STATE OF NEW JERSEY

In the Matter of Dennis Turner, Bayside State Prison, Department of Corrections	**DECISION OF THE CIVIL SERVICE COMMISSION**
CSC DKT. NO. 2022-1444 OAL DKT. NO. CSR 00472-22	

ISSUED: JUNE 29, 2022

The appeal of Dennis Turner, Senior Correctional Police Officer, Bayside State Prison, Department of Corrections, removal, effective December 14, 2021, on charges, was heard by Administrative Law Judge Kathleen M. Calemmo (ALJ), who rendered her initial decision on May 25, 2022, modifying the removal to a 30 working day suspension. 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 Administrative Law Judge's initial decision, and having made an independent evaluation of the record, including a thorough review of the exceptions and reply, the Civil Service Commission (Commission), at its meeting on June 29, 2022, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

DISCUSSION

The appellant was removed on charges of conduct unbecoming a public employee and other sufficient cause. Specifically, the appointing authority alleged that the appellant failed a random drug screening by testing positive for 11-Carboxy-THC (THC), including failing to report his accidental ingestion of marijuana prior to his screening.

In her initial decision, the ALJ found that the credible evidence in the record, based predominantly of the appellant and his wife's credible testimony, supported that the positive drug result was caused by the appellant's accidental ingestion of cookies that contained legally-purchased marijuana. The ALJ also found that based

on the appellant's own admission, he did not report the accidental ingestion when it occurred as required, nor did he report it immediately prior to the drug screening. Since the charges underlying the positive drug result were not sustained, and the upheld charges were only that the appellant failed to report the accidental usage, the ALJ recommended modifying the removal to a 30 working day suspension. The ALJ also noted that this reduction in penalty was based, in part, on the appellant's previously unblemished disciplinary history over his previous 19 years of service.

In its exceptions, the appointing authority argues that the ALJ minimized the severity of the upheld misconduct. It argues that removal from employment is warranted for the appellant's knowing and intentional failure to report his accidental ingestion of marijuana prior to the drug screening.

In reply, the appellant argues that the ALJ properly weighed all of the mitigating factors in reducing the penalty.

Upon its *de novo* review of the entire record, the Commission agrees with the ALJ's assessment of the charges. In this regard, the ALJ's initial decision was thorough and well-reasoned and after a review of the exceptions, the Commission finds no basis to discount the findings and conclusions made by the ALJ. The Commission also agrees that the proper penalty in this matter is a 30 working day suspension.

Regarding the penalty, the Commission's review is also *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007). Even when a Senior Correctional Police Officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense occurring in the environment of a correctional facility may, nevertheless warrant the penalty of removal where it compromises the safety and security of the institution, or has the potential to subvert prison order and discipline. *See Henry, supra.* In this regard, the Commission emphasizes that a Senior Correctional Police Officer is a law enforcement officer who, by the very nature of his job duties, is held to a higher standard of conduct than other

public employees. *See Moorestown v. Armstrong,* 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied,* 47 *N.J.* 80 (1966). *See also, In re Phillips,* 117 *N.J.* 567 (1990).

In this case, the appellant's actions are clearly serious, especially in a correctional setting. The appellant's failure to properly report his accidental ingestion of marijuana for a significant period of time is problematic. In fact, had the appellant followed the proper policies and reported such ingestion, the Commission can only assume that this matter may have never actually resulted in disciplinary charges. Nevertheless, the appellant's failure to self-report such ingestion as required *could* clearly support removal from employment, especially given the appellant's status as a law enforcement officer. The public expects Senior Correctional Police Officers to present a personal background that exhibits respect for the law and rules. The appellant failed in that respect in this matter. Nevertheless, the Commission agrees with the ALJ that the upheld infractions are not so egregious to warrant removal absent the imposition of progressive discipline. In that regard, the Commission cannot ignore that the appellant's previous 19 years of employment were marked by no discipline and several commendations. Such a record of service clearly mitigates against the imposition of the penalty of removal. Accordingly, the Commission agrees with the ALJ's assessment that a 30 working day suspension is sufficient under the circumstances. The Commission believes this suspension will impress upon the appellant the severity of his misconduct as well as serve as notice that any future infractions could result in more significant disciplinary penalties, up to and including his removal from employment.

