Christopher Carralero's employment be **REVERSED**.

It is further **ORDERED** that appellant Christopher Carralero shall be reinstated to his position as a Police Officer in the Town of West New York Police Department and that all back pay shall be reinstated to him, along with any other accompanying employment benefits.

It is further **ORDERED** that reasonable counsel fees should be awarded to the appellant as the prevailing party, subject to submittal of an affidavit of services and supporting documentation to the appointing agency, if settlement of fees is not successful, in accordance with N.J.A.C. 4A:2-2.12.

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.



October 31, 2022 _____

DATE

GAIL M. COOKSON, ALJ

Date Received at Agency:

10/31/22 _____

Mailed to Parties:
id

10/31/22 _____