As the appellant's removal has been modified, he is entitled to mitigated back pay, seniority and benefits 30 working days from his separation from employment until his actual reinstatement. *See N.J.A.C.* 4A:2-2.10. However, he is not entitled to counsel fees. *N.J.A.C.* 4A:2-2.12(a) provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in the disciplinary appeal is the merits of the charges. See *Johnny Walcott v. City of Plainfield,* 282 N.J. *Super.* 121,128 (App. Div. 1995): *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, charges were sustained, and major discipline was imposed. Consequently, as appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12, counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections,* unpublished, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. However, under no circumstances should the appellant's reinstatement be delayed due to any back pay dispute.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore modified the removal to a 30 working day suspension. The appellant is entitled to backpay, benefits and seniority as provided for in *N.J.A.C.* 4A:2-2.10. The amount of back pay awarded is to be reduced and mitigated to the extent of any income earned, or could have been earned, by the appellant during this period. Proof of income earned, and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 29TH DAY OF JUNE, 2022

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

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and
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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 00472-22
AGENCY DKT. NO. N/A
2022-1444

IN THE MATTER OF DENNIS TURNER,
BAYSIDE STATE PRISON.

Arthur J. Murray, Esquire, for appellant (Alterman & Associates, LLC, attorneys)

Mikhaeil Awad and **Jana DiCosmo**, Deputy Attorneys General, for respondent (Matthew J. Platkin, Acting Attorney General of New Jersey, attorney)

Record Closed: May 16, 2022 Decided: May 25, 2022

BEFORE **KATHLEEN M. CALEMMO,** ALJ:

STATEMENT OF THE CASE

Appellant, Dennis Turner (Turner), a Senior Corrections Police Officer (SCPO) at Bayside State Prison (BSP), appeals his removal by the respondent, New Jersey Department of Corrections (DOC), effective December 14, 2021. Respondent removed appellant after a toxicology report identified a positive result for 11-Carboxy-THC (THC) from a random urine screening. Respondent charged appellant with violations 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)(8), misuse of public property, including motor vehicles; N.J.A.C. 4A:2-2.3(a)12, other sufficient cause; Human Resources Bulletin (HRB) 84-17, C-11, conduct unbecoming a public employee; HRB 84-17, C-30, use, possession, or sale of any controlled dangerous substance (custody); and HRB 84-17, E-1, violation of a rule, regulation, policy, procedure, order, or administrative decision. Turner conceded that his conduct, prior to

his random drug test on March 5, 2021, in failing to disclose his accidental ingestion of marijuana, represented violations of N.J.A.C. 4A:2-2.3(a)(6) and HRB 84-17, C-11, conduct unbecoming a public employee; and, as such, a violation of HRB 84-17 E-1, violation of a rule, regulation, policy, procedure, order, or administrative decision. Turner admits the positive result on the toxicology report but appeals the discipline of termination because he claimed his ingestion of a controlled dangerous substance was accidental and unknowing.

PROCEDURAL HISTORY

On May 11, 2021, respondent issued a Preliminary Notice of Disciplinary Action (PNDA) setting forth the charges and specifications made against the appellant. (R-1.) Appellant did not request a departmental hearing. On December 14, 2021, the respondent issued a Final Notice of Disciplinary Action (FNDA) and removed appellant from employment, effective December 14, 2021. (R-2.) Appellant filed a direct filing removal appeal to the Office of Administrative Law (OAL), where it was filed on January 21, 2021, as a contested case pursuant to N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52: 14F-1 to 13. The hearing was held on April 12 and 14, 2022. The record remained open to allow the parties to submit post-hearing submissions, and the record closed on May 16, 2022.

FACTUAL DISCUSSIONS AND FINDINGS

Based on the record, I **FIND** the following **FACTS**:

The DOC requires that all sworn law-enforcement officers, regardless of rank or assignment, are subject to random, unannounced mandatory drug testing by urinalysis. (R-4, Attachment C.) The testing process is under the direct supervision of the DOC's Special Investigation Division (SID) for administrative investigations.

On March 5, 2021, Turner was randomly selected for a drug test by urinalysis. Under HRB 99-01(C)(2), all covered personnel[1] are required to give urine specimens

[1] As an SCPO, Turner is a considered "covered personnel" under HRB 99-01(1)(A)(4).

when randomly selected. (R-13.) In accordance with the DOC's written booklet, "Drug Screening Program Monitor", Turner executed Attachment C, which recited his understanding of the weight and significance of the random drug test, including removal from his position in law enforcement if he produced a positive test result for illegal drug use. (R- 4.)

Turner's random drug test was positive. The Law Enforcement Drug Testing Toxicology Report, dated April 16, 2021, reported a positive result for THC, a controlled substance not listed on Turner's medication sheet. (R-5.) As a result of testing positive for a metabolite of a cannabis product, Turner was suspended pending an investigation.

Turner was interviewed by Senior Investigator Robert Nicotera on May 6, 2021. After being informed of his positive random urine result and advised of his Weingarten Administrative Rights, Turner proceeded with the interview with union representation. (R-6.) Turner acknowledged that he was aware of DOC's policy prohibiting the use of all drugs, including marijuana, without a valid prescription. Turner does not have a medical marijuana prescription. When asked whether he smoked marijuana, Turner responded that he did not smoke it, but he had eaten cookies that, unbeknownst to him at the time, contained marijuana. In his interview, Turner stated that he did not know the cookies contained marijuana until his wife came home from work and noticed the missing cookies and informed him. A few days later, Turner was randomly selected for a drug test.

Turner started his career with the DOC in 2001 as an officer recruit. At the time of his removal, Turner was an SCPO at BSP, with over nineteen years of service. On December 14, 2021, DOC removed Turner from service because he tested positive for THC on a random drug test. (R-2.)

Although not charged on the PNDA, the FNDA contained a sustained charge of misuse of public property, including a motor vehicle, in violation of N.J.A.C. 4A:2-2.3(A)(8). (R-2.) Respondent presented no testimony to sustain this charge.

TESTIMONY

A summary of the pertinent and relevant testimony to the contested issues follows:

Robert Nicotera testified on behalf of the respondent in his capacity as a senior investigator with the SID. He is stationed at BSP. As a senior investigator, Nicotera oversees the criminal and administrative investigations for the DOC. He is familiar with the drug screening process and the random drug testing required for all law enforcement personnel. On the first workday of every month, the SID receives a computer printout list of individuals randomly selected by a computer algorithm to be drug tested from the Office of Information and Technology (OIT). Turner was listed on the Master List for Donor Notifications for the period March 1, 2021, to March 31, 2021. (R-3.)

On March 5, 2021, Turner submitted to a random urine drug test. All random urine tests follow strict protocol in accordance with the DOC's written booklet, "Drug Screening Program Monitor." (R-4.) Nicotera, as the designated monitor, witnessed Turner's signature acknowledging his understanding that he would be terminated if the test result was positive for illegal drug use. (R-4, Attachment C.) Turner was also required to complete a medication information form that listed all prescribed and non-prescribed medications and the dates when last taken. (R-12.) Nicotera recorded the dates and times for every step in the process. (R-4, Attachment F.)

On May 3, 2021, BSP received the positive toxicology report. On May 6, 2021, Nicotera interviewed Turner and authored a report. (R-8.) During the interview, Turner admitted to eating cookies baked with marijuana. Turner claimed he did not know about the marijuana until his wife came home from work that evening, noticed missing cookies and told him. The cookies were allegedly made for his wife by their son-in-law, who has a prescription for medical marijuana. Turner was not on duty; he had been drinking beer and working in his garage when he ate the cookies. Having denied ever consuming marijuana, he did not know if it affected him. He did not report this incident prior to his March 5, 2021, random test, because he hoped it would go away without detection. His random drug test was within the same week that he ate the cookies.

Turner never reported ingesting cookies baked with marijuana to anyone in his chain of command. He just kept it quiet. Nicotera testified that while officers are not permitted to ingest drugs, if something were to happen, it should be reported immediately.

Nicotera confirmed that Turner's test was random, and there was no reasonable suspicion based on Turner's behavior that he was under the influence of an illegal substance. The SID investigation was solely based on the toxicology report from the random urine test that was positive for cannabinoids (THC). (R-5.)

Jennifer Pesce, Senior Investigator, testified that she transported the urine samples, including Turner's, to the lab for testing.

Omayra Ortega, Senior Investigator, testified that she received Turner's results from the lab and emailed the results to BSP for investigation.

George F. Jackson testified for respondent as an expert in the field of forensic toxicology. Dr. Jackson is the Executive Director of Laboratories and the Chief Forensic Toxicologist for the State of New Jersey Toxicology Laboratory.

There are two sections in the lab, the post-mortem and law enforcement drug testing, where the urine drug testing for law enforcement officers is performed. Dr. Jackson described their role as providing analytical analysis of the officer's urine sample in a double-blind environment for the presence of certain drug groups. The lab does not know who the donor is and has no demographic information. Each sample is subject to a two-step process. The first is a screening which detects the presence of a compound in a drug group. If a presence is detected, it is confirmed by a second testing procedure known as gas chromatography/mass spectrometry. The analysts identify the component by its molecular makeup. The confirmation results are reviewed by the analyst, confirmed by Dr. Jackson, and then sent to a medical review officer in a sealed package. The medical review officer opens the secure envelope with the medication list and compares the medications listed with the findings. All the results are returned to Dr. Jackson for final review. All pertinent and required information is entered on the Forensic Urine Drug

Testing Custody and Submission Form. (R-10.) Every step in the process is documented and reviewed.

Dr. Jackson explained that the screening cut-off for cannabinoids is twenty nanograms per milliliter; anything above twenty is a presumptive positive reading. After an initial presumptive positive result, the analyst runs negative and positive quality controls to ensure the instruments are working correctly and the data is reliable. Turner's initial testing showed a positive result for THC. The testing showed that the result was valid.

Dr. Jackson conducted the final review by looking at the chain of custody, the quality control, the data, and the testing. The final concentration was twenty-eight nanograms per milliliter of THC. In the confirmation testing, the cutoff for THC is fifteen nanograms per milliliter to allow for passive inhalation exposure. Turner's result of twenty-eight was higher than the fifteen allowed. The result means that Turner was exposed to marijuana, but it does not state how that exposure occurred, nor is it determinative of how much marijuana Turner ingested. The testing only conclusively determined that Turner was exposed to marijuana before he gave his urine sample.

Andrew Falzon, M.D., M.C.S, D.A.B.P., is the Chief State Medical Examiner, and testified for respondent as an expert in forensic pathology. (R-11.) Dr. Falzon is certified as a medical review officer. He receives the positive test results along with the officer's medication list in a sealed envelope. He reviews and compares the two to determine if any of the medications caused or contributed to the positive result. Turner listed Valsartan, a prescribed high blood pressure medication, and multi-vitamins as his over-the-counter medication. Neither would have influenced his positive test result.

Major Jason Lewis is the Administrative Major at BSP. Major Lewis testified that the DOC has a zero-tolerance policy for any officer who tests positive for a controlled dangerous substance such as marijuana. If an officer tests positive, they are suspended immediately and processed for termination. Termination for use of a controlled dangerous substance bars the officer from ever working for any other law enforcement department in the State of New Jersey.

All correction officers are subject to the Attorney General's drug testing policy and guidelines for the DOC. By his signature on the Policy Receipt Form, Turner acknowledged receipt of the HRB 99-01 on May 23, 2001, which contains the drug testing policy. (R-13.) As a SCPO, Turner was required to comply with the Law Enforcement Personnel Rules and Regulations. (R-14.) Specifically, Article IV, Section 1(b) states that no officer shall "[u]se, possess or sell any illegal drug or controlled dangerous substance, whether on or off duty." Id. HRB 84-17 lists infractions and sanctions for various violations. (R-16.)

Major Lewis stated that in accordance with the policy, the only sanction for using a controlled dangerous substance, such as marijuana, is removal.

None of the policies or procedures address accidental ingestion of a controlled dangerous substance.

William J. Purificato, III., testified on behalf of his father-in-law, Dennis Turner. Mr. Purificato married Turner's daughter over two years ago. He never resided in Turner's household, but lives with his wife in Philadelphia.

From June 6, 2019, until June 30, 2021, Mr. Purificato had a New Jersey Department of Health issued medical marijuana card, which allowed him to purchase marijuana at any dispensary in New Jersey. (P-1.) Although he could not recall all the details, he believed that in May or June 2021, Turner's wife, Silvia, asked him to make her cookies with his medical marijuana because she was having knee pain. Using a box chocolate chip cookie mix, he added his medical marijuana to the recipe and baked cookies for her. He estimated that he used about an eighth of an ounce of marijuana in the recipe. Mr. Purificato explained that after the cookies are baked, there is no marijuana smell or taste. This was not the first time he baked cookies with marijuana.

After he made the cookies, he left them on a baking tray for Silvia to pick up. He never had any discussions with Turner about making cookies for Silvia or sharing medical

marijuana. He has never known Turner to use marijuana. He never made any cookies specifically for Turner or at his request.

After being given the date of Turner's positive drug test to refresh his recollection of when he baked the cookies, Mr. Purificato answered that it could have been in February, but he did not remember.

On cross-examination, Mr. Purificato admitted that he was aware that the medical marijuana program prohibited him from sharing his marijuana. This prohibition included baking cookies with his marijuana to give to his mother-in-law.

Mr. Purificato was familiar with making cookies with marijuana and he knew he was making them for his mother-in-law, so he just estimated the amount. When Silvia came to the house to pick up the cookies, Mr. Purificato was not home.

Mr. Purificato was questioned about the smell of marijuana in baked cookies, and he stated that after the cookies are baked, there is no smell of marijuana.

Silvia Turner testified on behalf of her husband, Dennis Turner. They have been married for eighteen years. For over forty years, Mrs. Turner worked in customer service with computer firms, she now performs accounting services for a pest control company. She suffers from osteoarthritis in both knees. Mrs. Turner is sixty-six years old.

Because of pain in her knees, Mrs. Turner, who was aware that her son-in-law had a medical marijuana prescription, asked him to bake her cookies using his marijuana so she could try it. She had been getting injections in her knees, but the effectiveness wears off before she is eligible for another shot. The pain prevented her from getting a good night's sleep. She did not tell her husband that she intended to test marijuana to help manage her knee pain because she wanted to see if it worked before broaching the subject.

Mrs. Turner recalled that she picked up the cookies on the last Sunday in February 2021 from her daughter and son-in-law's home. She brought the cookies back in a zip

lock bag. She did not tell her husband. Although Mrs. Turner was familiar with the smell of marijuana, she testified that the cookies baked with marijuana only smelled like chocolate chip cookies. She did not taste marijuana when she ate the cookie.

After having brought the cookies home on Sunday, she left them on the kitchen counter on Monday morning when she left for work. Monday was March 1, 2021. When she came home from work that evening, she noticed there were cookies missing from the bag. She estimated that five or six cookies were missing. She immediately told her husband that the cookies were baked with marijuana.

Mrs. Turner is currently a registered member of the medicinal marijuana program. Because the marijuana cookies helped with her knee pain, she registered for the program in August 2021. She keeps her marijuana in a separate room in the house in a marked container.

On cross-examination, Mrs. Turner stated her understanding that her husband as a law enforcement officer was subjected to random drug testing. She also knew that the DOC had a zero-tolerance policy for drug use. Mrs. Turner explained that she brought the marijuana into their home because she wanted to try it before going through the process of getting her own prescription. She never told her husband about her plan or about bringing home the marijuana cookies.

Mrs. Turner keeps her medical marijuana in a separate bedroom closet in their home in Ziplock bags in a plastic container so there is no smell of marijuana in their home. She does not bake with it.

Dennis Turner offered testimony on his own behalf. He is sixty-one years old. He started working after graduating from high school in various jobs, including as a plumber and an electrician, before going into law enforcement. Turner took the civil service test and a psychological examination as part of the DOC hiring process. He was hired and assigned to BSP in August 2001. His employment ended due to the positive drug test. During his term of employment, Turner was never sent for a fitness for duty examination

or a reasonable suspicion drug test. During his career, he had been subjected to random drug tests but never failed any of those prior to March 5, 2021.

Turner does not deny failing the drug test. He knew, after the fact, that he had ingested marijuana. By about 6:00 p.m. on Monday, March 1, 2021, his wife told him about the cookies he had eaten earlier in the day. He was afraid to mention it and hoped that the cookies were not strong enough to show up on a test. He was scared and did not report his accidental ingestion to anyone at BSP.

Turner did not know all the details, but he knew his son-in-law had registered for the medical marijuana program. He had no idea that his wife had approached their son-in-law to make her cookies until she told him after he had already eaten them.

Turner is familiar with the distinct smell of marijuana. The cookies he ate smelled like chocolate chip cookies, not marijuana. He recalled grabbing two at a time from the bag, so he believed he must have eaten six cookies. He was going in and out of his house and recalled taking the cookies as he went through the kitchen on his way back to the garage. It was his day off, so he was working in the garage on his car and drinking beer. The reason he had to keep going back into the house was because his wife was at work, so he needed to take care of their dogs. One of the dogs has kidney failure and the other dog is blind. The blind dog needs to be carried in and out of the house when she needs to go outside. As he was going back and forth, he grabbed a couple of cookies on each trip. The cookies were appealing because they looked home-made and were readily accessible, so he grabbed them on his trips to and from the kitchen. The cookies tasted like chocolate chip cookies. He was eating cookies rather than stopping for lunch because he wanted to finish the work on his car before his wife came home from work. When she came home, she noticed the missing cookies and told him about the marijuana. He was very upset.

Turner stated that he never intentionally ingested marijuana or any other illegal drug since becoming employed with the DOC.

Turner accepts discipline for his action but does not feel that termination is warranted because it was an accident. If reinstated, he would willingly submit to a fitness for duty examination and to increased drug testing. He stated that he would have no problem submitting to drug testing now or at any time in the future because he does not use marijuana or any other controlled dangerous substance.

On cross-examination, Turner stated he was scared and hoped that nothing would show up on the test. He was nervous, scared, and hoping for the best.

Turner could not say why his wife did not confide in him with her plan, but he knew she was suffering from the pain in her knees. She told him that she finally got a good night's sleep after she ate the cookies, so Turner supported her decision to get a medical marijuana prescription.

The only time he ever ingested marijuana was when he ate the cookies on March 1, 2021, just days before his March 5, 2021, drug test.

Turner does not dispute his failure to self-report his accidental ingestion of marijuana when he returned to work on March 2, 2021, and every day thereafter until his drug test violated DOC's policy. For his failure to report, he accepts major discipline. However, he does not believe that removal was justified because he did not intentionally or knowingly use marijuana.

When assessing credibility, inferences may be drawn concerning the witness's expression, tone of voice, and demeanor. MacDonald v. Hudson Bus Transportation Co., 100 N.J. Super. 103 (App. Div. 1968). Additionally, the witness's 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 how 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).

Turner's testimony was consistent with Senior Investigator Nicotera's recollection of their interview and his written summary. (R-8.) I reviewed and considered the video recording of the interview and noted no inconsistencies. There was nothing in the story or the telling of the story that appeared contrived or incredible. Turner accepted responsibility without hesitation or anger.

Despite Mrs. Turner's obvious financial interest in the outcome of this matter, her justification for bringing home the cookies to see if they would help relieve her knee pain was plausible and believable. Her current medical marijuana prescription supports her willingness to try marijuana as an alternative pain relief to manage her knee pain. Likewise, Mr. Purificato is related by marriage, but his answers to questions that were against his own interest were direct and responsive. He did not avoid or stumble when asked about his misuse of his prescription. Mr. Purificato's failure to recollect dates did not detract from his overall credibility because the details of the story were consistent with Mrs. Turner's testimony. My role is not to judge the actions of Mrs. Turner or her son-in-law. Whether they acted recklessly is not before me. My concern was whether their testimony provided a credible reason for how the cookies came to be in Turner's possession and whether Turner's claim of lack of knowledge had any support. The explanation provided by Turner's wife and son-in-law did not sound rehearsed or contrived. They both answered at the risk of personal embarrassment or potential liability. Mrs. Turner confessed that she had deceived her husband of eighteen years and carelessly left cookies made with marijuana on her kitchen counter. Mr. Purificato admitted to misusing his prescription. Although the familial relationship and Mrs. Turner's obvious financial interest in the outcome raised several questions, I was satisfied based on my observations of their demeanor and an overall assessment of the internal consistencies of their stories that their testimony was believable and plausible, not fabricated or contrived. Regardless of who was telling the story or where it was being told, it hung together as consistent.

Turner's testimony was sincere and straightforward. He did not look for a scapegoat or to question the testing process. He accepted responsibility for his failure to report his accidental

ingestion. Given the consistency of the story and Turner's demeanor, I accept his explanation as credible that when he ate the cookies, he did not know they contained marijuana.

Based upon due consideration of the testimonial and documentary evidence presented at this hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following as additional **FACTS**:

On March 1, 2021, while off duty, Turner ingested cookies that, unbeknownst to him, were made with marijuana. His use of marijuana was accidental in that he never intended to use marijuana and he did not purposely ingest it.

LEGAL ANALYSIS AND CONCLUSIONS

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

The appointing authority bears the burden of establishing the truth of the allegations by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co, 124 N.J.L. 420, 423 (Sup. Ct 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J Super. 93,104 (App. Div. 1959).

Appellant was charged with "misuse of public property," N.J.A.C. 4A:2-2.3(a)(8). Respondent presented no evidence to support this charge. Accordingly, I **CONCLUDE** that this charge must be dismissed.

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

Appellant's status as a correction's officer subjects him to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1980). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J. Super. 560 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons, and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967).

The DOC has a zero-tolerance drug use policy and requires that, as a condition of employment, officers submit to random urine drug testing. The DOC policy requires that a negative result is required to maintain employment and a positive test will result in termination. Turner failed his random drug test on March 5, 2021, by testing positive for the metabolite of THC. The New Jersey DOC Rules and Regulations for Law Enforcement Personnel prohibit an officer from using any illegal drug or controlled dangerous substance, whether on or off duty. Because of his positive test, Turner was charged with violating HRB 84-17, (C)(30), "[u]se possession or sale of any controlled

dangerous substance." As a SCPO, Turner represented law and order to the public and must present an image of personal integrity. Drug use among law enforcement personnel is certainly conduct that adversely affects the morale or efficiency of a governmental unit and tends to destroy public respect in the delivery of governmental services.

Although there is no dispute that Turner ingested marijuana, the above findings, based on a careful credibility analysis, established that he did not do so knowingly, intentionally, or voluntarily, but rather accidentally. Article I, General Provisions, of "Law Enforcement Personnel Rules and Regulation," states that "[n]o officer shall knowingly act in any way that might reasonably be expected to create an impression of suspicion among the public that an officer may be engaged in conduct violative of the public trust as an officer." Here, Turner reasonably believed he was eating chocolate chip cookies while alone in his home. There was no evidence to suggest he should have been suspicious of the cookies, so his actions were not negligent or reckless. His plausible and credible explanation for his positive test rebutted the presumption that he knowingly used an illegal drug. Thus, I **CONCLUDE** that Turner did not violate HRB 84-17, (C)(30) because his use of marijuana was accidental. His use was neither intentional, negligent, nor reckless.

Although I **FIND** that Turner's use was accidental, he conceded and stipulated that his failure to report his accidental ingestion of medical marijuana from the dated ingested through the date of his random drug test violated the charge of conduct unbecoming a public employee under N.J.A.C. 4A:2-2.3(A)(6) and HRB 84-17 (C)(11) and therefore resulted in a conceded violation of HRB 84-17 (E)(1). Therefore, I **CONCLUDE** that these violations as stipulated must stand.

Appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Turner admitted that he knew the ramifications of using illegal drugs or controlled dangerous substances. He also admitted that he should have reported it, but his fear held him back. Turner's failure to report his accidental ingestion of marijuana violates the implicit standard of good behavior one

would expect from a SCPO with nineteen years of service. Therefore, I **CONCLUDE** that the respondent has met its burden of proof in establishing a violation of other sufficient cause for Turner's admitted failure to report his accidental ingestion of medical marijuana.

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 an appropriate analysis for determining the reasonableness of the penalty. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number, and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

The theory of progressive discipline is not a fixed rule to be followed without question. In re Carter, 191 N.J. 474, 484 (2007). "[S]ome disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." Id. The question for the fact finder is whether the disciplinary action is so disproportionate to the offense, considering all circumstances, to shock one's sense of fairness. Id. Removal has been upheld where the acts charged, with or without prior disciplinary history, have warranted imposition of the sanction. Id. Hence, an employee may be removed, without regard to progressive discipline, if their conduct was egregious. Id.

Sworn law enforcement officers are recognized as a "special" kind of public employee. Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), cert denied, 47 N.J. 80 (1966). Their primary duty is to enforce and uphold the law; exercise tact, restraint, and good judgment; and represent law and order to the citizenry. Id. Hence, they must present an image of personal integrity and dependability to garner the respect of the public. Id.

Herein, respondent seeks to remove appellant Turner from his employment as a SCPO because of its zero-tolerance drug policy when a random drug screen produces a positive result, bypassing progressive discipline. Accordingly, respondent contended that removal is the consequence of a positive test result (R-13) and the only recognized discipline to address drug use (R-16). Respondent further submits that removal is required because Turner was required to report his ingestion of marijuana to the chain of command at BSP, even if the ingestion was accidental.

Appellant requests that an appropriate analysis using progressive discipline should be invoked. Turner conceded that his action in failing to report his accidental ingestion of marijuana is deserving of major discipline, and even a fitness for duty examination or increased drug testing upon reinstatement. He requests consideration of the mitigating factors to show that the ultimate penalty of removal is not warranted under the totality of the circumstances.

Relative to the existence of mitigating factors, Turner had no discipline over his nineteen plus years of service, until his removal. Not only did Turner have an exemplary record, but he also received six commendations for his professional performance.

Under the totality of the circumstances, herein, I **FIND** that progressive discipline should be followed.

While Turner tested positive for THC, the record showed that the cookies he consumed without prior knowledge contained marijuana which likely caused the positive result. Although Turner should have informed his superiors at BSP about the cookies, his failure to do so should not result in his termination. There was no evidence to show that Turner's accidental ingestion had any bearing on his workplace or the public.

Turner's nineteen years of exemplary service mitigates against his removal based on an accident and a mistake. I **CONCLUDE** that the penalty of removal is not warranted here. Considering progressive discipline, I **CONCLUDE** that the imposition of discipline of a thirty-day suspension without pay is appropriate for the sustained charges, stemming

from Turner's failure to report his accidental ingestion of marijuana, which included: conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6) and HRB 84-17:C(11); other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12); and violating a rule, regulation, policy, procedure, order or administrative decision under HRB 84-17:E(1).

I **CONCLUDE** the original removal penalty shall be **MODIFIED** to a thirty-day suspension without pay.

ORDER

It is **ORDERED** that the FNDA removing appellant, Dennis Turner, from his position effective December 14, 2021, is **REVERSED**. It is further **ORDERED** that appellant be reinstated with back pay subject to a thirty-day suspension without pay and emoluments.

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.

Kathleen M. Calemmo

May 25, 2022
DATE

KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: May 25, 2022, VIA EMAIL

Date Mailed to Parties: May 25, 2022, VIA EMAIL

KMC/jns

APPENDIX
WITNESSES

For petitioner:

William J. Purificato, III
Silvia Turner
Dennis Turner

For respondent:

Robert Nicotera
Jennifer Pesce
Omayra Ortega
George F. Jackson
Jason Lewis
Andrew Falzon

EXHIBITS

For petitioner:

P-1 Medical marijuana prescription card

For respondent:

R-1 PNDA
R-2 FNDA
R-3 Master List for Donor Notification
R-4 Drug Screening Program Monitor booklet
R-5 Toxicology Report
R-6 Weingarten Administrative Rights
R-7 Interview recording - Turner

R-8 Investigation Report

R-9 Curriculum Vitae – George Jackson, Ph.D

R-10 Litigation Package

R-11 Curriculum Vitae – Andrew Falzon, M.D.

R-12 Drug Testing Medication form

R-13 DOC HR Bulletin 99-01 Drug Testing Policy

R-14 Law Enforcement Personnel Rules and Regulation

R-15 New Hire Checklist and Policy Acknowledgement

R-16 DOC Resources Bulletin 84-17

R-17 Work History